

**MEMORANDUM**

July 11, 2006

TO: Chairman Sidran  
Commissioner Jones  
Commissioner Oshie  
Carole Washburn  
Dave Danner  
Chris Rose  
Bob Wallis (w/attachments)  
Sally Johnston (w/attachments)  
Glenn Blackmon (w/attachments)  
Marilyn Meehan  
Wilford Saunders

FROM: Mike Sommerville, Records Center

SUBJECT: Qwest Corporation v. Washington Utilities and Transportation  
Commission and Level 3 Communications, LLC and Pac-West  
Telecomm, Inc.  
(UT-053036 / UT-053039)  
Complaint  
No. CV 06-0956

A Complaint has been filed in the United State District Court, Western District of Washington at Seattle, on July 10, 2006, by Sheree S. Carson, representing Plaintiff listed above. The Complaint was received by the Commission on July 10, 2006.

Please contact the Records Center if you would like copies of the attachments.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

QWEST CORPORATION,

Plaintiff,

SUMMONS IN A CIVIL CASE

v.

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION;  
MARK SIDRAN, Chairman,  
PATRICK OSHIE, Commissioner, and  
PHILIP JONES, Commissioner, in their official  
capacities as Commissioners of the Washington  
Utilities and Transportation Commission;

CASE NUMBER:

CV 06-0956 RSL

LEVEL 3 COMMUNICATIONS, LLC;

PAC-WEST TELECOMM, INC.,

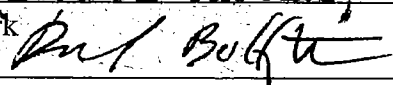
Defendants.

**TO:** WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION  
("WUTC"); MARK SIDRAN, PATRICK OSHIE and PHILIP JONES, in  
their official capacities as Commissioners of the WUTC; LEVEL 3  
COMMUNICATIONS, LLC; and PAC-WEST TELECOMM, INC.

**YOU ARE HEREBY SUMMONED** and required to serve on plaintiff's attorney,

Sheree Strom Carson  
Perkins Coie LLP  
The PSE Building  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579

an answer to the complaint which is served on you with this summons, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

**BRUCE RIFKIN**  
Clerk   
(By) Deputy Clerk

**JUL 10 2006**  
Date

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WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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Service of the Summons and Complaint was made by me	DATE	
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<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the defendant. Place where served: _____ _____		
<input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein./ Name of person with whom the summons and complaint were left: _____ _____		
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AT SEATTLE  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

QWEST CORPORATION,  
Plaintiff,

v.

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION;  
MARK SIDRAN, Chairman,  
PATRICK OSHIE, Commissioner, and  
PHILIP JONES, Commissioner,  
in their official capacities as  
Commissioners of the Washington Utilities  
and Transportation Commission; and  
LEVEL 3 COMMUNICATIONS, LLC;  
PAC-WEST TELECOMM, INC.,  
Defendants.

No. **CV 06-0956**  
COMPLAINT

Plaintiff Qwest Corporation ("Qwest") brings this claim for declaratory and injunctive relief against the Washington Utilities and Transportation Commission (the "Washington Commission"), a regulatory agency of the State of Washington; defendants Mark Sidran, Patrick Oshie and Philip Jones in their official capacities as Commissioners of the Washington

**COPY**

1 Commission (collectively referred to herein as "the Commissioners"); Level 3 Communications,  
2  
3 LLC ("Level 3"); and Pac-West Telecomm, Inc. ("Pac-West").  
4

5 In support of its Complaint, Qwest alleges as follows.  
6

7  
8 **NATURE OF THE ACTION**  
9

10 1. This action arises under the Telecommunications Act of 1996 (the "Act"), 47  
11 U.S.C. § 151, et seq. Qwest, an incumbent local exchange carrier ("ILEC"), and defendant Pac-  
12 West, a competitive local exchange carrier ("CLEC"), are parties to an amended interconnection  
13 agreement approved by the Washington Commission. Qwest, as an ILEC, and defendant Level  
14 3, a CLEC, are also parties to an interconnection agreement approved by the Washington  
15 Commission. This dispute arose when Pac-West and Level 3 separately filed petitions with the  
16 Washington Commission ostensibly to enforce the terms of their interconnection agreements  
17 with Qwest. The interconnection agreements incorporate the requirements of the Federal  
18 Communication Commission's ("FCC") decision in *Implementation of the Local Competition*  
19 *Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound*  
20 *Traffic*, 16 FCC Rcd 9151 (2001) (the "ISP Remand Order").  
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33 2. Section 251(b)(5) of the Act imposes on all local exchange carriers (*i.e.*, ILECs  
34 and CLECs) "[t]he duty to establish reciprocal compensation arrangements for the transport and  
35 termination of telecommunications."<sup>1</sup> The Act provides that the duties imposed by Sections  
36 251(b) and 251(c), including the duty established by Section 251(b)(5), should be implemented  
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51 <sup>1</sup> 47 U.S.C. § 251(b)(5).

1 through "interconnection agreements," arrived at either through negotiations or,<sup>2</sup> if necessary,  
2  
3 arbitration by the relevant state commission.<sup>3</sup>  
4

5  
6 3. This dispute concerns the legal effect to be given to the *ISP Remand Order* in  
7  
8 which the FCC prescribed intercarrier compensation only for calls made to Internet Service  
9  
10 Providers ("ISPs") located in the same local calling area as the calling party.<sup>4</sup> Despite the limited  
11  
12 reach of the *ISP Remand Order*, in their "petitions for enforcement" filed with the Washington  
13  
14 Commission, Pac-West and Level 3 sought compensation from Qwest for all calls placed to  
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16 ISPs, including long distance calls placed to ISPs located outside the local calling area of the  
17  
18 calling party.  
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20  
21 4. The Washington Commission entered orders granting Pac-West and Level 3 the  
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23 relief they were seeking and ordered Qwest to pay intercarrier compensation to Pac-West and  
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25 Level 3 on all calls placed to ISPs. In so doing, the Washington Commission unlawfully  
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27 expanded the scope of the *ISP Remand Order* to encompass long distance calls that are governed  
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29 not by the *ISP Remand Order*, but by the entirely separate access charge regime and access  
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31 charge rules prescribed by the FCC and preserved by Section 251(g) of the Act.<sup>5</sup>  
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34  
35 5. By requiring Qwest to pay intercarrier compensation on non-local calls placed to  
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37 ISPs, the Washington Commission has exceeded the limited authority delegated to it by  
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39 Congress in the Act, and violated the substantive provisions of the Act and federal policies  
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41 underlying the Act. The compensation requirement the Washington Commission has imposed  
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49 <sup>2</sup> See 47 U.S.C. § 252(a).

50 <sup>3</sup> See 47 U.S.C. § 252(b).

51 <sup>4</sup> ISPs are companies that provide access to the Internet, including, for example, America On Line.

<sup>5</sup> 47 U.S.C. § 251(g).

1 on Qwest also impermissibly conflicts with binding rulings and orders of the FCC and the  
2 federal courts that have reviewed and interpreted those rulings and orders.  
3  
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5 6. For these reasons, and those set forth below, Qwest brings this Complaint against  
6 the Washington Commission and the Commissioners, in their official capacities, seeking (1) a  
7 declaration that the Washington Commission's orders relating to this issue are unlawful, (2) an  
8 injunction prohibiting the Washington Commission from enforcing the relevant provisions of the  
9 orders granting relief to Pac-West and Level 3, and (3) a remand with an instruction for the  
10 Washington Commission to remedy the legal errors in the orders and to issue revised orders that  
11 are consistent with Qwest's rights and obligations under federal law and Washington law.  
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#### 21 JURISDICTION AND VENUE

22 7. This Court has jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6).  
23

24 8. Venue is proper under 28 U.S.C. §§ 1391(b)(2) because the acts of the  
25 Washington Commission and the individual Commissioners giving rise to the claims occurred in  
26 this District.  
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#### 32 THE PARTIES

33 9. Qwest is a corporation incorporated under the laws of the State of Colorado with  
34 its principal place of business at 1801 California Street, Denver, Colorado 80202. It is an ILEC  
35 that provides local telephone service in Washington and 13 other western and mid-western states.  
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42 10. Defendant Washington Commission is a governmental body organized under the  
43 laws of the State of Washington. It has authority to regulate telecommunications carriers  
44 providing intrastate service in Washington. The Commission is headquartered at 1300 S.  
45 Evergreen Park Dr. SW, Olympia, Washington, 98504-7250.  
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1           11.    Qwest brings this action against the Washington Commission in its capacity as the  
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3 agency of the Washington state government authorized by the United States Congress to take  
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5 certain limited actions related to interconnection agreements pursuant to a limited delegation of  
6  
7 authority under Section 252 of the Act.  
8  
9

10           12.    The defendant individual Commissioners (Mark Sidran, Patrick Oshie, and Philip  
11  
12 Jones) are the three present members of the Washington Commission and are named as  
13  
14 defendants solely in their official capacities as members of the Commission.  
15  
16

17           13.    Defendant Pac-West is a California Corporation with its principal place of  
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19 business at 1776 W. March Lane, Suite 250, Stockton, CA 95207. Pac-West is a corporation  
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21 that has been classified by the Washington Commission as a competitive telecommunications  
22  
23 company.  
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25

26           14.    Defendant Level 3 is a Delaware limited liability company with its principal place  
27  
28 of business at 1025 Eldorado Blvd, Broomfield, Colorado 80021. Level 3 is a corporation that  
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30 has been classified by the Washington Commission as a competitive telecommunications  
31  
32 company.  
33  
34

## 35                                   **STATEMENT OF FACTS**

### 36                   **A.       The 1996 Telecommunications Act**

#### 37                           **1.       Compensation for Transport and Termination of Telecommunications** 38                                       **Traffic**

39           15.    At the time of the passage of the Act, telephone calls were generally divided into  
40  
41 two categories – local calls and long distance (or interexchange) calls. A local call is a call that  
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43 originates (*i.e.*, is placed by an end-user) and terminates (*i.e.*, is received by the called party)  
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45 within a geographic area known as a "local calling area." State commissions, including the  
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1 Washington Commission, define and establish local calling areas for their particular states. An  
2  
3 end user who purchased local exchange service could generally make an unlimited number of  
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5 local calls for a flat monthly rate. A long distance (or interexchange) call is a call between two  
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7 separate local calling areas, with the call originating in one local calling area and terminating in  
8  
9 another. Long distance calls were generally priced on a per minute (or some other usage-  
10  
11 sensitive) basis and for that reason were often referred to as "toll calls."  
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14  
15 16. Local and long distance calls differed in another respect at the time the 1996 Act  
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17 was passed. An end user typically purchased local service and long distance service from  
18  
19 different providers. Local service was provided by the end user's local exchange carrier (or  
20  
21 "LEC"). Long distance service was provided by the end user's interexchange carrier (or "IXC").  
22  
23 In most cases, these were different companies.  
24  
25

26  
27 17. In order to provide long distance service, IXCs required the use of the networks of  
28  
29 local exchange carriers to originate and terminate telephone calls. To compensate local  
30  
31 exchange carriers for the use of their networks to originate and terminate long distance telephone  
32  
33 calls, the FCC and state commissions developed access charges to be paid by IXCs to each local  
34  
35 exchange carrier that originated the calls and each local exchange carrier that terminated the  
36  
37 calls.<sup>6</sup> If the telephone call was between end users in different local calling areas within the  
38  
39 same state, the IXC would pay intrastate access charges to the originating and terminating local  
40  
41 exchange carriers. If the telephone call was between end users in different local calling areas in  
42  
43 different states, the IXC would pay interstate access charges to the originating and terminating  
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47  
48 <sup>6</sup> The two most common types of access charges are charges for originating long distance calls and charges  
49 for terminating long distance calls. However, there are other kinds of access charges (e.g., charges for transport  
50 services that IXCs could purchase in addition to originating and terminating access service). Depending on the  
51 nature of the traffic, these charges could be intrastate charges regulated by state commissions or interstate charges  
regulated by the FCC.

