

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

LEVEL 3 COMMUNICATIONS,)	DOCKET UT-053039
LLC,)	
)	
Petitioner,)	ORDER 06
)	
v.)	
)	ORDER DENYING PETITION
QWEST CORPORATION,)	FOR RECONSIDERATION
)	
Respondent.)	
)	
.....)	

1 *Synopsis.* We deny Qwest’s petition for reconsideration and affirm our interpretation of the ISP Remand Order. We affirm our finding that the FCC’s order applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. We clarify that preemption is not a basis for our decision. We also deny Qwest’s petition for reconsideration of the effective date for implementing the FCC’s Core Forbearance Order.

PROCEDURAL BACKGROUND

2 **Nature of Proceeding.** This proceeding involves a petition filed by Level 3 Communications, LLC (Level 3), seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs). Qwest filed counterclaims against Level 3 contesting compensation for ISP-bound traffic and the propriety of Level 3’s use of Virtual NXX, or VNXX,¹ traffic under the parties’ interconnection agreement.

¹ “VNXX” or “Virtual NXX” refers to a carrier’s acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

- 3 **Order 03 – Order on Motions for Summary Determination.** On August 26, 2005, Judge Rendahl entered Order 03 granting certain claims in motions for summary determination filed by Level 3 and Qwest, and denying others.² Order 03 interpreted the Federal Communication Commission’s (FCC) *ISP Remand Order*³ and the parties’ interconnection agreement to allow compensation for ISP-bound VNXX traffic under the compensation scheme established in the FCC’s order. Order 03 found the change in compensation for ISP-bound traffic established in the FCC’s *Core Forbearance Order*⁴ effective following the Washington Utilities and Transportation Commission’s (Commission) approval of an amendment to the parties’ interconnection agreement, and declined to accept either party’s proposed amendment language. Order 03 also denied, in part, Level 3’s motions and Qwest’s counterclaims, and required the parties to develop in a hearing issues of fact and law governing the use of VNXX traffic.
- 4 **Order 05 – Commission Decision on Interlocutory Review.** On February 10, 2006, in Order 05, the Commission accepted Level 3’s petition for interlocutory review of Order 03, granting in part, and denying in part, Level 3’s petition. The Commission reversed the decisions in Order 03 concerning the *Core Forbearance Order*, required Qwest to compensate Level 3 for ISP-bound traffic under the *Core Forbearance Order* as of the effective date of that order, with interest, and approved Level 3’s proposed amendment language. The Commission also determined that under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. The Commission dismissed Qwest’s counterclaims concerning the use of VNXX arrangements, finding Qwest’s VNXX claims not material or necessary to deciding the issue of compensation for ISP-bound traffic under the *ISP Remand Order*. The Commission also affirmed the finding in Order 03 that the Commission has not approved or rejected the use of VNXX arrangements in interconnection agreements, denying Level 3’s petition on this issue.

² On August 23, 2005, Administrative Law Judge Karen M. Caillé entered a recommended decision on similar issues in Docket UT-053036, which involves an enforcement petition filed by Pac-West Telecomm, Inc. (Pac-West), granting Pac-West’s petition.

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) [Hereinafter “*ISP Remand Order*”].

⁴ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, FCC 04-241 (rel. Oct. 18, 2004) [Hereinafter “*Core Forbearance Order*”].

5 On February 21, 2006, Qwest filed a petition for reconsideration of Order 05, the Commission's Order Accepting Interlocutory Review; Granting in Part and Denying in Part, Level 3's Petition for Interlocutory Review. On March 3, 2006, Level 3 filed a response to Qwest's petition for reconsideration. On April 12, 2006, Qwest filed as supplemental authority *Global Naps, Inc. v. Verizon New England et al.*, 444 F.3d 59 (1st Cir, April 11, 2006) and a related *amicus* brief filed by the FCC. On April 26, 2006, the Commission requested additional briefing from the parties on the issue of preemption in light of Qwest's filing of supplemental authority. The parties filed supplemental briefs on May 10, 2006.

6 **Commission Decision on Petition for Reconsideration.** The Commission denies Qwest's petition for reconsideration of Order 05, finding that the Commission's interpretation of the *ISP Remand Order* rests within the bounds of the FCC's broad language in the order and reflects the FCC's policy and intent of establishing a uniform compensation regime for all ISP-bound traffic. The Commission also denies Qwest's petition for reconsideration of the effective date for implementing the *Core Forbearance Order*.

