

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

IN THE MATTER OF:

LEVEL 3 COMMUNICATIONS, LLC'S
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT WITH
QWEST CORPORATION

Docket No. UT-053039

**LEVEL 3 COMMUNICATIONS, LLC'S
RESPONSE REQUEST FOR
ADDITIONAL BRIEFING**

1. The Washington Utilities and Transportation Commission (“WUTC” or “Commission”) has asked the parties to “brief the issue of preemption in light of the First Circuit’s opinion” in *Global NAPs, Inc. v. Verizon New England, Inc.*, Case No. 05-2657, 2006 U.S. App. LEXIS 8805 (1st Cir. April 11, 2006) (“*Global NAPs*”); and to “explain ... why the *ISP Remand Order* would apply a different compensation scheme for intrastate ISP-bound traffic than for local and interstate ISP-bound traffic.”¹ The brief answers are: (1) the First Circuit’s ruling has not preempted the WUTC’s conclusion in this matter; and (2) the *ISP Remand Order* does not require this Commission to apply a different compensation scheme to “intrastate” ISP-bound traffic.

1. Federal Preemption.

2. The most important conclusion to be drawn from the First Circuit’s *Global NAPs* decision is that the WUTC retains authority over the legal question presented in this docket. *Global NAPs* argued in a 2002 arbitration proceeding before the Massachusetts Department of

¹ Commission Request for Additional Briefing, Docket No. UT-053039 (April 26, 2006).

Telecommunications and Energy (the “DTE”) that the *ISP Remand Order* “preempted” the DTE from addressing intercarrier compensation for any ISP-bound calling. The DTE disagreed, holding that it had the authority under state law to categorize certain ISP-bound traffic as intrastate VNXX calls and to treat them as toll calls. The First Circuit recently upheld the agency, holding that the FCC had not clearly and unequivocally preempted state action and that a state could interpret the *ISP Remand Order* to allow for a separate “intrastate” category of ISP-bound traffic within that state.

3. However, nothing in the First Circuit’s decision can be read to diminish the WUTC’s authority to independently interpret the *ISP Remand Order* for the state of Washington. The First Circuit ruled that “states have authority over intrastate access charge regimes” and the FCC “did not expressly preempt state regulation” with respect to “intrastate access charges.” *Global NAPs*, 2006 U.S. App. LEXIS at [*3]. The First Circuit affirmed the DTE’s authority, finding that the *ISP Remand Order* was “unclear” on whether the FCC had intended to preempt state regulation of “the access charges at issue here.” *Id.* at [*23]. Since preemption of state authority requires “a clear indication,” the First Circuit could not conclude that the DTE was preempted. *Id.* at [*37]-[*38].

4. In Order No. 05 in this docket, this Commission did exactly what the First Circuit affirmed states could do – it interpreted the *ISP Remand Order*. Specifically, on page 10, at paragraph 25, this Commission stated:

We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. Under this compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest’s interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area.

There can be no question that this specific interpretation of the *ISP Remand Order* is reasonable

– the FCC itself said that it was. Specifically, in its *amicus* brief to the First Circuit, the FCC stated: “[T]he *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order.”²

5. So, the First Circuit confirmed that a state commission has the authority to interpret the *ISP Remand Order* regarding how the FCC’s compensation regime for ISP-bound calls will be implemented in a state; and the FCC itself confirmed that the specific interpretation that *this* Commission gave to that order is reasonable. Thus, as far as the FCC is concerned, this Commission is free to harmonize the treatment of all ISP-bound traffic under one compensation regime. It is not obligated to create different treatment regimes for different categories of ISP-bound traffic as Qwest is proposing. Therefore, the Commission does not need to modify its ruling here based on the *Global NAPs* case.

6. Several other considerations reinforce this conclusion. First, although this Commission’s decision is fully consistent with the holding in the *Global NAPs* case, First Circuit decisions are not binding on this Commission. Under 47 U.S.C. §252(e)(6), appellate review of this Commission’s decisions is by the Ninth Circuit. So even if the First Circuit had contradicted this Commission’s conclusion – which it did not – the Commission would first have to examine whether that court’s logic was consistent with Ninth Circuit precedent, and also so compelling as to convince this Commission that it had erred. Neither is true.