1 local exchange carriers. Access charges did not apply to calls between end users within the same  
2  
3 local calling area because such calls are local calls.  
4

5  
6 18. Prior to the Act, local exchange service was generally provided only by a single  
7  
8 local exchange carrier. With the opening of the local exchange markets to competition, there are  
9  
10 now multiple local exchange carriers in markets throughout the country. As a result of this  
11  
12 competition brought about by the Act, it is now common for two or more carriers to be involved  
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14 in the completion of a local call. Thus, Congress included Section 251(b)(5) in the Act, which  
15  
16 imposes a duty, under certain circumstances, for carriers to enter into reciprocal compensation  
17  
18 arrangements for certain types of traffic. Specifically, as noted above, Section 251(b)(5) imposes  
19  
20 the duty on all local exchange carriers to "establish reciprocal compensation arrangements for the  
21  
22 transport and termination of telecommunications."  
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25  
26 19. In its first order implementing the 1996 Act (the "*Local Competition Order*"),<sup>7</sup> the  
27  
28 FCC expressly recognized that "[t]he Act preserves the legal distinction between charges for  
29  
30 transport and termination of local traffic and interstate and intrastate charges for terminating long  
31  
32 distance traffic."<sup>8</sup> Thus, the FCC determined that reciprocal compensation under Section  
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34 251(b)(5) applies only to local calls and that "the provisions of section 251(b)(5) for transport  
35  
36 and termination of traffic do not apply to the transport or termination of interstate or intrastate  
37  
38 interexchange traffic."<sup>9</sup> The FCC has never changed or altered its determination that Section  
39  
40 251(b)(5) does not apply to interstate or intrastate interexchange traffic.  
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47 <sup>7</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications*  
48 *Act of 1996*, 11 FCC Rcd. 15499 (FCC August 8, 1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*  
49 *on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff'd in part and rev'd in part on other*  
50 *grounds, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

51 <sup>8</sup> *Id.* at ¶ 1033.

<sup>9</sup> *Id.* at ¶ 1034.

1                   2.       **The FCC's *ISP Remand Order***  
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3                   20.       Subsequent to the FCC's issuance of the *Local Competition Order*, the question  
4  
5 arose whether calls placed by a caller to an ISP in the same local calling area are subject to  
6  
7 reciprocal compensation under Section 251(b)(5). Calls to ISPs tend to be one-way.  
8  
9 Specifically, the caller dials the ISP to gain access to the Internet, and the ISP generally does not  
10  
11 call back or initiate calls of its own. This particular traffic pattern led many CLECs to focus  
12  
13 almost exclusively on serving ISPs in order to obtain reciprocal compensation payments from the  
14  
15 ILECs whose customers placed the calls. Thus, the FCC found in the *ISP Remand Order* that the  
16  
17 payment of reciprocal compensation for this traffic causes uneconomic subsidies and improperly  
18  
19 creates incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.<sup>10</sup>  
20  
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22

23                   21.       The question whether reciprocal compensation should be paid on calls placed to  
24  
25 ISPs in the same local calling area as the calling party ("local ISP calls") was the subject of  
26  
27 extensive litigation before the FCC and the United States Court of Appeals for the D.C. Circuit.  
28  
29 The FCC's most recent ruling on this issue is the *ISP Remand Order*. In that order, the FCC  
30  
31 determined that calls placed to an ISP in the same local calling area constitute "information  
32  
33 access" and are not subject to reciprocal compensation under Section 251(b)(5). In place of  
34  
35 reciprocal compensation, the FCC established a separate compensation regime for local ISP  
36  
37 traffic. The *ISP Remand Order* was appealed to the United States Court of Appeals for the D.C.  
38  
39 Circuit, and in *Worldcom v. FCC*, the D.C. Circuit rejected the analysis underlying the FCC's  
40  
41 conclusion that calls placed to an ISP in the same local calling area are information access.<sup>11</sup>  
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50                   <sup>10</sup> *ISP Remand Order* at ¶¶ 67-76.  
51                   <sup>11</sup> 288 F.3d 429 (D.C. Cir. 2002).

1 However, the D.C. Circuit remanded to the FCC without vacating the *ISP Remand Order* or the  
2 rules the FCC established in that order. Thus, those rules remain in effect.  
3  
4

5 22. In the *ISP Remand Order*, the FCC expressly recognized that under its rules, ISPs  
6 are treated as end users for the purpose of applying access charges and that Section 251(g) of the  
7 Act preserves the existing interstate and intrastate access charge compensation schemes  
8 applicable to long distance calls.<sup>12</sup>  
9  
10

11 **B. The Washington Proceeding**  
12

13 **1. The Amended Qwest/Pac-West Interconnection Agreement**  
14

15 23. Pac-West and Qwest are parties to an Interconnection Agreement for Washington  
16 (the "Pac-West ICA"). The Commission approved the Pac-West Interconnection Agreement on  
17 February 14, 2001, in Docket No. UT-013009.  
18  
19

20 24. On May 24, 2002, Pac-West and Qwest executed an ISP Amendment to  
21 incorporate the requirements of the *ISP Remand Order* into their interconnection agreement.  
22 The Washington Commission approved the ISP Amendment on March 12, 2003, in Docket No.  
23 UT-013009.  
24  
25

26 **2. The Amended Qwest/Level 3 Interconnection Agreement**  
27

28 25. Level 3 and Qwest are parties to an Interconnection Agreement for Washington  
29 (the "Level 3 ICA"). The Commission approved the Level 3 ICA in March 2003, in Docket No.  
30 UT-023042.  
31  
32

33 26. The Level 3 ICA incorporates the requirements of the *ISP Remand Order*. Thus,  
34 Qwest's obligation, if any, to pay intercarrier compensation on ISP-bound traffic exists only if  
35 and to the extent that it is required by the *ISP Remand Order*.  
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<sup>12</sup> *ISP Remand Order* at ¶¶ 11, 36-39.

1                   **3. The Pac-West and Level 3 Complaints**

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3           27. On or about June 8, 2005, Pac-West filed a petition for enforcement with the  
4  
5 Washington Commission ostensibly to enforce the amended Pac-West ICA. In its petition, Pac-  
6  
7 West sought intercarrier compensation from Qwest for all calls placed by Qwest end-users to  
8  
9 ISPs, including long distance calls placed to ISPs located in local calling areas outside of the  
10  
11 local calling areas of the calling parties, and delivered by Qwest to Pac-West over the  
12  
13 interconnection network facilities established under the amended Pac-West ICA.  
14  
15

16           28. On or about June 21, 2005, Level 3 filed a petition for enforcement with the  
17  
18 Washington Commission ostensibly to enforce the Level 3 ICA. In its petition, Level 3 sought  
19  
20 intercarrier compensation from Qwest for all calls placed by Qwest end users to ISPs, including  
21  
22 long distance calls placed to ISPs located in local calling areas outside of the local calling areas  
23  
24 of the calling parties, and delivered by Qwest to Level 3 over the interconnection network  
25  
26 facilities established under the Level 3 ICA.  
27  
28

29           29. The traffic for which Pac-West and Level 3 sought compensation included Virtual  
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31 NXX (or "VNXX") traffic. VNXX arrangements involve the assignment by a CLEC (including  
32  
33 Pac-West and Level 3) of telephone numbers to an ISP that disguise long distance calls to the  
34  
35 ISP as local calls. For example, Pac-West or Level 3 might assign a Seattle telephone number to  
36  
37 an ISP located in San Francisco. To a caller located in Seattle, the call to the ISP would appear  
38  
39 to be a local call, when in fact, it is a long distance call from Seattle to San Francisco.  
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43           30. VNXX arrangements violate industry telephone number assignment rules that  
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45 carriers are required to follow pursuant to FCC regulations. Under the industry number  
46  
47 assignment rules, Pac-West and Level 3 are required to assign telephone numbers to ISPs that  
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1 correspond with the exchange in which the ISP is located. Pac-West and Level 3 use VNXX in  
2  
3 order to make long distance calls appear to be local calls and thereby to avoid access charges  
4  
5 they would have to pay to the local exchange carrier that originates long distance VNXX calls.  
6  
7 As described by the U. S. Court of Appeals for the Second Circuit in a decision issued last week,  
8  
9 VNXX arrangements "force [an ILEC] to subsidize [a CLEC's] service."<sup>13</sup> In affirming the  
10  
11 Vermont Commission's ruling prohibiting the use of VNXX, the Second Circuit emphasized with  
12  
13 respect to CLECs' use of VNXX that "the FCC has been consistent and explicit that it will not  
14  
15 permit CLECs to game the system and take advantage of the ILECs in a purported quest to  
16  
17 compete."<sup>14</sup>  
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#### 21 4. The Washington Commission's Orders

22 31. The Washington Commission granted Pac-West the relief it was seeking and  
23  
24 ordered Qwest to pay intercarrier compensation to Pac-West on all calls placed to ISPs,  
25  
26 including long distance VNXX calls placed to ISPs. Attached as Exhibit I is the Washington  
27  
28 Commission's Order No. 5 dated February 10, 2006 in Docket No. UT-053036. Qwest  
29  
30 petitioned for rehearing, and on June 9, 2006, the Commission denied Qwest's petition.  
31  
32 Attached as Exhibit II is the Washington Commission's Order No. 6 dated June 9, 2006 in  
33  
34 Docket No. UT-053036.  
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39 32. The Washington Commission granted Level 3 the relief it was seeking and  
40  
41 ordered Qwest to pay intercarrier compensation on all calls placed to ISPs, including long  
42  
43 distance VNXX calls placed to ISPs. Attached as Exhibit III is the Washington Commission's  
44  
45 Order No. 5 dated February 10, 2006 in Docket No. UT-053039. Qwest petitioned for rehearing,  
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47  
48

49 <sup>13</sup> *Global Naps, Inc. v. Verizon New England, Inc.*, Docket no. 04-4685-cv, slip op. at 22 (2<sup>nd</sup> Cir. July 5,  
50 2006).

51 <sup>14</sup> *Id.*

1 and on June 9, 2006, the Commission denied Qwest's petition. Attached as Exhibit IV is the  
2  
3 Washington Commission's Order No. 6 dated June 9, 2006 in Docket No. UT-053039.  
4

5 33. In its orders, the Washington Commission determined that Qwest was required to  
6  
7 pay Pac-West and Level 3 intercarrier compensation on all ISP traffic, including long distance  
8  
9 VNXX traffic, based on an erroneous interpretation of the *ISP Remand Order*. According to the  
10  
11 Washington Commission, the *ISP Remand Order* prescribed intercarrier compensation for both  
12  
13 local and non-local ISP traffic. The Washington Commission reached this conclusion  
14  
15 notwithstanding the plain limitations the FCC placed on the *ISP Remand Order*.  
16  
17  
18

## 19 CAUSES OF ACTION

### 20 21 COUNT I 22 (Violation of the *ISP Remand Order*) 23

24 34. Qwest hereby incorporates the preceding paragraphs as if fully set forth herein.  
25

26 35. As the Ninth Circuit has stated, the "Act gives the FCC authority to establish  
27  
28 regulations implementing the Act," which "must be considered part and parcel of the  
29  
30 requirements of the Act."<sup>15</sup>  
31  
32

33 36. In granting Pac-West and Level 3 relief, the Washington Commission violated  
34  
35 federal law by incorrectly interpreting the *ISP Remand Order* and applying it to long distance  
36  
37 calls placed to ISPs, including in particular VNXX calls to ISPs. The Washington Commission's  
38  
39 ruling unlawfully substitutes the compensation regime established in the *ISP Remand Order* for  
40  
41 the separate access charge regime that applies to long distance calls, including VNXX long  
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43 distance calls to ISPs.  
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50 <sup>15</sup> *U.S. West Communications, Inc. v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002).  
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**COUNT II**  
**(Violation of Section 251(g))**

37. Qwest hereby incorporates the preceding paragraphs as if fully set forth herein.

38. Section 251(g) of the Act preserves the separate access charge regulatory regime that applies to interstate and intrastate long distance calls.

39. The Washington Commission's orders violate Section 251(g) by applying the compensation regime established in the *ISP Remand Order* instead of the separate access charge regime that governs long distance calls.