7 **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, and Rogelio E. Peña, Peña & Associates, Boulder, Colorado, represent Level 3. Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, and Alex M. Duarte, Corporate Counsel, Portland, Oregon, represent Qwest.

DISCUSSION

A. The *ISP Remand Order*.

8 Qwest asserts the Commission erred as a matter of law in its discussion and interpretation of the two controlling decisions in this proceeding, the FCC's *ISP Remand Order* and the D.C. Circuit Court's decision in *WorldCom*,⁵ which Qwest

⁵ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) *reh'g en banc, denied* (D.C. Cir. Sept.24, 2002) *cert. denied*, 538 U.S. 1012 (May 5, 2003) [Hereinafter "*Worldcom*"].

asserts reversed the FCC's order. Qwest reiterates its argument that the *ISP Remand Order* addresses only local traffic, and that VNXX traffic is not local traffic. Qwest argues that the Commission's interpretation of these decisions results in an incorrect conclusion about whether VNXX traffic falls within the term "ISP-bound traffic" as the term is used in the *ISP Remand Order*.⁶

9 Qwest also seeks reconsideration on the issue of the effective date for implementing changes in compensation for ISP-bound traffic under the *Core Forbearance Order*.⁷ We address this issue below in Section B.

10 Level 3 asserts Qwest merely reiterates in its petition arguments the Commission has already rejected.⁸ Level 3 asserts Qwest incorrectly interprets paragraph 39 of the *ISP Remand Order* as applying "the old regime of access regulation to ISP-bound traffic." Level 3 asserts the paragraph is simply part of the FCC's historical discussion of regulation and not part of the FCC's ultimate decision.⁹ Level 3 also asserts Qwest mischaracterizes VNXX traffic as exchange access traffic and fails to recognize the differences of routing locally-dialed ISP-bound traffic and long distance traffic.¹⁰

11 After Qwest filed its petition and Level 3 filed its response, the First Circuit Court of Appeals issued its decision in *Global Naps*.¹¹ Qwest filed the decision as supplemental authority in this proceeding along with a related *amicus* brief filed by the FCC. We asked the parties to brief the issue of preemption in light of the First Circuit's opinion in *Global Naps*, and to explain why the *ISP Remand Order* would apply a different compensation scheme to intrastate ISP-bound traffic than for local and interstate ISP-bound traffic.

⁶ Qwest's Petition for Reconsideration, ¶ 1.

⁷ *Id.*, ¶ 10.

⁸ Level 3 Response, ¶ 2.

⁹ *Id.*, ¶ 3.

¹⁰ *Id.*, ¶ 4.

¹¹ *Global Naps, Inc. v. Verizon New England, Inc. et al.*, Case No. 05-2657, 444 F.3d 59 (1st. Cir. April 11, 2006) [Hereinafter "*Global Naps*"].

1. First Circuit's *Global NAPs* Decision

- 12 The First Circuit's decision addresses a 2002 arbitration proceeding before the Massachusetts Department of Telecommunications and Energy (DTE) in which Global NAPs argued that the *ISP Remand Order* preempts state commissions from regulating intercarrier compensation for all ISP-bound traffic. The DTE disagreed, holding that it had authority under state law to categorize certain ISP-bound calls, i.e., VNXX calls, as intrastate calls and treat them as toll calls. The First Circuit upheld the DTE's decision on preemption, concluding the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls, leaving the DTE free to impose access charges for such calls under state law.¹²
- 13 Qwest asserts the *Global NAPs* decision requires this Commission to reverse its decision in Order 05 because "*Global NAPs* holds that the *ISP Remand Order* did not establish a compensation regime applicable to VNXX traffic or other non-local ISP traffic."¹³ Qwest also argues that *Global NAPs* applies a preemption analysis established by the United States Supreme Court that is applicable in all circuits, including the Ninth Circuit.¹⁴
- 14 Level 3 asserts that the First Circuit's decision supports our decision in Order 05 and provides no basis for modifying our order.¹⁵ Level 3 asserts the First Circuit finds the FCC has not clearly preempted state authority or regulation of intrastate access charges.¹⁶ Level 3 asserts the First Circuit finds state commissions may interpret the *ISP Remand Order* for purposes of determining appropriate charges for ISP-bound traffic.¹⁷ Level 3 also argues the decisions of the First Circuit are not binding on the Commission.¹⁸

¹² *Global Naps*, 444 F.3d at 61.