7. Both the Ninth and First Circuits confirm that this Commission has the authority, in the context of an interconnection agreement enforcement proceeding, to interpret the

² FCC Brief at 10. Emphasis in the original. The FCC’s brief, on which the First Circuit relied, concluded that the *ISP Remand Order* “can be read to support the interpretation set forth by either party in this dispute.” *Global NAPs, supra*. at [*44]. The FCC brief to the First Circuit was submitted to the WUTC by Qwest in its *Fifth Filing of Supplemental Authority*.

substantive standards of the *ISP Remand Order*. In the Ninth Circuit’s decision in *Pac-West*,³ that court ruled that a “decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation [is] not inconsistent with § 251.” Pursuant to the Ninth Circuit decision, there is no question that this Commission has the authority to interpret and apply the parties’ interconnection agreement and, accordingly, not differentiate different categories of ISP-bound calling.⁴ Specifically, the Ninth Circuit’s directly on point guidance supports treating all ISP-bound traffic the same, rather than creating sub-categories of traffic. As that court observed, “following the D.C. Circuit’s *vacatur* of its Declaratory Ruling, the FCC itself abandoned the distinction between local and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic.”⁵ Pursuant to governing law, the Commission plainly has the authority to make the determination that there is not a separate category of “intrastate” ISP-bound toll calls.⁶

8. In this case, the parties’ interconnection agreement requires that they follow the *ISP Remand Order*, so the Commission’s task in interpreting that agreement, pursuant to its Section 251 authority, is to decide the best reading of that order. So, even if the *ISP Remand Order* did not expressly preempt states – because it did not clearly and unequivocally express its intention to do so – the best reading of that order still is that its compensation regime applies to

³ *Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114 (9th Cir. 2003).

⁴ *Pac-West*, *supra*, 325 F.3d at 1130. That state authority was thoroughly discussed and affirmed in the Ninth Circuit’s opinion, “The CPUC’s decision was well reasoned; it found that Pacific Bell’s proposed definition of local calls was inconsistent with CPUC and industry practice, and it also cited the FCC’s long history of treating ISP-bound traffic as local traffic.”

⁵ *Pac-West*, *supra*, 325 F.3d at 1130-31.

⁶ “To the extent that the states previously had authority over interstate traffic as a necessary incident to the regulation of intrastate traffic, the Act sets up a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) **has left the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policy-making left open to administrative agencies—are beyond federal control.**” *Id.* at 1126 n. 10 (citations omitted, emphasis added). The Ninth Circuit, therefore, supports the conclusion that this Commission has the authority to decide this case as it did.

all ISP-bound traffic. Ultimately, this Commission’s analysis in this case is reasonable and will be sustained on review.

9. Second, the First Circuit’s opinion does not affect the WUTC’s policy analysis and reasoning because the WUTC has historically not relied on federal preemption to reach its conclusion that there are not separate categories for ISP-bound traffic. Because the First Circuit’s order fundamentally supports state authority to make a determination whether or not there are separate categories, the WUTC has not been presented with any basis to retract its longstanding, pro-competitive policy choices. The Commission’s precedent on the legal question at hand dovetails nicely with the First and Ninth Circuits’ ultimate conclusions; to the extent that the *ISP Remand Order* is ambiguous on the issue, states are free in interconnection agreement interpretation cases to implement their own policies regarding compensation for non-local ISP-bound calls.

10. In previous orders, the Commission has maintained consistency in its interpretation of the ISP Remand Order and in its stated policy objectives. For example, in the 2002 Level 3/CenturyTel arbitration, the Commission determined “We agree with Level 3 that the FCC preempted state commission over compensation for ISP-bound traffic, and did not preempt state commission authority to arbitrate other issues relating to ISP-bound traffic.”⁷ This distinction is precisely what the Ninth Circuit and the First Circuit permit state commissions to draw. As noted above, this case involves a dispute about the meaning of the parties’ existing interconnection agreement, which incorporates the FCC’s *ISP Remand Order* as the standard of decision. In that context, the Commission’s legal task is to establish the best and most logical reading of the *ISP Remand Order* and then apply that reading to the traffic the parties actually exchange. Clearly, that interpretation can be informed by state policy. In the recent WUTC Pac-

⁷ In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC and CenturyTel of Washington, Inc., Docket No. UT-023043, Paragraph 18 (January 2, 2003).

West complaint docket addressing the same legal question presented here, the Commission concluded, “This Order adopts Pac-West’s interpretation of the scope of ‘ISP-Bound’ traffic described by the FCC in the ISP Remand Order. Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.”⁸

11. For these reasons, the First Circuit’s preemption analysis in *Global NAPs* supports the WUTC’s conclusions and provides no basis for the Commission to modify its decision here. It is important to not read the First Circuit’s decision as limiting this Commission’s state authority or as having a broader meaning than can be reasonably inferred. Qwest’s brief will overgeneralize the impact and reach of the First Circuit’s opinion here in the Ninth Circuit, and argue for limiting the scope of this Commission’s authority. The First Circuit opinion is not controlling precedent in Washington and does nothing to change the interconnection agreement language at issue here.

2. **Why Would The ISP Remand Order Apply A Different Compensation Scheme For Intrastate ISP-Bound Traffic Than For Local And Interstate ISP-Bound Traffic?**

12. The short and simple answer to this question is that the *ISP Remand Order* does not apply a different compensation scheme for an intrastate category of ISP-bound traffic. The issue of a separate “intrastate” category of ISP-bound traffic has not been previously briefed by the parties in this docket.

13. As noted above, the First Circuit court limited its support of state authority to “intrastate” ISP-bound traffic. *Global NAPs, supra*, 2006 U.S. App. LEXIS at [*47]-[*48].⁹ This

⁸ *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket No. UT-053036, Paragraph 37 (August 23, 2005)

⁹ “The FCC’s helpful brief, while not taking a position on the outcome of this appeal, nonetheless supports the conclusion that the order did not clearly preempt state regulation of intrastate access charges.” *Global NAPs* at [*34]. “In the face of the FCC’s longstanding recognition of state authority over intrastate access charges, and in the absence of clear evidence that the access charges here would impede competition, this argument is insufficient to find implied preemption.” *Id.* at [*37].

means that in the First Circuit,¹⁰ the *ISP Remand Order* **may** be interpreted to permit a state to set up a separate compensation regime for “intrastate ISP-bound traffic.” That does not imply even remotely that the FCC or even the First Circuit would endorse such a policy. On the contrary, the DTE’s analysis simply cannot withstand any technical, legal or policy scrutiny.

14. First, the FCC did not carve out a separate category of “intrastate ISP-bound calling” for special compensation treatment. The hallmarks of the FCC’s analysis in the *ISP Remand Order* were (a) confirming that all ISP-bound traffic was jurisdictionally interstate and subject to its regulatory jurisdiction¹¹ and (b) solving the problem of regulatory arbitrage by establishing a unified compensation plan for ISP-bound traffic.¹² Nowhere does the *ISP Remand Order* condone creation of a “intrastate” ISP-bound traffic class. Moreover, while acknowledging that some ISP-bound traffic might be, literally, purely intrastate in nature, the FCC re-affirmed that the problems with reliably separating ISP-bound traffic into “interstate and intrastate components” means that all ISP-bound traffic “is properly classified as interstate” and “falls under the [FCC’s] section 201 jurisdiction.”¹³

15. Second, it is technically impossible to sort out interstate and intrastate ISP-bound traffic. The FCC description of the technical characteristics of ISP-bound traffic discourages any interpretation that the FCC wanted to apply different compensation regimes to different sub-categories of ISP-bound traffic. It takes significant mental gymnastics even to conceptually identify such ISP-bound traffic. This exercise is especially difficult given that the FCC found the ISP’s location is emphatically **not** one of the “ends” for jurisdictional purposes:

The “communication” taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants,

¹⁰ The First Circuit includes, Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico.

¹¹ *ISP Remand Order* at ¶¶ 52-65.

¹² *Id.* at ¶¶ 89-94.

¹³ *Id.* at ¶ 52.

databases or bulletin board contributors. *Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their email lists.* The proper focus for identifying a communication needs to be the users interacting with a desired webpage, friend, game, or chat room, *not on the increasingly mystifying technical and mechanical activity in the middle that makes the communication possible.* ISPs, in most cases, provide services that permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified.

ISP Remand Order at ¶ 59 (emphasis added, footnote omitted).¹⁴

16. Given the FCC's analysis, the only "intrastate" ISP-bound traffic that can logically exist under the *ISP Remand Order* is that portion of traffic where the end user and the web sites or servers visited are all in the same state. It is not clear how, as a practical matter, one would distinguish intrastate ISP-bound traffic from the interstate traffic that is unquestionably subject to the FCC's compensation regime.¹⁵

17. Consider how completely unrealistic that scenario is in practice. Suppose an end user is accessing the Internet at home in the suburbs of Seattle in the evening. Perhaps the end user wants to check his/her checking account balance. It is conceivable that a local bank's server storing that data is physically located within the state of Washington. However, if in this hypothetical example, the end user decides to have a longer Internet session the chances that the next servers he/she accesses are also physically located in Washington are remote. What if the end user in the same Internet session decides to pay an energy utility bill? It is unlikely that a large regional utility company such as Xcel has state specific servers for bill payments. It is much more efficient to have servers that serve a larger geographic region because that is what

¹⁴ Interestingly, the FCC's authority for this clear articulation of the *irrelevance* of the ISP's gear to the analysis of ISP-bound traffic was a submission by Qwest for the FCC's consideration at the time it was considering the *ISP-Remand Order*. See *ISP Remand Order* at ¶ 59 n.116 (citing "Qwest Roadmap" filing).

¹⁵ Because the FCC's language quoted above makes clear that the ISP's location is irrelevant to whether the traffic is interstate (and therefore subject to the FCC's regime) or intrastate (and therefore, at least as far as the First Circuit is concerned, not preempted) – it is not logical to argue, as Qwest does, that one can reasonably use the location of the ISP for this purpose. That would be doing exactly what the FCC rejected. Obviously, intrastate access charges cannot properly apply to *interstate* traffic – which, on an end-to-end basis, is clearly the vast majority of ISP-bound traffic.

servers are technically engineered to do and it is an economic use of an expensive piece of equipment. The point is that it is difficult to imagine an Internet session in which an end user would only access data from servers that are geographically located in one state. This difficulty in administering separate compensation schemes for separately-defined sub-categories of ISP-bound traffic is another strong reason to reject that approach, even if, as the 1st Circuit believes, it is not legally foreclosed.

18. The FCC wants a unified, un-Balkanized approach to compensation for ISP-bound calling. This is a laudable goal in the state of Washington as well. The advantages of a separate compensation regime for supposed “intrastate” ISP-bound traffic in Washington are minimal. Such a state specific intercarrier compensation would be a mess to administer, would transfer above-cost access revenue to Qwest coffers from internet service provider customers, and is not a plausible reading of the parties’ interconnection agreement language. The FCC’s policy is addressed in the *Core Forbearance Order*,¹⁶ in which the FCC stated that its “mirroring rule” (requiring ISP-bound and local traffic to be treated the same) was originally based on its “goal of a more unified intercarrier compensation regime.”¹⁷ The FCC explained that its initial “growth cap” on ISP-bound minutes was imposed while it developed a fully unified system for all intercarrier compensation. It affirmed that its policy remained in favor of “a unified compensation regime.”¹⁸ And, it held that the public interest favors “creating a uniform compensation regime.”¹⁹ The FCC’s clear policy – both in the *ISP Remand Order* and in the *Core Forbearance Order* – is to establish a **uniform** compensation regime for this traffic, not to encourage a patchwork of different regimes that vary based on location of ISP equipment.

¹⁶ Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) From Application of the *ISP Remand Order, Order*, 19 FCC Rcd 20179 (2004) (“*Core Forbearance Order*”).

¹⁷ *Id.* at ¶ 19.

¹⁸ *Id.* at ¶ 20.


¹⁹ *Id.* at ¶ 21.

Conclusion

19. This Commission's Order No. 5 is consistent with binding 9th Circuit precedent. Both the First Circuit and the Ninth Circuit support the conclusion that this Commission may determine for itself the best and most logical reading of the *ISP Remand Order*. Nothing in *Global NAPs* indicates that the Commission was wrong, either as a matter of law or as a matter of policy. This Commission's previous orders and Order No. 5 in this docket would clearly be upheld by federal courts. The Commission's previous interpretations of the *ISP Remand Order* are based on solid reasoning and excellent pro-competitive policy choices. As a policy matter the best course is to advance the goal of a uniform compensation scheme for ISP-bound calling without creating artificial, hard-to-administer sub-categories of traffic subject to different compensation rules.

RESPECTFULLY SUBMITTED this 10th day of May, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of May, 2006, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I hereby certify that I have this 10th day of May, 2006, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of May, 2006, at Portland, Oregon.



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