**COUNT III**  
**(Acting without Statutory Authority)**

40. Qwest incorporates by reference the preceding paragraphs as though fully set forth herein.

41. The Act permits states to regulate based only on express grants of statutory authority from the U.S. Congress. Further, states must exercise the limited authority Congress has granted them under the Act in a manner that is consistent with federal law and policy, as established by the terms of the Act, the implementing rules and orders of the FCC, and binding decisions of federal courts.

42. The Washington Commission exceeded its authority under Section 252 by requiring Qwest to pay terminating compensation on non-local ISP traffic. The Washington Commission does not have authority to create intercarrier compensation rules or to prescribe intercarrier compensation for interstate communications that are contrary to the FCC's established access charge rules applicable to such communications.

43. The Washington Commission's unauthorized exercise of authority is *ultra vires*, is arbitrary and capricious, and violates Section 252.



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**COUNT IV**

**(Violation of U.S. Constitution Article VI (Supremacy Clause))**

44. Qwest incorporates by reference the preceding paragraphs as though fully set forth herein.

45. Under the Supremacy Clause of Article VI of the United States Constitution ("Supremacy Clause"), federal statutes and regulations may preempt state regulations and orders.

46. The Act, as interpreted and applied by the FCC, preempts state regulation of interstate communications and application of rules and regulations relating to intercarrier compensation to long distance calls. The Washington Commission's Order thus violates and is preempted by the Act and the Supremacy Clause.

**PRAYER FOR RELIEF**

WHEREFORE, pursuant to 47 U.S.C. §252(e)(6) and 28 U.S.C. §§ 1331, 2201 -02, Qwest respectfully requests that this Court grant the following relief:

1. Judgment declaring that the *ISP Remand Order* prescribes intercarrier compensation rules applicable only to calls placed by a caller to an ISP who are both physically located in the same local calling area.

2. Judgment declaring that the Washington Commission does not have authority to establish the terms of intercarrier compensation for interstate telecommunications.

3. Judgment declaring that the Washington Commission's rulings described herein violate federal law and are arbitrary and capricious.

4. Judgment declaring that the Washington Commission exceeded its authority under Section 252 and acted *ultra vires*.

1           5.     Permanent injunctive relief to implement the declaratory rulings of this Court,  
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3 including:  
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5           a.     Ordering the Washington Commission to vacate the relevant portions of  
6  
7 the Orders.  
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9           b.     Enjoining the Washington Commission from requiring Qwest to pay  
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11 intercarrier compensation on calls placed to ISPs that are not physically located in the  
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13 same local calling area as the calling party.  
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15           c.     Requiring Pac-West to refund to Qwest the intercarrier compensation  
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17 payments Qwest has made to Pac-West for calls placed to ISPs outside of the local  
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19 calling area of the calling party.  
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22           d.     Such other injunctive relief as is necessary to place into effect the Court's  
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24 decisions on Qwest's request for declaratory relief.  
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26           6.     A remand to the Commission with instructions to grant the relief described herein.  
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29           7.     Such other relief as Qwest may seek in further pleadings or that the Court finds  
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31 appropriate.  
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35 DATED: July 10, 2006

**PERKINS COIE LLP**

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38 By: 

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48 Attorneys for Plaintiff Qwest Corporation  
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## **Exhibit I**

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	DOCKET NO. UT-053036
	)	
Petitioner,	)	
	)	ORDER NO. 05
v.	)	
	)	
QWEST CORPORATION,	)	FINAL ORDER AFFIRMING AND
	)	CLARIFYING RECOMMENDED
Respondent.	)	DECISION
.....	)	

1     ***Synopsis:** This Order affirms and clarifies a recommended decision that grants Pac-West's petition to enforce its interconnection agreement with Qwest. The Order requires Qwest to comply with the FCC's ISP Remand Order and fulfill its contractual obligation to compensate Pac-West for all ISP-bound traffic, including VNXX traffic. The Commission interprets the interim compensation mechanism in the ISP Remand Order to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. This Order also affirms the recommended decision's disposition of Qwest's counterclaims. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.*

2     **Nature of Proceeding.** This proceeding involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, for enforcement of its interconnection agreement with Qwest Corporation (Qwest). In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement relating to payment to Pac-West for terminating traffic. The dispute centers on

whether Pac-West is entitled to compensation for "VNXX"<sup>1</sup> ISP-bound traffic. Qwest filed an answer and counterclaims to the petition.

3 **Recommended Decision.** Administrative Law Judge Karen Caillé entered a recommended decision on August 23, 2005, proposing to grant Pac-West's petition and ordering Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the parties' interconnection agreement.<sup>2</sup> The recommended decision proposed that Qwest's payment include all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.

4 **Exceptions to Recommended Decision.** Qwest asks the Commission to review the recommended decision, contending that the recommended decision erred in (1) concluding that VNXX traffic is "ISP-bound traffic" as that term is used in the *ISP Remand Order* and the parties' interconnection agreement, (2) failing to decide the counterclaims raised by Qwest in its answer, and (3) concluding that the amount due on VNXX traffic is the full \$637,389.90 claimed by Pac-West.

5 **Commission decision.** We affirm the recommended decision with the following clarification regarding the scope of the *ISP Remand Order*. The *ISP Remand Order* applies 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. Therefore, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We also affirm the recommended disposition of

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<sup>1</sup> "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.

<sup>2</sup> On August 26, 2005, Administrative Law Judge Ann Rendahl entered an order in Docket No. UT-053039 that addresses similar issues, granting and denying certain claims in motions for summary determination filed by Level 3 and Qwest.

Qwest's counterclaims in the recommended decision, finding Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.

- 6 **Appearances.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

## I. MEMORANDUM

### A. Introduction.

- 7 This matter involves a petition by Pac-West for enforcement of its interconnection agreement with Qwest. In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement, as amended by the "ISP Amendment," relating to payment for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.

- 8 A VNXX arrangement "converts what would otherwise be toll calls into local calls."<sup>3</sup> Traditionally, whether a call is billed as a local call or toll call depends on the location, or local calling area, in which the telephone call originates and terminates. Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix or number that identifies the specific telephone company central office serving the line. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers are telephone numbers that have the same NXX as the local calling area of an end-user customer. The numbers are "virtual" as the dialing pattern tells callers that it is made within the callers' local calling area,

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<sup>3</sup> *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004).

rather than the called party's local calling area, when in fact the call may terminate in a different calling area, Local Access and Transport Area (LATA), or state.<sup>4</sup>

9 The parties in this proceeding requested that the matter proceed on a paper record with briefing and oral argument, followed by a recommended decision. The Administrative Law Judge entered a recommended decision on August 23, 2005, resolving the issues in the petition in favor of Pac-West. Qwest seeks review of the recommended decision. Pac-West responds, supporting the initial order.

## B. Background

### 1. History of Intercarrier Compensation for ISP-Bound Traffic

10 The definition of ISP-bound traffic and proper compensation for ISP-bound traffic are two of the primary issues in this proceeding. The Federal Communications Commission (FCC) has entered several orders addressing these issues, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."<sup>5</sup> The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.<sup>6</sup>

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<sup>4</sup> Qwest Opening Brief, ¶¶ 19-21.

<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].

<sup>6</sup> *Id.*, ¶¶ 1034-35.

- 11 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.<sup>7</sup> The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.<sup>8</sup> The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).<sup>9</sup> Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.<sup>10</sup> On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding that the FCC had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were “local” for purposes of reciprocal compensation.<sup>11</sup>
- 12 In April 2001, the FCC released its *ISP Remand Order*.<sup>12</sup> In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.<sup>13</sup> The FCC also modified its decision in the *First Report and Order* that only “transport and termination of local traffic” is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.<sup>14</sup> The FCC established a separate interim compensation regime for all ISP-bound traffic until

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<sup>7</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter “*Declaratory Ruling*”].

<sup>8</sup> *Id.*, ¶¶ 12, 18.

<sup>9</sup> *Id.*, ¶ 26.

<sup>10</sup> *Id.*, ¶¶ 26-27.

<sup>11</sup> *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)

<sup>12</sup> *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*”].

<sup>13</sup> *Id.*, ¶¶ 3, 35.

<sup>14</sup> *Id.*, ¶ 46.



the FCC finalizes the structure and rates for a new intercarrier compensation system.<sup>15</sup> The FCC's interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.<sup>16</sup>

- 13 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.<sup>17</sup> The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."<sup>18</sup>
- 14 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*.<sup>19</sup> The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.<sup>20</sup>

## 2. Pac-West's Petition and Qwest's Answer

- 15 In its petition, Pac-West alleges that Qwest is in breach of the interconnection agreement, as well as the underlying federal law, in refusing to compensate Pac-West for all local and ISP bound traffic, including calls from Qwest customers to an ISP that obtains FX/VNXX service from Pac-West.<sup>21</sup>

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<sup>15</sup> *Id.*, ¶ 77.

<sup>16</sup> *Id.*, ¶¶ 78, 81, 89.

<sup>17</sup> *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

<sup>18</sup> *Id.*

<sup>19</sup> *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*"].

<sup>20</sup> *Id.*, ¶ 27.

<sup>21</sup> Pac-West Petition, ¶ 12.

- 16 Pac-West alleges that the interconnection agreement requires the parties to compensate each other for terminating "Exchange Service (EAS/Local) traffic." Pac-West asserts that FX/VNXX service is "Exchange Service" provided to a customer physically located in a different exchange. According to Pac-West, the industry has recognized this fact by rating and routing calls within the customer's local calling area as local calls, regardless of the physical location of the customer.
- 17 Pac-West references the *ISP Remand Order* and asserts, "[s]pecifically with respect to ISP-bound traffic, the FCC has concluded that 'traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic.'"<sup>22</sup> Pac-West states that the compensation requirements of the *ISP Remand Order* are incorporated in the interconnection agreement through the ISP Amendment. According to Pac-West, nothing in the *ISP Remand Order* or the interconnection agreement limits compensable traffic to ISPs that are physically located in the same local calling area as the calling party.<sup>23</sup>
- 18 Pac-West seeks an order from the Commission requiring that Qwest comply with the interconnection agreement, specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the interconnection agreement. The compensation requested by Pac-West includes all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the interconnection agreement.<sup>24</sup>

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<sup>22</sup> *ISP Remand Order*, ¶ 1.

<sup>23</sup> Pac-West Petition, ¶ 12.

<sup>24</sup> *Id.*, p. 6.

- 19 Countering Pac-West's position that all calls to an ISP server are to be treated pursuant to the *ISP Remand Order*, no matter where the server is physically located, Qwest points to FCC precedent requiring that a call to a computer (such as an ISP server) be treated exactly the same as other end-user customers in determining whether the call is treated as a toll or local call. In other words, a call originated from one local calling area to an ISP server physically located in another local calling area is treated as a toll call.<sup>25</sup>
- 20 Qwest denies Pac-West's allegations about the compensation for traffic that Pac-West has terminated. Qwest counters Pac-West's claim that there is approximately \$637,389.90 in dispute from January 1, 2004 through March 31, 2005, asserting that the maximum amount is approximately \$401,736.<sup>26</sup>
- 21 Qwest counterclaims that Pac-West's assignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP server is physically located constitutes misuse of telephone numbering resources, and billing Qwest the *ISP Remand Order* rate for such VNXX traffic violates federal law (Count 1) and WAC 480-120-021, which establishes definitions of local calling areas and exchange access areas (Count 2). Qwest also asserts that Pac-West violates the parties' interconnection agreement, which provides that each party is responsible for administering NXX codes (Section 13.4), and by improperly routing VNXX ISP-bound traffic over Qwest's local interconnection service (LIS) trunks (Counts 3 and 4).<sup>27</sup>
- 22 Qwest requests that the Commission enter an order requiring Pac-West to refrain from assigning NPA/NXXs in local calling areas other than the local calling area where the ISP server is physically located, to cease its misuse of telephone numbering resources and to properly assign telephone numbers based on the

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<sup>25</sup> Qwest Answer, ¶¶ 8-11.

<sup>26</sup> *Id.*, ¶ 49.