¹³ Qwest Supplemental Brief, ¶¶ 8-12.

¹⁴ *Id.*, ¶¶ 13-16.

¹⁵ Level 3 Supplemental Brief, ¶ 11.

¹⁶ *Id.*, ¶ 3.

¹⁷ *Id.*, ¶ 5.

¹⁸ *Id.*, ¶ 6.

2. The *ISP Remand Order* and Intrastate ISP-Bound Traffic

15 In response to our question of why the FCC would create a different compensation scheme for intrastate ISP-bound traffic than for local and interstate ISP-bound traffic, Qwest repeats its argument that the FCC’s historical distinctions for compensation for local, intrastate and interstate traffic apply to ISP-bound traffic.¹⁹ As Qwest has included these arguments in its motion for summary determination, response to request for interlocutory review and petition for reconsideration, we do not repeat the arguments here.

16 Level 3 asserts the FCC did not establish a separate category for intrastate ISP-bound traffic in its *ISP Remand Order*. Level 3 asserts the FCC confirmed in its order “that all ISP-bound traffic was jurisdictionally interstate and subject to its regulatory jurisdiction,” and solved “the problem of regulatory arbitrage by establishing a unified compensation plan for ISP-bound traffic.”²⁰ Level 3 also asserts that it is technically impossible to sort out interstate and intrastate ISP-bound traffic given the FCC’s determination that an ISP’s location is not one of the ends of the communication.²¹ Level 3 asserts that the FCC further discussed its policy goal of a unified compensation scheme in the *Core Forbearance Order*, and that such a policy does not support a “balkanized” approach of compensation based on the location of ISP equipment.²²

3. Discussion and Decision

17 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 for determining compensation for ISP-bound traffic.²³ Our task is to establish the most

¹⁹ Qwest Supplemental Brief, ¶¶ 8-12, 19-20.

²⁰ Level 3 Supplemental Brief, ¶ 14, citing *ISP Remand Order*, ¶¶ 52-65, 89-94.

²¹ *Id.*, ¶ 15.

²² *Id.*, ¶ 18.

²³ Section 7.3.6.1 of the interconnection agreement between Qwest and Level 3 filed on March 7, 2003, provides that “[t]he Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.” Section 7.3.4.3 of the agreement further provides that “[t]he Parties agree to exchange all EAS/Local (§ 251 (b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order.”

logical and reasonable interpretation of the *ISP Remand Order* and then apply that interpretation to the traffic the parties exchange. We agree with Level 3 that “the hallmarks of the FCC’s analysis in the *ISP Remand Order* are (1) confirming that all ISP-bound traffic is jurisdictionally interstate and subject to its regulatory jurisdiction, and (b) solving the problem of regulatory arbitrage by establishing a unified compensation plan for ISP-bound traffic.”²⁴ The FCC’s policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*,²⁵ is to establish a *uniform* compensation regime for all ISP-bound traffic. Our decision in Order 05 reflects the FCC’s intent.

- 18 We disagree with Qwest’s characterization of the First Circuit’s decision in *Global NAPS*. The First Circuit’s decision is limited to the issue of preemption, and is not a determination of the proper compensation scheme for VNXX traffic. Describing a lack of clarity about whether the *ISP Remand Order* preempts state authority to impose access charges for interexchange VNXX ISP-bound traffic,²⁶ the First Circuit finds the *ISP Remand Order* is “at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here.”²⁷
- 19 In paragraph 35 of Order 05 in Docket UT-053036, we imply that the *ISP Remand Order* preempts state authority over ISP-bound traffic. We did not intend to assert preemption as a necessary basis for our interpretation of the *ISP Remand Order* and clarify in this order that preemption is not the basis for our decision here. The *ISP Remand Order* controls our decision not because of the FCC’s preemptive authority, but because the parties have made it controlling by explicitly incorporating the *ISP Remand Order* into their interconnection agreement.
- 20 Because the issue in this proceeding is not preemption but divining the *ISP Remand Order*’s intent for intercarrier compensation for ISP-bound calls, *Global Naps* is not on point. The First Circuit’s analysis is clearly focused on preemption. To the extent the court construes the policies and substance of the FCC’s order beyond their preemptive effect it is, if not dicta, not binding in Washington.