<sup>27</sup> *Id.*, ¶¶ 57-66.

actual physical location of its customer's ISP server. Qwest asks for a finding that the parties' interconnection agreement does not require any compensation for Pac-West's VNXX traffic and that Pac-West be directed to follow the change of law procedures contained in the interconnection agreement to implement the *Core Forbearance Order*. Qwest seeks to invalidate all Pac-West invoices charging reciprocal compensation at the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic described above and to stop routing VNXX traffic to Pac-West utilizing LIS facilities.<sup>28</sup>

### C. Review of the Recommended Decision.

#### 1. The recommended decision.

- 23 The recommended decision adopted Pac-West's interpretation of "ISP-bound" traffic described in the *ISP Remand Order*, specifically finding that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. The decision recognized that "[t]his interpretation is consistent with the Commission's decision in the *Level 3 Arbitration*, as well as a recent decision of the U.S. District Court for the District of Connecticut."<sup>29</sup>
- 24 The recommended decision also acknowledged Qwest's counterclaims concerning the legality and propriety of VNXX service, but declined to address

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<sup>28</sup> *Id.*, ¶ 67.

<sup>29</sup> Recommended Decision, ¶ 37; *In the Matter of the Petition for Arbitration of an Interconnection agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252, Fifth Supplemental Order, Arbitrator's Report and Decision*, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter "*Level 3/CenturyTel Arbitration*"], affirmed Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003); *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

them on the basis that the counterclaims addressed matters outside the parties' interconnection agreement, that there was no law regarding VNXX to be violated, or that Qwest's claims were resolved by the recommended outcome, i.e., compensation for ISP-bound traffic via VNXX service.<sup>30</sup>

**2. Qwest's exceptions to the recommended decision.**

25 Qwest objects to and seeks review of nearly all of the issues decided in the recommended decision, including whether the decision: (a) properly interpreted the FCC's *ISP Remand Order*, (b) erred in determining the amounts due Pac-West, and (c) erred in not deciding Qwest's counterclaims regarding the propriety of VNXX traffic generally, and whether the parties' agreement prohibits use of local interconnection service (LIS) trunks for exchanging VNXX traffic.

26 We will address each of the challenged rulings in light of the record, and the parties' pleadings.

**a. Did the recommended decision err in holding that the *ISP Remand Order* applies equally to VNXX traffic?**

27 The primary issues Pac-West raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively on brief. We will not repeat the arguments in this Order, as the recommended decision, Order No. 03, adequately summarizes the arguments.

28 The recommended decision interpreted the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*.<sup>31</sup> The recommended decision also

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<sup>30</sup> *Id.*, ¶ 40.

<sup>31</sup> Order No. 03, ¶ 37.

interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located.<sup>32</sup> Thus, the recommended decision required Qwest to compensate Pac-West under the parties' agreement for ISP-bound VNXX traffic.<sup>33</sup>

29 **Commission decision.** We deny Qwest's exception and affirm and clarify the recommended decision on this issue. Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, the FCC cases preceding the *ISP Remand Order*, our Order in the *Level 3/CenturyTel Arbitration*, and recent district court decisions in Vermont and Connecticut support our conclusion.

30 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.<sup>34</sup> According to the FCC's 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, as well as Pac-West's interpretation that the *ISP Remand Order* applies to all ISP-bound traffic between parties whose numbers are assigned to the same local calling area.

31 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic that culminates in the unified interim approach applicable to all types of traffic and interconnection arrangements set forth in the *ISP Remand Order*. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, ¶ 38.

<sup>34</sup> *ISP Remand Order*, ¶¶ 66, 67, 77, 78.

ISP-bound traffic is jurisdictionally interstate, as the call terminating to the internet could terminate in a different state or country.<sup>35</sup> In describing how ISP customers access the internet, the FCC noted that “[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.”<sup>36</sup> The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhance Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.<sup>37</sup> Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

32 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,<sup>38</sup> the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to “local” traffic.<sup>39</sup> Although the D.C. Circuit rejected the FCC’s findings concerning Section 251(g) as both Qwest and Pac-West argue, the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.<sup>40</sup>

33 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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<sup>35</sup> *Declaratory Ruling*, ¶¶ 13, 18.

<sup>36</sup> *Id.*, ¶ 4; see also ¶ 7.

<sup>37</sup> *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.

<sup>38</sup> *Bell Atlantic*, 206 F.3d 1.

<sup>39</sup> *ISP Remand Order*, ¶ 46.

<sup>40</sup> *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,<sup>41</sup> this discussion does not represent the FCC's decision in the *ISP Remand Order*. In the Order, the FCC described ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.<sup>42</sup> The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."<sup>43</sup> The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."<sup>44</sup>

34 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.<sup>45</sup> Thus, we reject Qwest's interpretation of the *ISP Remand Order*. Likewise, the FCC did not limit ISP-bound traffic only to traffic between parties whose numbers are assigned to the same calling area. Thus, we reject Pac-West's interpretation of the *ISP Remand Order* on this point as well. Our decision is consistent with the Commission's decision in arbitrating a recent agreement between Level 3 and CenturyTel,<sup>46</sup> and recent decisions by the District Courts of Connecticut and Vermont.<sup>47</sup> These decisions all find that the *ISP Remand Order* addresses *all* ISP-

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<sup>41</sup> *ISP Remand Order*, ¶¶ 9-13.

<sup>42</sup> *Id.*, ¶ 44.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, n.82.

<sup>45</sup> *Id.*, ¶ 58; *see also* ¶ 61.

<sup>46</sup> *Level 3/CenturyTel Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003), *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).

<sup>47</sup> *Global Naps*, 327 F.Supp.2d 290, 300 (D. Vermont, 2004); *SNET v. MCI*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005), *recons. denied*, 359 F.Supp.2d 229 (D. Conn. 2005).



bound traffic, and that “[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area.”<sup>48</sup>

35 In particular, the Vermont and Connecticut decisions identify that the FCC has preempted state commissions from determining the jurisdiction and compensation of ISP-bound traffic.<sup>49</sup> The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.<sup>50</sup> States and carriers must abide by the FCC’s interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Pac-West for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the ISP Amendment to the parties’ interconnection agreement, which adopts the *ISP Remand Order*.

**b. Did the recommended decision err in determining the charges in dispute?**

36 The recommended decision acknowledged that the parties are not in agreement on the amount that Qwest owes Pac-West, and recommended that the Commission use Pac-West’s total of \$637,389.90, which is based on spreadsheets provided by Qwest.<sup>51</sup> Qwest contends that the recommended decision erred by deciding a disputed issue of material fact without testimony or hearing.<sup>52</sup> Qwest claims that a substantial portion of the disputed amount is “due to a volume

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<sup>48</sup> *Global Naps*, 327 F.Supp.2d at 300; see also *SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *Level 3/CenturyTel Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

<sup>49</sup> *Global Naps*, 327 F.Supp.2d, 300; *SNET v. MCI*, 353 F.Supp.2d, 295, 299; *SNET v. MCI*, 359 F.Supp.2d, 231.

<sup>50</sup> *ISP Remand Order*, ¶¶ 66, 67, 77, 78.

<sup>51</sup> Recommended Decision, ¶ 38.

<sup>52</sup> Qwest Exceptions, ¶ 98.

dispute regarding transiting traffic.”<sup>53</sup> Qwest acknowledges that it was aware of the Pac-West figure at the outset of this case, but asserts that “it was not clear to Qwest that this material fact was in dispute until the briefs were filed.”<sup>54</sup> Qwest argues that Pac-West has the burden of establishing that all of the disputed minutes are VNXX minutes, and that they are Qwest-originated traffic. Qwest maintains that the recommended decision erred in accepting Pac-West’s figure.<sup>55</sup>

37 Pac-West responds that the recommended decision reached the only conclusion possible based on the record evidence.<sup>56</sup> Pac-West argues that Qwest had every opportunity to submit evidence to support its claim that a significant portion of the compensation that Qwest had been withholding since January 1, 2004, was attributable to some other dispute. Pac-West states that it presented evidence of the number of minutes of use and total compensation that Pac-West billed for the amount of traffic it received from Qwest over their interconnection facilities. Pac-West states that Qwest did not dispute this total.<sup>57</sup> Pac-West argues that “it was incumbent upon Qwest to produce evidence to prove that any subset of the traffic Qwest delivered to Pac-West should be excluded from the traffic for which Pac-West is entitled to compensation.”<sup>58</sup>

38 **Commission decision.** We deny Qwest’s exception and affirm the recommended decision on this issue. The recommended decision determined the amount owed based on spreadsheets provided by Qwest to Pac-West. Qwest had several opportunities to provide information about disputed amounts due to transit traffic, but did not. There is no apparent reason why this issue could not have been identified prior to the record closing and no persuasive reason to allow the record to be reopened at this late date. Accordingly, Qwest is required

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<sup>53</sup> *Id.*, ¶ 96.

<sup>54</sup> *Id.*, ¶ 100.

<sup>55</sup> *Id.*, ¶ 104.

<sup>56</sup> Pac-West Response, ¶32.

<sup>57</sup> *Id.*, ¶ 31.

<sup>58</sup> *Id.*

to pay Pac-West all compensation that it has withheld based on the evidence submitted by Pac-West.

**c. Did the recommended decision err in not deciding Qwest's counterclaims?**

39 The recommended decision acknowledged Qwest's counterclaims, but declined to address them, finding that Qwest's claims of violations of state and federal standards are matters outside the parties' interconnection agreement, that there are no laws to be violated, or that having held compensation is required for all ISP-bound traffic, including VNXX service, Qwest's counterclaims are resolved.<sup>59</sup>

40 Qwest contends that by not addressing its counterclaims, the recommended decision failed to decide all material issues of fact and law contrary to the requirements of RCW 34.05.461(3).<sup>60</sup> According to Qwest, the three undecided counterclaims address two essential issues – whether VNXX is permissible at all (counterclaims 2 and 3) and whether VNXX traffic, if permitted, can be carried over LIS trunks (counterclaim 4).<sup>61</sup> Qwest claims that “[t]he issue of whether VNXX is permissible at all under state law and the parties' interconnection agreement is a necessary predicate to determining whether ISP-bound traffic must be compensated on a going forward basis under the interconnection agreement.”<sup>62</sup>

41 Pac-West responds that the recommended decision properly disposes of Qwest's counterclaims. According to Pac-West, “Qwest's second counterclaim that ‘VNXX’ is unlawful under state law does not involve any provision of the parties' interconnection agreement, and Qwest has failed to identify any state

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<sup>59</sup> Recommended Decision, ¶ 40.

<sup>60</sup> Qwest Exceptions, ¶ 5.

<sup>61</sup> *Id.*, ¶ 8.

<sup>62</sup> *Id.*

law that Pac-West has violated.”<sup>63</sup> “Qwest’s third and fourth counterclaims arise out of language in the ICA<sup>64</sup> but essentially make the same contention that ‘VNXX’ is improper that the remainder of the decision rejects.”<sup>65</sup>

42 **Commission decision.** We deny this exception and affirm the recommended decision on this issue. The only material issue in this proceeding is whether the parties’ interconnection agreement requires Qwest to compensate Pac-West for the transport and termination of all ISP-bound traffic originated by Qwest, including VNXX traffic. The recommended decision interpreted the scope of “ISP-bound” traffic described by the FCC in the *ISP Remand Order* and concluded that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.

43 Qwest’s counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. WAC 480-07-650. Qwest has not met its burden to demonstrate that its counterclaims involve breach of provisions in the interconnection agreement. Moreover, Qwest’s counterclaims address the use of VNXX service generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

## II. FINDINGS OF FACT

44 Having discussed above in detail the documentary 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 and bases

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<sup>63</sup> Pac-West Response, ¶ 5.

<sup>64</sup> Interconnection agreement.

<sup>65</sup> Pac-West Response, ¶ 5.

for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by this reference.

- 45 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.
- 46 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 47 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.
- 48 (4) Pac-West is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.
- 49 (5) Pac-West and Qwest have negotiated an interconnection agreement that was approved by the Commission on February 14, 2001, in Docket No. UT-013009.
- 50 (6) Pac-West and Qwest executed an ISP Amendment to the interconnection agreement, incorporating the *ISP Remand Order*, that the Commission approved on March 12, 2003, in Docket No. UT-013009.
- 51 (7) In early 2004, Qwest began to withhold payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded the growth ceilings

for ISP-bound traffic described in section 3.2.2 of the ISP Amendment. This matter was ultimately decided by a private arbitrator who ruled in Pac-West's favor based on the FCC's *Core Forebearance Order*.

- 52 (8) In December 2004, Qwest notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004.
- 53 (9) In April 2005, Qwest notified Pac-West that Qwest had decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of 2005.
- 54 (10) Pac-West filed its Petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains foreign exchange service from Pac-West.
- 55 (11) Administrative Law Judge Karen M. Caillé entered her Recommended Decision, Order No. 03 in this proceeding, on August 23, 2005, recommending that Pac-West's petition for enforcement be granted and that Qwest be ordered to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.
- 56 (12) On September 9, 2005, Qwest filed Exceptions to the Recommended Decision. On September 30, 2005, Pac-West filed Response to Qwest's Exceptions to the Recommended Decision.

- 57 (13) Qwest seeks review of the following issues: (a) whether the decision properly interpreted the FCC's *ISP Remand Order*, (b) whether the decision erred in determining the amounts due Pac-West, and (c) whether the decision erred in not deciding Qwest's counterclaims.
- 58 (14) Based on our discussion herein, we affirm the recommended decision's factual determination that the amount owed to Pac-West is \$637,389.90, based on the spreadsheets provided Pac-West by Qwest.

### III. CONCLUSIONS OF LAW

59 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 60 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.
- 61 (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.
- 62 (3) The FCC did not limit ISP-bound traffic in its *ISP Remand Order* to traffic originating and terminating in the same local calling area where the ISP server is located, or to traffic between parties whose numbers are assigned to the same calling area.

- 63 (4) The FCC has established a separate interim compensation regime for all  
ISP-bound traffic until the FCC finalizes the structure and rates for a new  
intercarrier compensation regime.
- 64 (5) Pursuant to the parties' interconnection agreement as modified by the ISP  
Amendment, which incorporates the *ISP Remand Order*, and specifically  
the FCC's description of "ISP-Bound" traffic, Pac-West is entitled to  
compensation from Qwest for transport and termination of all ISP-bound  
traffic originated by Qwest, including VNXX traffic, according to the rates,  
terms and conditions in the ISP Amendment.
- 65 (6) Pursuant to the *Core Forebearance Order* and the Private Arbitrator's  
decision Pac-West is entitled to compensation described in Conclusion (5)  
from January 1, 2004.
- 66 (7) Qwest owes Pac-West \$637,389.90, based on spreadsheets provided by  
Qwest to Pac-West.
- 67 (8) Qwest's counterclaim requesting Pac-West be directed to follow the  
change of law procedures contained in the interconnection agreement to  
implement the *Core Forebearance Order* is denied.
- 68 (9) Qwest's counterclaim regarding VNXX compensation is denied as it is  
resolved by Conclusion (5).
- 69 (10) Qwest's counterclaims regarding VNXX in general are denied as they are  
beyond the scope of this proceeding and not material to the interpretation  
and enforcement of the interconnection agreement. *WAC 480-07-650*.



IV. ORDER

THE COMMISSION ORDERS:

- 70 (1) Qwest's exceptions to the Recommended Decision are denied.
- 71 (2) The Recommended Decision is affirmed as clarified herein.

DATED at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES:** This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

## **Exhibit II**

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

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	
Petitioner,	)	
	)	ORDER 06
v.	)	
	)	
QWEST CORPORATION,	)	ORDER DENYING PETITION
	)	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.

**PROCEDURAL BACKGROUND**

2     **Nature of Proceeding.** This proceeding involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, 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 Pac-West’s use of Virtual NXX, or VNXX<sup>1</sup>, traffic under the parties’ interconnection agreement.

3     **Order 03 – Recommended Decision to Grant Petition.** On August 23, 2005, Administrative Law Judge Karen Caillé entered a recommended decision, Order 03 proposing to grant Pac-West’s petition and to order Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms, and conditions in the ISP

<sup>1</sup> “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.

Amendment to the parties' interconnection agreement.<sup>2</sup> Order 03 interpreted the Federal Communication Commission's (FCC) *ISP Remand Order*<sup>3</sup> 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 acknowledged Qwest's counterclaims concerning the legality and propriety of VNXX service, but declined to address them on the basis that the counterclaims addressed matters outside the parties' interconnection agreement. The recommended decision proposed that Qwest pay Pac-West for all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.

4 **Order 05 – Commission Final Order Affirming and Clarifying Recommended Decision.** On February 10, 2006, in Order 05, the Washington Utilities and Transportation Commission (Commission) affirmed the recommended decision in Order 03, clarifying that the scope of the *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. The Commission determined that under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. Therefore, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. The Commission also affirmed the recommended decision's disposition of Qwest's counterclaims, finding Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.<sup>4</sup>

5 On February 21, 2006, Qwest filed a petition for reconsideration of Order 05, the Commission's Final Order Affirming and Clarifying Recommended Decision. On March 13, 2006, Qwest filed a letter withdrawing the portion of its petition for reconsideration that addresses the issue of the amount owed to Pac-West by Qwest for

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<sup>2</sup> On August 26, 2005, Administrative Law Judge Ann Rendahl entered an order in Docket UT-053039 that addresses similar issues, granting and denying certain claims in motions for summary determination filed by Level 3 and Qwest.

<sup>3</sup> *In the Matter of 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) *remanded sub nom* [Hereinafter "*ISP Remand Order*"].

VNXX traffic. On March 13, 2006, Pac-West filed a response in opposition to 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 (1<sup>st</sup> 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 its interpretation of the *ISP Remand Order* rests within the boundaries 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.
- 7 **Appearances.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

## DISCUSSION

### **Petition for Reconsideration**

- 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*,<sup>5</sup> which Qwest 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*.<sup>6</sup>

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<sup>4</sup> On February 10, 2006, the Commission entered Order 05 in Docket UT-053039 that addresses similar issues concerning enforcement of an interconnection agreement between by Level 3 and Qwest.

<sup>5</sup> *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*"].

<sup>6</sup> Qwest's Petition for Reconsideration, ¶¶1, 4-8. Qwest's petition raises two issues, the second of which is the calculation of the amount of compensation that Qwest owes Pac-West under the Commission's legal

9 In response, Pac-West points out that Qwest repeats the arguments it has made twice before in this proceeding, arguments the Commission previously rejected.<sup>7</sup> Pac-West again responds to those arguments and asserts that whether viewed as part of all ISP-bound traffic that is subject to the FCC's prescribed compensation, as our Final Order concluded, or as locally-dialed ISP-bound traffic as Pac-West proposed, we correctly concluded that the *ISP Remand Order* requires Qwest to compensate Pac-West for terminating this traffic at the rates established by the FCC.<sup>8</sup>

10 After Qwest filed its petition and Pac-West filed its response, the First Circuit Court of Appeals issued its decision in *Global NAPs*.<sup>9</sup> Qwest filed the decision as supplemental authority in this proceeding along with a related *amicus* brief filed by the FCC.<sup>10</sup> 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.

### 1. First Circuit's *Global NAPs* Decision

11 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

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interpretation of the FCC's *ISP Remand Order* and the parties' interconnection agreement. Since Qwest filed its petition, the parties have agreed on the calculation and payment of the compensation required under the Final Order and Qwest has withdrawn that issue from its petition. *Qwest letter to Carole Washburn re Docket UT-053036*, March 13, 2006.

<sup>7</sup> Pac-West Opposition to Reconsideration, ¶2.

<sup>8</sup> *Id.*, ¶¶ 4-8.

<sup>9</sup> *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*"].

<sup>10</sup> Pac West also filed as supplemental authority a recent decision of the Arizona Corporation Commission in a similar enforcement proceeding between Pac-West and Qwest.

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.<sup>11</sup>

- 12 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.”<sup>12</sup> 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.<sup>13</sup>
- 13 Pac-West asserts the First Circuit’s *interpretation* of the *ISP Remand Order* is not binding in Washington, which is a part of the Ninth Circuit. Pac-West asserts state commissions, as well as federal and state courts, are bound by the decisions of the federal court of appeals that *reviews* an FCC order, but neither the Hobbs Act nor any other federal law gives broad binding effect to the opinion of a federal appeals court that merely *interprets* an FCC order.<sup>14</sup>
- 14 Pac-West observes that the First Circuit failed to consider the FCC’s rationale and discussion in the entire *ISP Remand Order*, despite the Court’s claim to be doing just that.<sup>15</sup> Instead, the First Circuit chose to focus on the administrative history and the FCC’s litigation staff’s opinion that the FCC has not expressly addressed the application of the *ISP Remand Order* in particular, or intercarrier compensation in general, to VNXX traffic.<sup>16</sup>

## 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

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<sup>11</sup> *Global Naps*, 444 F3d at 61.

<sup>12</sup> Qwest Supplemental Brief, ¶¶ 8-12.

<sup>13</sup> *Id.*, ¶¶ 13-16.

<sup>14</sup> Pac-West Supplemental Brief, p. 2, fn. 1.

<sup>15</sup> *Id.*, ¶ 4.

<sup>16</sup> *Id.*, p. 5, fn. 10.

local, intrastate and interstate traffic apply to ISP-bound traffic.<sup>17</sup> As Qwest has included these arguments in its opening brief, exceptions to recommended decision, and petition for reconsideration, we do not repeat the arguments here.

- 16 Pac-West asserts the FCC did not establish a separate category for intrastate ISP-bound traffic in its *ISP Remand Order*. Pac-West argues “[t]he FCC unambiguously stated that *all* ISP-bound traffic is jurisdictionally interstate:

For jurisdictional purposes, the [FCC] views LEC-provided access to enhanced service providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers). . . . Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as *interstate access*.”<sup>18</sup>

Pac-West asserts that “[s]ubjecting some locally dialed ISP-bound calls—which the FCC ‘has always held’ are interstate – to intrastate access charges is fundamentally inconsistent with both the FCC’s rationale and conclusion in asserting jurisdiction over these calls.”<sup>19</sup> According to Pac-West, “[t]he FCC thus left no room whatsoever for a state commission to assert jurisdiction over a portion of an interstate call.”<sup>20</sup>

### 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.<sup>21</sup> Our task is to establish the most logical and reasonable interpretation of the *ISP Remand Order* and then apply that

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<sup>17</sup> Qwest Supplemental Brief, ¶¶ 8-12, 19-20.

<sup>18</sup> Pac-West Supplemental Brief, ¶¶ 4-5, citing *ISP Remand Order* ¶57 (emphasis in original).

<sup>19</sup> *Id.*, ¶7.

<sup>20</sup> *Id.*

<sup>21</sup> Section 1.4 of the ISP-bound Traffic Amendment (ISP Amendment) to Pac-West and Qwest’s interconnection agreement provides “‘ISP-Bound’ is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.” Section 3.1 of the ISP Amendment provides “Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC’s Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68...”



interpretation to the traffic the parties exchange. The FCC analysis in the *ISP Remand Order* (1) confirms that all ISP-bound traffic is jurisdictionally interstate and subject to its regulatory jurisdiction, and (2) solves the problem of regulatory arbitrage by establishing a unified compensation plan for ISP-bound traffic.<sup>22</sup> The FCC's policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*,<sup>23</sup> 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,<sup>24</sup> 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."<sup>25</sup>

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.

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<sup>22</sup> *ISP Remand Order*, ¶¶ 52-65, 89-94.

<sup>23</sup> *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) [Hereinafter "*Core Forbearance Order*"].

<sup>24</sup> *Global Naps*, 444 F3d at 72.

<sup>25</sup> *Id.*

21 The FCC acknowledges in its *amicus* brief<sup>26</sup> 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.<sup>27</sup> 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.

### FINDINGS OF FACT

22 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:

23 (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.

24 (2) Pac-West is authorized to operate in the state of Washington as a competitive local exchange carrier.

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<sup>26</sup> 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.

<sup>27</sup> Amicus Brief at 10.

- 25 (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.
- 26 (4) Pac-West and Qwest negotiated an interconnection agreement approved by the Commission on February 14, 2001.
- 27 (5) Pac-West and Qwest executed an ISP-Bound Traffic Amendment (ISP Amendment) to their interconnection agreement approved by the Commission on March 12, 2003.
- 28 (6) 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

- 29 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:
- 30 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 31 (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.

- 32 (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.
- 33 (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.
- 34 (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.
- 35 (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.
- 36 (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.
- 37 (8) The Commission's interpretation of the *ISP Remand Order* in Order 05 is within the boundaries of the *ISP Remand Order*'s broad language and reflects the FCC's policy and intent to establish a uniform compensation regime for all ISP-bound traffic.

**ORDER**

**THE COMMISSION ORDERS:**

38 Qwest'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

## **Exhibit III**

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS,	)	DOCKET NO. UT-053039
LLC,	)	
	)	ORDER NO. 05
Petitioner,	)	
	)	ORDER ACCEPTING
v.	)	INTERLOCUTORY REVIEW;
	)	GRANTING, IN PART, AND
QWEST CORPORATION,	)	DENYING, IN PART, LEVEL 3'S
	)	PETITION FOR
Respondent.	)	INTERLOCUTORY REVIEW.
.....	)	

1 *Synopsis.* This Order reverses portions of the administrative law judge's decision, Order No. 03, requires Qwest to compensate Level 3 for ISP-bound traffic under the Federal Communications Commission's (FCC) Core Forbearance Order as of the effective date of that Order, and approves Level 3's proposed amendment language. This Order also affirms the decision in Order No. 03 that ISP-bound VNXX traffic is compensable under the FCC's ISP Remand Order. As a result, the Order dismisses Qwest's counterclaims contesting the use of VNXX arrangements. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue in a petition for enforcement of Level 3's interconnection agreement concerning compensation for ISP-bound VNXX traffic.

**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, traffic under the parties' interconnection agreement.

3 **Order No. 03 – Order on Motions for Summary Determination.** On August 26, 2005, Judge Rendahl entered Order No. 03 in this proceeding, an order granting certain claims in motions for summary determination filed by Level 3 and Qwest, and denying other claims in their motions.<sup>1</sup> Order No. 03 interpreted the Federal Communication Commission's (FCC) *ISP Remand Order*,<sup>2</sup> and the parties' interconnection agreement, to allow compensation for ISP-bound VNXX traffic, under the compensation scheme established in the FCC's Order. Order No. 03 found the change in compensation for ISP-bound traffic established in the FCC's *Core Forbearance Order*<sup>3</sup> effective following Commission approval of an amendment to the parties' interconnection agreement, and declined to accept either party's proposed amendment language. Order No. 3 also denied, in part, Level 3's motions and Qwest's counterclaims, requiring the parties to develop in a hearing issues of fact and law governing the use of VNXX traffic.

4 **Level 3's Petition for Interlocutory Review.** On September 7, 2005, Level 3 filed with the Commission a Petition for Interlocutory Review, seeking review of portions of the administrative law judge's decision. Qwest filed an answer to Level 3's petition on September 19, 2005.

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<sup>1</sup> On August 23, 2005, Administrative Law Judge Karen M. Caillé entered a recommended decision on similar issues in Docket No. UT-053036, involving an enforcement petition filed by Pac-West Telecomm, Inc. (Pac-West), granting Pac-West's petition.

<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier 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*"].

<sup>3</sup> *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     **Request for Delay in Ruling on Level 3's Petition.** On September 28, 2005, Level 3 and Qwest requested the Commission defer ruling on Level 3's petition until after November 30, 2005, while the parties engaged in settlement discussions. On December 1, 2005, counsel for Level 3 advised the Commission the parties had not resolved the disputed issues through settlement discussions. Level 3 requested the Commission enter an order on its petition for interlocutory review, and stay the procedural schedule until after the order is entered. On December 8, 2005, the Commission notified the parties it would enter an order on Level 3's petition by February 10, 2006, and stayed the procedural schedule until the Commission entered its order.
- 6     **Commission Decision.** We accept Level 3's petition for interlocutory review of Order No. 03, granting in part, and denying in part, Level 3's petition. We reverse the administrative law judge's decisions concerning the *Core Forbearance Order*, require Qwest to compensate Level 3 for ISP-bound traffic under the FCC's *Core Forbearance Order* as of the effective date of that Order, with interest, and approve Level 3's proposed amendment language. We also dismiss Qwest's counterclaims concerning the use of VNXX arrangements, finding Qwest's claims about use of VNXX not material or necessary to deciding the issue of compensation for ISP-bound traffic under the FCC's *ISP Remand Order*. Finally, we affirm the finding in Order No. 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.
- 7     **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, 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.

MEMORANDUM

**A. Background Information**

8 In this proceeding, Level 3 seeks to enforce provisions of its interconnection agreement with Qwest concerning compensation for ISP-bound traffic. Specifically, Level 3 asserts the FCC's *ISP-Remand Order* requires compensation for ISP-bound VNXX traffic. A VNXX traffic arrangement "converts what would otherwise be toll calls into local calls."<sup>4</sup> Level 3 also requests the Commission order Qwest to amend its interconnection agreement with Level 3 to reflect a recent FCC decision governing compensation for ISP-bound traffic, referred to as the *Core Forbearance Order*.

9 In its counterclaims, Qwest asserts VNXX traffic violates federal and state law, as well as provisions of the parties' interconnection agreement. Qwest also seeks to amend the parties' agreement to reflect the *Core Forbearance Order*, excluding compensation for VNXX traffic and applying the Relative Use Factor (RUF) calculation such that Level 3 is responsible for all ISP-bound traffic originated by Qwest end user customers.

10 Order No. 03 in this proceeding interpreted the FCC's *ISP-Remand Order* to allow compensation for ISP-bound VNXX traffic. The decision denied Level 3's requests to order Qwest to amend the parties' agreement to reflect the *Core Forbearance Order*, and to require a change in compensation levels as of October 8, 2004, the effective date of the *Core Forbearance Order*. The Order also deferred

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<sup>4</sup> *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004). Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix, or number that identifies the specific telephone company central office serving the line. *Qwest Motion for Summary Determination*, ¶ 19. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers have the same NXX as the local calling area of an end-user customer, but may terminate in a different calling area, local access and transport area (LATA), or state. *Id.*, ¶¶ 4, 23.

Qwest's counterclaims for hearing to develop a more complete record on VNXX traffic, denying in part, and granting in part, Qwest's counterclaims and Level 3's motions concerning Qwest's counterclaims.

- 11 Level 3 seeks interlocutory review of five specific decisions in Order No. 03. We consider Level 3's request for interlocutory review and claims of error, as well as the issue of compensation for ISP-bound VNXX traffic, in Sections B through H, below.

**B. Interlocutory Review.**

- 12 Level 3 seeks interlocutory review of several decisions in Order No. 03, asserting review will save the Commission and the parties substantial effort or expense. Level 3 objects to certain decisions on its motion for summary determination. Level 3 asserts the issues in this proceeding are issues of law and that, contrary to the findings in Order No. 3, there are no issues of fact requiring a hearing. Level 3 asserts the burden of a hearing outweighs the costs and delay of exercising interlocutory review. Level 3 further asserts interlocutory review is appropriate to resolve inconsistencies within Order No. 3, as well as inconsistencies between Order No. 03 in this proceeding and the Recommended Decision in the Pac-West proceeding in Docket No. UT-053036.

- 13 Qwest argues interlocutory review is not warranted. Qwest asserts that disrupting the schedule imposes greater costs in time and delay than holding a hearing. Qwest asserts preparing for hearing imposes only a slight burden on the parties, i.e., preparing and filing testimony. Qwest asserts similar proceedings are underway in other states, lessening the burden of preparing testimony. Qwest also asserts interlocutory review resolves some of the issues in the proceeding, and Qwest would still request review of the decision in Order No. 3 concerning compensation for ISP-bound traffic. In the event the

Commission accepts interlocutory review and reviews all issues resolved in Order No. 03, Qwest requests permission to supplement its answer concerning whether VNXX traffic is compensable under the FCC's *ISP Remand Order*.

14 *Discussion and Decision.* Interlocutory review involves Commission review of interim decisions, i.e., orders that are not dispositive of all the issues in the proceeding. The order at issue in Level 3's petition, Order No. 03, is an interim order resolving the parties' motions for summary judgment, and is not a recommended decision resolving all of the issues presented by the parties.

15 The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2)*. Pursuant to WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds that:

(a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense or some other factor is present that outweighs the costs in time and delay of exercising review.

16 We find interlocutory review appropriate under WAC 480-07-810(2)(c) and accept interlocutory review of Order No. 03. Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding. It is more efficient for the Commission and the parties to address the disputed issues on interlocutory review than to decide the issues after the Commission holds a hearing and the administrative law judge enters a recommended decision. While Qwest focuses solely on the burden of the *parties* in preparing for a hearing, our

rule addresses whether review would save the parties *and the Commission* substantial effort or expense.

- 17 In addition, we find the contested issues in this proceeding significantly similar to those presented in the Pac-West proceeding in Docket No. UT-053036. Both proceedings concern interpretation of the FCC's *ISP Remand Order* and *Core Forbearance Order*, and compensation for ISP-bound VNXX traffic. Qwest made the same counterclaims concerning VNXX in the two proceedings. Accepting interlocutory review is an appropriate way resolve all the issues in this proceeding simultaneously with the Commission entering a final order in the Pac-West proceeding. We reject Qwest's request for additional briefing on the issue of compensation for VNXX traffic under the *ISP Remand Order*, finding the parties provided sufficient briefing on the issue in their motions for summary determination.

**C. Compensation for VNXX Traffic under the *ISP Remand Order*.**

- 18 The primary issues Level 3 raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively in their motions for summary judgment. We will not repeat the arguments in this Order, as the administrative law judge's decision, Order No. 03, adequately summarizes the arguments.
- 19 Order No. 03 interprets the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*. Order No. 03, ¶ 28. The Order also interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located. *Id.*, ¶ 34. Thus, the Order required

Qwest to compensate Level 3 under the parties' agreement for ISP-bound VNXX traffic. *Id.*, ¶ 35. We affirm these decisions.

- 20 We provide a brief history and analysis of the FCC's decisions concerning compensation for ISP-bound traffic as support for our decision: The FCC has entered several orders on the issue, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."<sup>5</sup> The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.<sup>6</sup>
- 21 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.<sup>7</sup> The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.<sup>8</sup> The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).<sup>9</sup> Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.<sup>10</sup> On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding the FCC

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<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].

<sup>6</sup> *Id.*, ¶¶ 1034-35.

<sup>7</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter "*Declaratory Ruling*"].

<sup>8</sup> *Id.*, ¶¶ 12, 18.

<sup>9</sup> *Id.*, ¶ 26.

had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were “local” for purposes of reciprocal compensation.<sup>11</sup>

- 22 In April 2001, the FCC released its *ISP Remand Order*. In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.<sup>12</sup> The FCC also modified its decision in the *First Report and Order* that only “transport and termination of local traffic” is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.<sup>13</sup> The FCC established a separate interim compensation regime for all ISP-bound traffic until the FCC finalizes the structure and rates for a new intercarrier compensation system.<sup>14</sup> The FCC’s interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.<sup>15</sup>
- 23 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC’s findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.<sup>16</sup> The Court did not vacate the order, finding that “there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs.”<sup>17</sup>

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<sup>10</sup> *Id.*, ¶¶ 26-27.

<sup>11</sup> *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)

<sup>12</sup> *ISP Remand Order*, ¶¶ 3, 35.

<sup>13</sup> *Id.*, ¶ 46.

<sup>14</sup> *Id.*, ¶ 77.

<sup>15</sup> *Id.*, ¶¶ 78, 81, 89. The rate applicable to day to minutes of use for ISP-bound traffic is \$0.0007 per minute.

<sup>16</sup> *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

<sup>17</sup> *Id.*

24 Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order*, the FCC cases preceding the *ISP Remand Order*, the Commission's orders in the *Level 3/CenturyTel* arbitration,<sup>18</sup> and recent district court decisions in Vermont<sup>19</sup> and Connecticut<sup>20</sup> support the decision in Order No. 03 and our decision today.

25 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.<sup>21</sup> 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.

26 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic culminating in the interim approach in the *ISP Remand Order* applicable to all types of traffic and interconnection arrangements. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that ISP-bound traffic is jurisdictionally interstate, as a call terminating to the internet could

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<sup>18</sup> *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252, Fifth Supplemental Order, Arbitrator's Report and Decision*, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter "*CenturyTel-Level 3 Arbitration*"], affirmed Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).

<sup>19</sup> *Global Naps*, 327 F.Supp.2d at 300.

<sup>20</sup> *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

<sup>21</sup> *ISP Remand Order*, ¶ 77.



terminate in a different state or country.<sup>22</sup> In describing how ISP customers access the internet, the FCC noted that “[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.”<sup>23</sup> The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhanced Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.<sup>24</sup> Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

27 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,<sup>25</sup> the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to “local” traffic.<sup>26</sup> Although the D.C. Circuit rejected the FCC’s findings concerning Section 251(g), the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.<sup>27</sup>

28 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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<sup>22</sup> *Declaratory Ruling*, ¶¶ 13, 18.

<sup>23</sup> *Id.*, ¶ 4; see also ¶ 7.

<sup>24</sup> *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.

<sup>25</sup> *Bell Atlantic*, 206 F.3d 1.

<sup>26</sup> *ISP Remand Order*, ¶ 46.

<sup>27</sup> *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,<sup>28</sup> this discussion does not represent the FCC's decision in the *ISP Remand Order*. The FCC describes ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.<sup>29</sup> The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."<sup>30</sup> The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."<sup>31</sup>

29 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.<sup>32</sup> Our decision is consistent with this Commission's decision in arbitrating a recent agreement between CenturyTel and Level 3,<sup>33</sup> and recent decisions by the District Courts of Connecticut and Vermont.<sup>34</sup> These decisions all find that the *ISP Remand Order* addresses *all* ISP-bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."<sup>35</sup>

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<sup>28</sup> *ISP Remand Order*, ¶¶ 9-13.

<sup>29</sup> *Id.*, ¶ 44.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, n.82.

<sup>32</sup> *Id.*, ¶ 58; *see also* ¶ 61.

<sup>33</sup> *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

<sup>34</sup> *Global Naps*, 327 F.Supp.2d at 300; *SNET v. MCI*, 353 F.Supp.2d at 296-97, 299.

<sup>35</sup> *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

30 The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.<sup>36</sup> States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Level 3 for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the parties' interconnection agreement, which adopts the *ISP Remand Order*.

**D. Approval of VNXX arrangements in Interconnection Agreements.**

31 Level 3 asserts the administrative law judge erred, in part, in deciding Qwest's Counterclaim No. 2. In that counterclaim, Qwest alleges Level 3 violated state law by billing Qwest the federal reciprocal compensation rate for all VNXX ISP-bound traffic. Level 3 assigns error to Order No. 03's finding at paragraph 42 that the Commission has "not approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state," and to the parallel Conclusion of Law No. 8 at paragraph 76.<sup>37</sup>

32 Level 3 asserts the Commission's prior decision in the Level 3/Century Tel Arbitration proceeding in Docket No. UT-023043 contradicts this decision in Order No. 3. In the arbitration decision, the Commission determined that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."<sup>38</sup> Level 3 asserts that the Commission approved payment of reciprocal compensation for VNXX ISP-bound traffic in approving an interconnection agreement between Level 3 and

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<sup>36</sup> *ISP Remand Order*, ¶ 77.

<sup>37</sup> *Level 3 Communications LLC v. Qwest Communications*, Docket No. UT-053039, Order No. 03, August 26, 2005, ¶¶ 42, 76.

<sup>38</sup> *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 1, 35.

CenturyTel. Level 3 also asserts the Commission approved Level 3's transport and termination of VNXX traffic in its agreement with Qwest, approved soon after the agreement with CenturyTel.

33 Level 3 also asserts the decision in paragraph 42 of Order No. 03 is inconsistent with the Recommended Decision in the Pac-West proceeding, in which the assigned judge rejected Qwest's counterclaim on the basis of the Level 3 /CenturyTel Arbitration.

34 Qwest asserts the Commission's Level 3/CenturyTel Arbitration Order did not decide the propriety of VNXX traffic, but simply decided the issue of compensation for VNXX ISP-bound traffic. Qwest asserts that the parties disputed only the proper compensation for VNXX traffic, not whether its use under the interconnection agreement was proper. Qwest also asserts the Commission did not approve the use of VNXX routing for ISP-bound traffic in the Level 3/Qwest arbitration, noting that the only issue for decision was whether ISP-bound traffic should be included in the Relative Use Factor.

35 *Discussion and Decision.* In our prior decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, we have not considered the propriety of VNXX arrangements, but instead focused specifically on compensation for these arrangements. We have understood that Level 3 intended to use VNXX arrangements, but no party in the arbitration proceedings raised the issue of whether these arrangements are appropriate or within the law. We do not find the finding reached in paragraph 42 or Conclusion of Law No. 8 in Order No. 03 in error. We deny Level 3's petition for interlocutory relief on this issue.

**E. Qwest's Counterclaim No. 4: Obligation to Administer NXX Codes.**

36 Level 3 asserts Order No. 03 erred in denying Level 3's motion on Qwest's Counterclaim No. 4. In its counterclaim, Qwest asserts Level 3 is obligated under Section 13.4 of the parties' interconnection agreement to administering NXX codes, and that use of VNXX arrangements violates this provision of the agreement. In paragraph 44 of the Order, the administrative law judge denied both parties' motions for summary judgment on this counterclaim, finding there were disputed issues of material fact. In the Order, the administrative law judge directed the parties to develop a record on the issue through prefiled testimony and hearing to allow a Commission decision on the issue.

37 Level 3 asserts that no factual issues exist. Level 3 asserts that Section 13.4 of the agreement merely identifies administrative responsibilities for assigning NXX codes and does not address the physical location of ISP servers. Level 3 asserts the industry guidelines Qwest cites do not support Qwest's argument, and are insufficient to preclude summary judgment in favor of Level 3.

38 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that there remain factual issues, such as whether industry guidelines should be used to interpret the parties' agreement, and the interpretation of the guidelines. Qwest asserts that the proper use and legality of VNXX arrangements should be addressed in hearing before the Commission enters a decision on its counterclaim.

39 *Discussion and Decision.* We grant Level 3's petition for interlocutory relief on this issue, and dismiss Qwest's counterclaims in this proceeding. It is not necessary for us to decide in this proceeding whether VNXX arrangements, generally, are appropriate or within the law. The only material issue in this

proceeding is whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic. Having resolved this issue above, there is no need to address Qwest's counterclaims.

40 Qwest's counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. WAC 480-07-650. Qwest has not met its burden to demonstrate breach of provisions in the interconnection agreement. Qwest's counterclaims address the use of VNXX arrangements generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

**F. Qwest's Counterclaim No. 5: Authority to Exchange VNXX ISP-bound Traffic on LIS Interconnection Trunks.**

41 Level 3 also asserts the administrative law judge erred in Order No. 03 in denying Level 3's motion on Qwest's Counterclaim No. 5. In its counterclaim, Qwest asserts the parties' interconnection agreement does not permit Level 3 to exchange VNXX ISP-bound traffic on local interconnection service (LIS) interconnection trunks. In paragraph 46 of Order No. 03, the administrative law judge granted Level 3's motion on Qwest's claim and denied Qwest's motion. However, the Order also directed the parties to develop a complete record on the issue before deciding whether Level 3 may exchange VNXX traffic over LIS trunks, effectively denying Level 3's motion. Level 3 asserts the administrative law judge's ruling is inconsistent, and in error.

42 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that factual issues concerning the routing of VNXX traffic over LIS trunks should be

addressed in hearing before the Commission enters a decision on its counterclaim.

43 *Discussion and Decision.* Based on our discussion in Section E above, we grant Level 3's petition on this issue, and dismiss Qwest's counterclaims 1, 2, 4 and 5. There is no need to develop in hearing in this proceeding whether VNXX arrangements are appropriate or within the law. Having resolved above the only material issue in this proceeding – compensation for ISP-bound traffic, there is no need to address Qwest's counterclaims or to address Qwest's claims more fully in hearing.

#### **G. Implementing the Core Forbearance Order.**

44 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*. The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.<sup>39</sup>

45 While Level 3 and Qwest agree that the *Core Forbearance Order* results in a change in law governing compensation for ISP-bound traffic, the parties disagree over how to implement these changes. Level 3 seeks additional compensation for ISP-bound traffic from Qwest back to October 8, 2004, the effective date of the *Core Forbearance Order*, and has billed Qwest for these amounts. Qwest asserts that it may only pay the additional amounts after the Commission approves an amendment to the parties' agreement. Level 3 has proposed language to amend the parties' interconnection agreement to reflect the *Core Forbearance Order*, but Qwest and Level 3 continue to dispute the appropriate language.

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<sup>39</sup> *Core Forbearance Order*, ¶27.

- 46 In paragraph 52 of Order No. 03, the administrative law judge determined that Level 3 may not bill Qwest for additional compensation for ISP-bound traffic under the *Core Forbearance Order* until the Commission approves an amendment to the parties' interconnection agreement implementing the change in law. Level 3 asserts the administrative law judge erred in finding Level 3 in violation of the change of law provisions of the interconnection agreement by billing Qwest for compensation for ISP-bound traffic back to the effective date of the *Core Forbearance Order*.
- 47 Level 3 requests the Commission reverse the administrative law judge's decision. Level 3 asserts the decision in Order No. 03 is inconsistent with the parties' interconnection agreement, the Recommended Decision entered in the Pac-West proceeding, and creates a perverse incentive for ILECs to delay negotiating agreements to reflect changes in law. Level 3 asserts it has followed the change of law provisions in the agreement by attempting to negotiate an amendment to the parties' interconnection agreement. Level 3 asserts it has followed the dispute resolution provisions of the agreement by requesting the Commission resolve the issues in this proceeding. Level 3 has billed Qwest for the amounts it believes are due under the *Core Forbearance Order* in order to perfect and maintain its claim to the amounts.
- 48 Level 3 asserts that the *Core Forbearance Order* merely changes the amount of compensable traffic. Level 3 asserts that the issue is not whether Level 3 is entitled to additional compensation under the *Core Forbearance Order*, but when Qwest's obligation to compensate Level 3 began. Level 3 asserts that the change in compensation under the *Core Forbearance Order* begins as of the effective date of the FCC's order.
- 49 Qwest asserts the parties have not reached agreement on amendment language, and have not filed language with the Commission. Qwest asserts the



Commission has consistently held that interconnection agreements and changes to agreements are not effective until the agreement has been filed with and approved by the Commission. Qwest further asserts there is nothing in the *Core Forbearance Order* to support the argument that the change in law is retroactive to the effective date of the FCC's order.

50 *Discussion and Decision.* Consistent with our prior orders on this issue, changes in law are generally not effective under an interconnection agreement until the parties modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. However, there are circumstances where the FCC has determined a change in law is effective on a certain date regardless of whether the parties have modified their interconnection agreements. For example, in the FCC's *Triennial Review Remand Order*,<sup>40</sup> the FCC required changes in access to unbundled network elements as of March 11, 2006, without requiring carriers to modify their amendments to interconnection agreements to implement the change in law.

51 We find a similar effect in the FCC's decision in the *Core Forbearance Order*, requiring the change in compensation rate as of the effective date of the order, October 8, 2004. In the Order, the FCC provides "Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 8, 2004."<sup>41</sup> There is no discussion in the order requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements. We find the FCC intended the *Core Forbearance Order* to have immediate effect, and grant Level 3's petition for interlocutory relief on this issue.

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<sup>40</sup> *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "*Triennial Review Remand Order*"].

<sup>41</sup> *Core Forbearance Order*, ¶ 28.

52 Further, we find that Level 3 is not prohibited from *billing* Qwest for the amounts it alleges Qwest owes under the *Core Forbearance Order*, but that Qwest is not obligated under its interconnection agreement to pay the amounts due until the Commission approves an amendment to the parties' agreement. Given our decision above concerning the effective date of the *Core Forbearance Order*, we require Qwest to compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order. We reject the argument that payment back to the effective date is a retroactive application of rates: We are simply implementing the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order. We grant Level 3's petition on this issue, finding Level 3 in compliance with the change of law provisions in its interconnection agreement

53 We agree with Level 3's assertion that the administrative law judge's decision on this issue creates an incentive for ILECs to delay implementing amendments to their interconnection agreements. To deter incentives for delay and encourage prompt compliance with FCC Orders, it is appropriate to require Qwest to pay Level 3 late payment fees, as described in Section 5.4.4.1 of the parties' interconnection agreement filed with the Commission on March 7, 2003, on the amounts owing since October 8, 2004. Qwest must make the payments after our approval of an amendment to the parties' agreement consistent with this Order.

#### **H. Approval of Proposed Amendment Language.**

54 Level 3 and Qwest agree that the *Core Forbearance Order* results in a change of law, and that they must amend their interconnection agreement to implement the change in law. They disagree, however, about the appropriate amendment language. In paragraph 55 of Order No. 03, the administrative law judge did not recommend approval of either party's language, denied Level 3's motion to

require Qwest to execute Level 3's proposed amendment, and suggested the parties use the decisions in the Order as guidance for further negotiations.

55 Level 3 asserts the administrative law judge erred in denying its motion. Level 3 requests the Commission reverse the administrative law judge's decision and require Qwest to execute Level 3's proposed amendment. Level 3 asserts that Qwest's proposed language is contrary to the Commission's decision in the Level 3/CenturyTel Arbitration Order and the administrative law judge's decision in Order No. 03 governing compensation for ISP-bound traffic. Level 3 asserts that its proposed language, attached to its Motion for Summary Determination as Exhibit B to the Affidavit of Mack Greene, is consistent with these decisions and would accurately implement the *Core Forbearance Order*.

56 Qwest objects to Level 3's proposed amendment as allowing the exchange of VNXX traffic. Qwest asserts that the issue of the propriety of VNXX traffic should be fully litigated before the Commission decides on the appropriate amendment language to implement the *Core Forbearance Order*.

57 **Discussion and Decision.** We grant Level 3's petition for interlocutory relief on this issue, and reverse the decision in paragraph 55 in Order No. 03. Level 3 complied with the dispute resolution provisions in its interconnection agreement with Qwest by filing an enforcement petition with this Commission. Level 3 appropriately sought a Commission decision on the parties' competing amendment language. It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.

58 Upon review, we find Level 3's proposed amendment language appropriate to implement the changes in law as a result of the *Core Forbearance Order*. Level 3's language is limited to the changes to the *ISP Remand Order* identified in the *Core*

*Forbearance Order*, and is consistent with our decisions in this Order. Qwest's language seeks to exclude VNXX traffic from compensation for ISP-bound traffic, contrary to our decision. In addition, Qwest's proposed language improperly seeks to relitigate the issue of how to apply the Relative Use Factor, which we decided in Level 3's favor in the Level 3/Qwest Arbitration Order. We require Qwest and Level 3 to execute Level 3's proposed amendment to the interconnection agreement, and file the agreement with the Commission within 15 days of the effective date of this Order.

#### FINDINGS OF FACT

- 59 Having discussed above in detail the documentary 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 and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.
- 60 (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.
- 61 (2) Level 3 Communications, LLC is authorized to operate in the state of Washington as a competitive local exchange carrier.
- 62 (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.

- 63 (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.
- 64 (5) The interconnection agreement between Qwest and Level 3 provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 65 (6) The FCC entered its *Core Forbearance Order* in October 2004, changing the effect of certain provisions of the *ISP Remand Order*.

#### CONCLUSIONS OF LAW

66 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 67 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 68 (2) The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2)*.

- 69 (3) Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding compared to addressing the issues after holding a hearing and entering a recommended decision. As the issues in this proceeding are similar to those in the Pac-West proceeding in Docket No. UT-053036, interlocutory review appropriately resolves all issues in the two proceedings simultaneously.
- 70 (4) The FCC's *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. In the *ISP Remand Order*, the FCC creates a separate compensation category for all ISP-bound traffic, regardless of the nature of the traffic. *ISP Remand Order*, ¶ 77.
- 71 (5) In decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, the Commission has addressed and approved compensation for VNXX arrangements, but has not considered the propriety of these arrangements.
- 72 (6) Qwest's counterclaims are not appropriate for this proceeding, where the only pertinent and material issues are the interpretation and enforcement of the interconnection agreement, and whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic.
- 73 (7) In general, the Commission recognizes that changes in law are generally not effective under an interconnection agreement until carriers modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. The FCC has made exceptions to this general rule, for example in its *Triennial Review Remand Order*.

- 74 (8) The FCC intended the *Core Forbearance Order* to have immediate effect, as of the effective date of the Order, October 8, 2004.
- 75 (9) Given the FCC's decision concerning the effective date of its *Core Forbearance Order*, Qwest must compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order.
- 76 (10) It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.
- 77 (11) Level 3's proposed amendment language implements the changes in law as a result of the *Core Forbearance Order*, is limited to the changes to the *ISP Remand Order* identified in the *Core Forbearance Order*, and is consistent with our decisions in this Order.
- 78 (12) Qwest's proposed amendment language is not consistent with our decision in this Order, and seeks to exclude VNXX traffic from compensation for ISP-bound traffic. Qwest's proposed language also seeks to relitigate the issue of how to apply the Relative Use Factor, an issue resolved in the Level 3/Qwest Arbitration Order in Docket No. UT-023042.

**ORDER**

**THE COMMISSION ORDERS:**

- 79 (1) Level 3 Communications, LLC's, Petition for Interlocutory Review is accepted.

- 80 (2) Paragraphs 73, 74, 83, and 84 of Order No. 03 in this proceeding, interpreting the FCC's *ISP Remand Order* to address all ISP-bound traffic and establish a compensation regime for all ISP-bound traffic, are affirmed.
- 81 (3) Issue No. 1 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the finding in paragraph 42 and Conclusion of Law No. 8 in paragraph 76 in Order No. 03 that "the Commission has not approved or rejected the use of VNXX arrangements or other traffic in interconnection agreements in the state," is denied.
- 82 (4) Issue No. 2 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 52 of Order No. 03 prohibiting Level 3 Communications, LLC, from billing Qwest Corporation for amounts allegedly owed under the FCC's *Core Forbearance Order*, is granted.
- 83 (5) Issue No. 3 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 55 of Order No. 03 to deny Level 3 Communications, LLC's, motion seeking approval of its proposed amendment language, is granted.
- 84 (6) Issue Nos. 4 and 5 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to decisions in paragraphs 44 and 46 of Order No. 03 to deny Level 3 Communications, LLC's, motion for summary judgment on Qwest counterclaims asserting breach of the parties' interconnection through the use of VNXX arrangements, is granted.



- 85 (7) Upon the Commission's approval of an amendment to the parties' agreement consistent with this Order, Qwest Corporation must pay Level 3 Communications, LLC, late payment fees, as described in Section 5.4.4.1 of the March 7, 2003, interconnection agreement between Level 3 Communications, LLC, and Qwest Corporation, on the amounts owing since October 8, 2004, under the *Core Forbearance Order*.
- 86 (8) Level 3 Communications, LLC, and Qwest Corporation must file with the Commission within 15 business days after the effective date of this Order an amendment to their interconnection agreement complying with the provisions of this Order.

Dated at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES:** This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

## **Exhibit IV**

**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,<sup>1</sup> traffic under the parties’ interconnection agreement.

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<sup>1</sup> “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.<sup>2</sup> Order 03 interpreted the Federal Communication Commission’s (FCC) *ISP Remand Order*<sup>3</sup> 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*<sup>4</sup> 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.

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<sup>2</sup> 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.

<sup>3</sup> *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*”].

<sup>4</sup> *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 (1<sup>st</sup> 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*,<sup>5</sup> which Qwest

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<sup>5</sup> *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*.<sup>6</sup>

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*.<sup>7</sup> We address this issue below in Section B.

10 Level 3 asserts Qwest merely reiterates in its petition arguments the Commission has already rejected.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

11 After Qwest filed its petition and Level 3 filed its response, the First Circuit Court of Appeals issued its decision in *Global Naps*.<sup>11</sup> 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.

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<sup>6</sup> Qwest's Petition for Reconsideration, ¶ 1.

<sup>7</sup> *Id.*, ¶ 10.

<sup>8</sup> Level 3 Response, ¶ 2.

<sup>9</sup> *Id.*, ¶ 3.

<sup>10</sup> *Id.*, ¶ 4.

<sup>11</sup> *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.<sup>12</sup>
- 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."<sup>13</sup> 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.<sup>14</sup>
- 14 Level 3 asserts that the First Circuit's decision supports our decision in Order 05 and provides no basis for modifying our order.<sup>15</sup> Level 3 asserts the First Circuit finds the FCC has not clearly preempted state authority or regulation of intrastate access charges.<sup>16</sup> 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.<sup>17</sup> Level 3 also argues the decisions of the First Circuit are not binding on the Commission.<sup>18</sup>

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<sup>12</sup> *Global Naps*, 444 F.3d at 61.

<sup>13</sup> Qwest Supplemental Brief, ¶¶ 8-12.

<sup>14</sup> *Id.*, ¶¶ 13-16.

<sup>15</sup> Level 3 Supplemental Brief, ¶ 11.

<sup>16</sup> *Id.*, ¶ 3.

<sup>17</sup> *Id.*, ¶ 5.

<sup>18</sup> *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.<sup>19</sup> 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."<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

## 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.<sup>23</sup> Our task is to establish the most

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<sup>19</sup> Qwest Supplemental Brief, ¶¶ 8-12, 19-20.

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

<sup>21</sup> *Id.*, ¶ 15.

<sup>22</sup> *Id.*, ¶ 18.

<sup>23</sup> 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.”<sup>24</sup> The FCC’s policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*,<sup>25</sup> 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,<sup>26</sup> 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.”<sup>27</sup>
- 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.

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

<sup>25</sup> *Core Forbearance Order*, ¶¶ 19-21.

<sup>26</sup> *Global Naps*, 444 F. 3d at 72.

<sup>27</sup> *Id.*

21 The FCC acknowledges in its amicus brief<sup>28</sup> 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.<sup>29</sup> 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

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<sup>28</sup> 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.

<sup>29</sup> Amicus Brief at 10.

processes.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> Level 3 asserts that accepting Qwest's proposal of an effective date when Level 3 requested dispute resolution would be poor public policy.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.

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<sup>30</sup> Qwest Petition, ¶ 11.

<sup>31</sup> *Id.*, ¶ 12.

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

<sup>33</sup> Level 3 Response, ¶ 6.

<sup>34</sup> *Id.*, ¶ 8.

<sup>35</sup> *Id.*, ¶ 9.

<sup>36</sup> *Id.*

<sup>37</sup> *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

CIVIL COVER SHEET

CV 06-0950 RSL

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. [SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.]

I. (a) PLAINTIFFS

QWEST Corporation

(b) County of Residence of First Listed Plaintiff Denver County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Sheree S. Carson, Perkins Coie LLP, 10885 NE 4th Street, Suite 700, Bellevue, WA 98004, 425-635-1400

DEFENDANTS

Washington Utilities and Transportation Commission; Mark Sidran, WUTC Chairman; Patrick Oshie, WUTC Commissioner; Philip Jones, WUTC Commissioner; Level 3 Communications, LLC; PAC-West Telecom, Inc.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE LOCATION OF LAND INVOLVED Attorneys (If Known)

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

Table with 6 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, OTHER STATUTES.

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.) 47 U.S.C. § 151, et seq. Claim for Declaratory and injunctive relief under the Telecommunications Act of 1996

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY: (See Instructions) JUDGE DOCKET NUMBER LODGED RECEIVED

DATE 7/10/06 SIGNATURE OF ATTORNEY OF RECORD Sheree S. Carson

RECEIPT # AMOUNT APPLYING IFP JUDGE MAGISTRATE TITLE CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON BY DEPUTY

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