²⁴ Level 3 Supplemental Brief, ¶ 14, citing *ISP Remand Order*, ¶¶ 52-65, 89-94.

²⁵ *Core Forbearance Order*, ¶¶ 19-21.

²⁶ *Global Naps*, 444 F. 3d at 72.

²⁷ *Id.*

21 The FCC acknowledges in its amicus brief²⁸ that the *ISP Remand Order* can be read to find that all ISP-bound calls are interstate calls subject to the jurisdiction of the FCC, and that the language of the order is sufficiently broad to encompass *all* such calls within the payment regime established by the order.²⁹ We affirm our interpretation of the *ISP Remand Order*, finding that the FCC created a separate compensation category for all ISP-bound traffic, regardless of origination and termination of the traffic, to advance its goal of a uniform intercarrier compensation scheme. Our interpretation falls well within the broad language of the *ISP Remand Order*. Thus, we deny Qwest's petition for reconsideration.

B. Implementing the *Core Forbearance Order*.

22 In Order 05, we found the FCC required a change in compensation for ISP-bound traffic as of the effective date of the *Core Forbearance Order*, October 8, 2004, rather than after the parties implemented change of law procedures. We reached this decision finding that there is no discussion in the *Core Forbearance Order* requiring carriers to implement the decision under change of law provisions in interconnection agreements. We also found that denying payments due under the *Core Forbearance Order* until we approved an agreement would create an incentive for incumbent local exchange carriers (ILECs) to delay implementing amendments to their interconnection agreements.

23 Qwest asserts the Commission erred in holding that the *Core Forbearance Order* overrides the change of law process in the parties' interconnection agreement. Qwest asserts there is nothing in the *Core Forbearance Order* suggesting the terms of the order become effective without further action or through the usual change of law

²⁸ By order entered January 4 2006, the First Circuit requested that the FCC file a brief addressing three issues, including: "Whether, in the *ISP Remand Order*, the Commission intended to preempt states from regulating intercarrier compensation for all calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?" Amicus Brief at 1-2. The FCC litigation staff responded that "[t]he *ISP Remand Order* does not provide a clear answer to this question." Amicus Brief at 10. The FCC litigation staff admitted that "[t]he *ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute." Amicus Brief at 13.

²⁹ Amicus Brief at 10.

processes.³⁰ Qwest asserts that Level 3, not Qwest, is responsible for any undue delay in implementing a change in law and that the Commission should not provide a remedy that rewards Level 3.³¹ If the Commission seeks to impose an effective date earlier than the date of Commission approval, Qwest requests the Commission choose the date Level 3 requested an amendment rather than the effective date of the *Core Forbearance Order*. Qwest notes the Commission imposed a similar remedy in another proceeding.³²

24 Level 3 asserts Order 05 correctly found that the change in law under the *Core Forbearance Order* superseded the dispute resolution process in interconnection agreements.³³ Level 3 counters Qwest's claim that Level 3 caused delay, asserting that Level 3 began billing Qwest for the additional compensation due under the *Core Forbearance Order* after the effective date of the FCC's order.³⁴ Level 3 asserts that accepting Qwest's proposal of an effective date when Level 3 requested dispute resolution would be poor public policy.³⁵ Level 3 asserts adopting Qwest's proposal would allow an ILEC to drag its feet during negotiation to delay the date a competitive local exchange carrier (CLEC) would request dispute resolution.³⁶ Level 3 asserts that *Eschelon v. Qwest* is distinguishable – it involves the sufficiency of a party's right to opt in to another interconnection agreement, not the proper effective date of the agreement.³⁷

25 **Discussion and Decision.** In its *Core Forbearance Order*, the FCC chose to forbear from enforcing specific provisions of the *ISP Remand Order* that limited compensation for certain ISP-bound traffic. The FCC specifically provided the forbearance order would apply to all affected CLECs as of October 8, 2004. In Order 05 we found the terms of the *Core Forbearance Order* effective as of October 8, 2004, not the date the Commission approves an amendment implementing the FCC's order.

³⁰ Qwest Petition, ¶ 11.

³¹ *Id.*, ¶ 12.

³² *Id.*, ¶ 13, citing *Eschelon v. Qwest*, Docket UT-033039, Order 04, Final Order Granting Petition In Part ¶ 45 (Feb. 6, 2004).

³³ Level 3 Response, ¶ 6.

³⁴ *Id.*, ¶ 8.

³⁵ *Id.*, ¶ 9.

³⁶ *Id.*

³⁷ *Id.*, ¶ 7.

26 We do not find Qwest's arguments for a different effective date convincing. The *Core Forbearance Order* does not include any language requiring carriers to follow change of law provisions, but applies to all CLECs as of the effective date. We do not accept Qwest's proposal based on the remedy in *Eschelon v. Qwest* for an effective date as of the date Level 3 requested dispute resolution. Our decision in *Eschelon* rested on a different set of facts and equities than in this case. Allowing the compensation required under the *Core Forbearance Order* as of the date Level 3 requested dispute resolution does not deter possible delays in negotiation. We deny Qwest's petition for reconsideration of the effective date for implementing the compensation provisions of the *Core Forbearance Order*.

FINDINGS OF FACT

27 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

- 28 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 29 (2) Level 3 Communications, LLC, is authorized to operate in the state of Washington as a competitive local exchange carrier or CLEC.
- 30 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

- 31 (4) The Commission approved an interconnection agreement between Qwest and
Level 3 in March 2003, allowing Level 3 to exchange ISP-bound traffic with
Qwest.
- 32 (5) The parties' interconnection agreement incorporates by reference the *ISP
Remand Order* as the basis for determining compensation for the exchange of
ISP-bound traffic.

CONCLUSIONS OF LAW

33 Having discussed above all matters material to this decision, and having stated
detailed findings, conclusions, and the reasons therefore, the Commission now makes
the following summary conclusions of law, incorporating by reference pertinent
portions of the preceding detailed conclusions:

- 34 (1) The Commission has jurisdiction over the subject matter of this proceeding
and the parties to the proceeding.
- 35 (2) The Washington Utilities and Transportation Commission is designated in the
Telecommunication Act of 1996 as the agency responsible for arbitrating,
approving and enforcing interconnection agreements between
telecommunications carriers, pursuant to Sections 251 and 252 of the Act.
- 36 (3) The First Circuit's *Global Naps* decision is limited to the issue of preemption
and is not a determination of the proper compensation scheme for VNXX
traffic.
- 37 (4) The decision in this proceeding does not rest on a finding that the FCC's *ISP
Remand Order* preempts state authority for determining compensation for ISP-
bound traffic.

- 38 (5) Because the parties' interconnection agreement incorporates by reference the *ISP Remand Order* as the basis for determining compensation for the exchange of ISP-bound traffic, the *ISP Remand Order* controls the Commission's interpretation of the parties' agreement.
- 39 (6) The Commission interprets the *ISP Remand Order* to create a separate compensation category for all ISP-bound traffic, regardless of origination and termination of traffic, to advance the FCC's goal of a uniform intercarrier compensation scheme.
- 40 (7) The interpretation of the *ISP Remand Order* in the enforcement of an interconnection agreement is not a jurisdictional issue, but rather giving meaning to a term of a contract.
- 41 (8) The Commission's interpretation of the *ISP Remand Order* in Order 05 is within the bounds of the *ISP Remand Order's* broad language and reflects the FCC's policy and intent of establishing a uniform compensation regime for all ISP-bound traffic.
- 42 (9) The *Core Forbearance Order* does not include any language requiring carriers to follow change of law provisions, but applies to all CLECs as of its effective date, October 8, 2004.
- 43 (10) Requiring the compensation allowed under the *Core Forbearance Order* only upon requesting dispute resolution creates an incentive for undue delay in resolving disputes through negotiation.

ORDER

THE COMMISSION ORDERS:

44 Qwest Corporation's petition for reconsideration of Order 05 is denied.

Dated at Olympia, Washington, and effective June 9, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner