[Service Date February 10, 2012]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	DOCKET UT-053036
	)	*(consolidated*)
Petitioner,	)	
	)	ORDER 13
v.	)	
	)	
QWEST CORPORATION,	)	ORDER DENYING PETITION FOR
	)	RECONSIDERATION
Respondent.	)	
	)	
. . . . .	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC,	)	
	)	
Petitioner,	)	DOCKET UT-053039
	)	(*consolidated)*
v.	)	
	)	ORDER 13
QWEST CORPORATION,	)	
	)	ORDER DENYING PETITION FOR
Respondent.	)	RECONSIDERATION
	)	
. . . . .	)	

I. INTRODUCTION

1 **NATURE OF PROCEEDINGS.** In these consolidated proceedings, the Washington Utilities and Transportation Commission (Commission) responds to a remand order from the United States District Court for the Western District of Washington (District Court). The remand order originated with an action by Qwest Corporation (Qwest)[1] in the United States District Court challenging the Commission's final orders in

[1] Following the Commission's final order in Docket UT-100820, entered on March 14, 2011, Qwest Communications International, Inc., the parent company of Qwest Corporation, merged with CenturyTel, Inc., becoming CenturyLink. We continue to refer to Qwest in this order given the long history of these cases.

Dockets UT-053036 and UT-053039.[2] In those 2006 orders, the Commission granted Pac-West Telecomm, Inc.'s (Pac-West) and Level 3 Telecommunications, LLC's (Level 3) (collectively Competitive Local Exchange Carriers, or CLECs) petitions for enforcement of their interconnection agreements with Qwest. The Commission found that the CLECs were entitled to compensation for calls bound for Internet service providers (ISP) using "VNXX"[3] traffic arrangements provided by the CLECs, without regard to whether such calls were considered local or interexchange. In its review, the District Court disagreed with the Commission's analysis and remanded the case to the Commission. The District Court directed the Commission to reinterpret the Federal Communications Commission's (FCC's) order on compensation for ISP-bound traffic, known generally as the *ISP Remand Order*,[4] and to classify VNXX ISP-bound traffic as within or outside a local calling area in reaching a decision on the CLECs' petitions for enforcement.

2 **APPEARANCES.** Lisa A. Anderl and Adam Sherr, Seattle, Washington, and Thomas Dethlefs, Denver, Colorado, represent Qwest, now CenturyLink. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, and Christopher W. Savage, Davis Wright Tremaine LLP, Washington, D.C., represent Level 3.

3 **PROCEDURAL HISTORY.** The Commission issued Order 12, its final order in these proceedings, on November 14, 2011, deciding competing motions for summary

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[2] Under Section 252(e)(6) of the Telecommunications Act of 1996, state commission decisions in arbitrating interconnection agreements between carriers, as well as the enforcement of such agreements, are subject to judicial review in federal district court, to ensure state commission compliance with federal law. *See* 47 U.S.C. § 252(e)(6); *see also Verizon Md. Inc. v. Pub. Serv. Comm'n of Md,*, 5635 U.S. 635, 643-44, 122 S.Ct. 1753, 152 L.Ed.2sd 871 (2002).

[3] "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. Even though the call is between local calling areas (*i.e.*, a long distance or toll call), the call appears local based on the telephone number.

[4] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

determination filed by Pac-West, Level 3 and Qwest,[5] determining, as described below, that VNXX calls occur outside a local calling area.

4 On November 28, 2011, Pac-West and Level 3 filed a joint petition for reconsideration of Order 12.

5 On December 1, 2011, the Commission issued a notice requesting an answer from Qwest, and noting that the Commission would enter an order on the petition for reconsideration by January 15, 2012. Qwest filed its answer to the CLECs' petition for reconsideration on December 12, 2011.

6 On January 13, 2012, the Commission issued a further notice that it would enter an order on the petition by February 10, 2012.

7 On January 31, 2012, Qwest filed Supplemental Authority with the Commission.[6]

II. MEMORANDUM

A. The Commission's Final Order

8 In deciding the issues in this proceeding, the Commission followed the District Court's remand instructions to:

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[5] *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket UT-053036, and *Level 3 Communications, LLC v. Qwest Corporation*, Docket UT-053039 (Consolidated), Order 12, Order Denying Pac-West's Motion for Summary Determination; Denying Level 3's Motion for Summary Determination; Granting in Part and Denying in Part Qwest's Motion for Summary Determination; and Denying Qwest's Motion to Strike, or in the Alternative File a Reply, (November 14, 2011) (*Order 12*). The procedural history of these consolidated matters is set forth fully in the Commission's final order, Order 12, and will not be repeated here.

[6] Qwest submitted an order of the United States District Court for the District of Oregon, Portland Division, which dismissed a case between Level 3, Qwest and the Public Utility Commission of Oregon, based on the recommendations of a magistrate judge. See *Level 3 Communications v. Public Utility Commission of Oregon, et al.,* No. 3:10-CV-01030-AC (D. Or. Jan. 13, 2012); See *Level 3 Communications v. Public Utility Commission of Oregon, et al.,* No. 3:10-CV-01030-AC (D. Or. Oct. 27, 2011). Qwest also submitted the magistrate judge's order. While the discussion in those orders is relevant to the underlying issue we decided in Order 12, the orders are not directly applicable to the issues raised in the petition for reconsideration.

> reinterpret the *ISP-Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.[7]

In following these directions, the Commission considered the following sources: The parties' briefs and supplemental authority, the parties' interconnection agreements, Sections 251(b)(5) and 251(g) of the Telecommunications Act of 1996 (the Act),[8] prior federal court decisions on the issues, the FCC's *Mandamus Order*[9] (the order responding to the remand of the FCC's *ISP Remand Order* entered subsequent to the District Court's decision), the Commission's analysis in the *Final VNXX Order*[10] in a case involving VNXX traffic arrangements, and state law.[11]

9 In its final order, Order 12, the Commission found that Pac-West and Level 3 are entitled to neither reciprocal compensation nor the ISP-bound traffic rate established in the FCC's *ISP Remand Order* for intrastate VNXX ISP-bound traffic. Specifically, the Commission determined that the FCC's *ISP Remand Order* and *Mandamus Order* addressed only compensation for traffic within a local calling area, not intrastate, interexchange traffic.[12] The Commission found that states retain authority under Section 251(g) of the Act to apply access or toll charges to intrastate interexchange traffic, i.e., traffic outside of a local calling area.[13] Based on provisions of state law, rule, Qwest's tariffs and the parties' interconnection agreements, the Commission

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[7] *Order 12*, ¶ 32, *quoting Qwest v. Washington Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160, 1177 (W.D. Wash., 2007) (*Qwest*).

[8] 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996).

[9] *In re High Cost Universal Service Support, et al.*, WC Docket 05-337, et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008) (*Mandamus Order*).

[10] *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order, Approving Settlement, (July 16, 2008) (*Final VNXX Order*).

[11] *Order 12*, ¶¶ 16-45.

[12] *Id.* ¶¶ 57, 60.

[13] *Id.* ¶¶ 20, 58-60.

found that VNXX calls occur outside a local calling area.[14] Finally, consistent with the District Court's direction, the Commission determined that the parties' interconnection agreements do not require Qwest to compensate the CLECs for the VNXX traffic in question either using the FCC's ISP-bound traffic rate or reciprocal compensation under Section 251(b)(5) of the Act.[15] Rather, the Commission determined that the parties' agreements likely require the CLECs to pay Qwest for their interexchange or IntraLATA toll traffic.[16]

B. The Petition for Reconsideration

10 The CLECs make three specific arguments for why the Commission should reconsider all or part of Order 12, but argue, overall, that the Commission answered the wrong question. We consider and reject each of these arguments for the reasons discussed below.

1. Does Order 12 Answer the Appropriate Question?

11 The CLECs claim the Commission's "fundamental error" in Order 12 was "to apply traditional, legacy regulatory concepts … to ISP-bound calls handled via modern, efficient VNXX arrangements."[17] They assert that the Commission should have asked "what regulatory treatment of VNXX ISP-bound traffic makes policy and regulatory sense in light of the unique characteristics of such traffic and the ongoing transition of the industry away from dial-up and towards broadband as the primary means of Internet access?"[18] By focusing on the wrong question, the CLECs argue the Commission reached the wrong answer.

12 We reject the CLECs' assignment of error as a misreading of the District Court's directive. While the question the CLECs pose is an interesting one, it is not the direction the District Court gave to the Commission on remand to resolve the CLECs' petitions for enforcement of their interconnection agreements with Qwest. The

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[14] *Id.* ¶¶ 72-74.

[15] *Id.* ¶¶ 90-95.

[16] *Id.* ¶¶ 90-95.

[17] Petition, at 2.

[18] *Id.*

Commission's role in this case is not to set policy prospectively for "regulatory treatment" of new or emerging service arrangements. Rather, the issues before the Commission stem from agreements executed as long as ten years ago. These agreements will remain in force until the parties negotiate different terms. Our decision in Order 12 resolves disputes from the past based on our interpretation of the applicable law. Despite the CLECs' position, at no time was this proceeding intended to establish a compensation regime or policy for the future. The Commission recognizes that the FCC has set a course for the future in its recent *USF/ICC Order*,[19] which the CLECs correctly identify as establishing a "going-forward intercarrier compensation system".[20] No aspect of that order, however, implicates or controls actions taken under preceding telephone traffic arrangements subject to pre-existing law and policy.

2. Does the FCC's Recent Order Require the Commission to Reconsider Order 12?

13 Despite recognizing the prospective effect of the *USF/ICC Order*, the CLECs argue that the FCC's decision requires that we reconsider our decision in Order 12 concerning the scope of reciprocal compensation under Section 251(b)(5). Specifically, the CLECs argue that the FCC's recent order clarifies that the Section 251(g) exclusion from reciprocal compensation under Section 251(b)(5) is limited to whether the carrier serving an ISP is acting as a local exchange carrier (LEC) rather than as an interexchange or information service provider.[21] They also assert that the Commission must reconsider its decision of whether VNXX traffic is subject to reciprocal compensation by applying the definition of "telephone exchange service" and determining whether VNXX service is comparable to traditional local service.[22] While the CLECs acknowledge that VNXX service is geographically interexchange in nature, they claim that they are appropriately acting as LECs under the definition of "telephone exchange service" in providing VNXX traffic, and further, that VNXX

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[19] *Connect America Fund, et al.*, Docket Nos. WC 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (*USF/ICC Order*).

[20] Petition, n.4.

[21] Petition, at 3, *citing USF/ICC Order*, ¶ 958.

[22] *Id.* at 5.

traffic is comparable to traditional local exchange service.[23] For this reason, they argue the Commission erred in finding that VNXX service is not exchange service.

14 Qwest disputes both the CLECs' interpretation of the FCC's recent order, as well as the argument that they provide a local exchange service through VNXX arrangements.[24] Qwest asserts that the FCC focused on the function the carrier performs in determining its classification under Section 251(g), and that function is determined by the nature of the traffic.[25] As to the definition, Qwest asserts that under the Act, a LEC "is engaged in the provision of telephone exchange or exchange access," which is dependent on whether the service is "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area".[26] Qwest argues that service between local calling areas, which is the case with VNXX, is interexchange service, and that the definition of "telephone exchange service" does not turn on whether the carrier uses local dialing patterns.[27] Further, Qwest requests the Commission reject the CLECs' petition on this point, as the CLECs did not raise this definitional issue in the many rounds of pleadings in this proceeding.[28]

15 We do not read the definition of "telephone exchange service" to include the VNXX service the CLECs provide. Neither do we read the portion of the definition which allows a "comparable service" to apply to the CLECs' VNXX service. A "comparable service" must still be provided "within an exchange or connected system of exchanges," i.e., a local calling area.[29] As we stated in Order 12, "[s]tate law distinguishes local and interexchange traffic based on the geographic endpoints of the call."[30] However, these proceedings ultimately concern enforcement of the CLECs' interconnection agreements with Qwest, and the terms of those agreements determine

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[23] *Id.* at 4-5.

[24] Qwest Answer, ¶¶ 5-7.

[25] *Id.* ¶¶ 8-9, *citing USF/ICC Order*, ¶¶ 956-58.

[26] *Id.* ¶¶ 10-11, *citing* 47 U.S.C. § 153(32), (54).

[27] *Id.* ¶¶ 11-12.

[28] *Id.* ¶ 13.

[29] 47 U.S.C § 153 (54).

[30] *Order 12*, ¶ 73.

the compensation for the VNXX traffic at issue. The CLECs ignore the actual terms of their agreements in their petition for reconsideration. As we noted in Order 12, those agreements define the following types of service: "Exchange Service," "Access Service," and "Exchange Access (IntraLATA Toll)".[31] While the Act may define "telephone exchange service," the parties specifically defined the types of service allowed under the agreements, including "Exchange Service," which determines the compensation due under the agreements. We continue to find that these contractual definitions and terms control the outcome of this proceeding.

16 In addition, we find that the CLECs' had numerous opportunities to raise the issue of the definition during the many rounds of briefing in this case and have failed to do so. The Commission has held previously that a petition for reconsideration must demonstrate errors of law or facts not reasonably available to the petitioner at the time of the hearing.[32] Accordingly, the CLECs' argument is not timely and need not be considered.

17 In addition, while the CLECs' claim the *USF/ICC Order* determines the outcome of this case, it clearly does not. The FCC's order is prospective in nature, and establishes rules governing intercarrier compensation going forward. In its order, the FCC states:

> [S]ection 251(g) preserves access charge rules only during a transitional period, which ends when we adopt superseding regulations. Accordingly, to the extent section 251(g) has preserved state intrastate access rules against the operation of section 251(b)(5) until now, this rulemaking supersedes the provision.[33]

Thus, Section 251(g) preserved intrastate access charge rules in place during the transitional period, the period between the effective date of the Act and the effective

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[31] *Id.* ¶¶ 91-95.

[32] *Application GA-75968 of Sureway Medical Services, Inc.*, Order M.V.G. 1674, Commission Decision and Order Denying Reconsideration at 3 (Dec. 20, 1993); *Application GA-868 of Sureway Incineration, Inc.*, Order M.V.G. 1475, Commission Decision and Order Denying Reconsideration; Affirming Final Order at 2 (Feb. 14, 1991); *Application No. GA-849 of Superior Refuse Removal Corp.*, Order M.V.G. No. 1357, Commission Decision and Order Denying Reconsideration, Affirming Final Order Denying Application at 2 (Sept. 20, 1988).

[33] *USF/ICC Order*, ¶ 766.

date of the FCC's *USF/ICC Order*. As the VNXX traffic in question in this proceeding occurred during this transitional period, we find the FCC's recent order is not dispositive of the issues in this proceeding.

18 Further, reviewing paragraphs 956 through 958 of the *USF/ICC Order*, the FCC stated that whether Section 251(g) applies depends not on whether a particular service existed prior to the Act, but whether there was a "pre-Act obligation relating to intercarrier compensation for" particular traffic exchanged between a LEC and interexchange carriers and information service providers.[34] In addressing certain Voice over Internet Protocol (VoIP) service, the FCC considered the nature of the service provided, i.e., whether it was interexchange, not the type of service provided, in determining whether to apply the Section 251(g) exclusion.[35]

19 Moreover, the order clearly deals with and distinguishes application of the nation's federal and state access charge regime to telecommunications traffic exchanged between LECs, interexchange carriers, and information service providers, including the telecommunications traffic at issue in the instant proceeding. Referring in part to emerging traffic arrangements of the type embraced by the CLECs here (such as VNXX ISP-bound traffic), the FCC provided clear guidance as to the appropriate pre-existing treatment of such traffic:

> Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs' compensation for the provision of exchange access to an IXC or an information service provider. Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP.[36]

20 For the reasons we discuss above, we reject the CLECs' petition on this issue.

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[34] *Id.*, ¶ 956.

[35] *Id.* ¶ 957.

[36] *Id.* (footnotes omitted).

3. Does Order 12 Reach an Incorrect Decision Based on Policy Reasons?

21 The CLECs take issue with the policy arguments in paragraph 61 of Order 12, asserting that the Commission expressed misplaced concern for the impact of the loss of access charges on universal service funding for small and rural local exchange companies.[37] The CLECs argue that the Commission inappropriately based its decision about classification of VNXX traffic on policy arguments about the effect of classifying all ISP-bound calls as interstate traffic subject to the FCC's rate. They argue that neither Level 3 nor Pac-West has paid originating access charges to rural LECs in connection with calls to VNXX numbers, and that as dial-up traffic is declining, it is inconsistent to conclude harm to rural LECs.[38] The CLECs also argue that the FCC's *USF/ICC Order* makes the Commission's policy concerns moot, as the order removes the role of state commissions in setting terminating access rates and reduces intrastate terminating access rates to interstate levels by July 2013.[39] Further, the CLECs claim that paragraph 61 of the order is inconsistent with WAC 480-120-540 because terminating access charges, which facilitate carriers obtaining universal service funding, would never apply to VNXX traffic.[40] Based on these issues, the CLECs argue the Commission should reconsider its decision in Order 12 to classify VNXX traffic as interexchange.

22 In response, Qwest asserts that the issues Pac-West and Level 3 raise do not warrant reconsideration of the Commission's policy determination that VNXX calls should be classified as interexchange as a matter of state law.[41] Qwest states that the Commission's concern about the effect on rural LECs was not its sole policy concern supporting the Commission's decision to classify VNXX calls as non-local.[42] Qwest

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[37] Petition, at 6.

[38] *Id.*.

[39] *Id.* at 6-7.

[40] *Id.* at 7.

[41] Qwest Answer, ¶ 19.

[42] *Id.* ¶¶ 14, 18.

notes that the CLECs admit they have not paid originating access charges for VNXX traffic, which impacts the ability of carriers to appropriately recover the costs of originating interexchange traffic, regardless of declining dial-up traffic.[43] Qwest argues that it is irrelevant whether the FCC in its *USF/ICC Order* has removed a role for states in setting terminating access charges: VNXX traffic should result in originating access charges and the FCC has only capped originating access charges, deferring further consideration until a later date.[44] Finally, Qwest asserts that nothing in the Commission's terminating access charge rule, WAC 480-120-540, requires reconsideration of Order 12, as the Commission's policy concerns were broader than the concern about rural carriers being deprived of universal service monies.[45]

23 Our decision in Order 12 resolved issues of law in dispute between the parties in keeping with the District Court's direction. The policy concerns expressed in paragraph 61 of the order are not the sole basis for the decision. As such, our decision would remain the same without the policy arguments. Nevertheless, as Qwest points out, the CLECs demonstrate the need for the policy concern in their arguments against it. They admit to not paying originating access charges for VNXX traffic, yet these charges compensate carriers for the cost of originating interexchange traffic.

24 Finally, as we discuss above, the FCC's order does not provide a basis for reconsideration of Order 12. The *USF/ICC Order* applies prospectively, while the traffic in this case, and any policy concerns about compensation for the traffic, occurred prior to the FCC's order. Thus, we reject the CLECs' petition on this issue.

4. Should Collateral Estoppel Apply to CenturyLink?

25 The CLECs' final argument for reconsideration is that Qwest, which was recently acquired by CenturyLink, should be collaterally estopped from arguing that intrastate access charges apply to VNXX ISP-bound traffic. They argue that CenturyLink has taken a position "diametrically opposed" to Qwest's in Louisiana. In *CenturyTel of*

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[43] *Id.* ¶¶ 15, 17.

[44] *Id.* ¶ 16.

[45] *Id.* ¶ 18.

Central Louisiana v. MCIMetro Access Transmission Services,[46] CenturyLink successfully argued that ISP-bound calls are inherently interstate in nature, and should never be subject to access charges.[47] The CLECs argue that it is unjust and inequitable to allow CenturyLink to seek the opposite result in this proceeding. Based on an analysis of Washington law on collateral estoppel and a review of the two cases, the CLECs argue that the Commission should apply the doctrine in this case, precluding Qwest from requesting compensation for VNXX ISP-bound traffic though access charges.

26 Qwest argues that collateral estoppel does not apply in this proceeding to preclude Qwest from arguing that the CLECs owe Qwest intrastate originating access charges. First, Qwest notes that the CLECs submitted the Louisiana decision to the Commission as supplemental authority in July 2011, and stated in the submission that the cases have "similar", not identical, issues. Qwest argues that the Commission had an opportunity to consider the potential for collateral estoppel prior to entering its final order and that reconsideration is not warranted.[48]

27 Second, Qwest argues that the Louisiana decision does not meet the criteria for applying the doctrine of collateral estoppel as the facts and issues are different. In the Louisiana case, the parties – CenturyLink and a Verizon company – did not have an interconnection agreement, and the issue was payment of terminating access charges on VNXX traffic to ISP modems located outside of the state of Louisiana.[49] Further, Verizon, the carrier using VNXX number assignment, had an intrastate tariff in place that differed from how the Louisiana commission had determined optional exchange access service should be treated, and Verizon's intrastate tariff did not apply to interstate traffic.[50] Unlike the present case, all of the traffic in question terminated to modems located outside of the state. Qwest argues that the issues in the cases are not identical, and thus the doctrine of collateral estoppel does not apply.

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[46] Order No. U-31211, 2011 La. PUC LEXIS 68 (La. PUC May 10, 2011). The CLECs filed this case as supplemental authority with the Commission on July 28, 2011.

[47] Petition, at 7-8.

[48] Qwest Answer, ¶ 21.

[49] *Id.* ¶ 22.

[50] *Id.* ¶¶ 23-24.

28 The doctrine of collateral estoppel works to bar "relitigation of issues of ultimate fact that have been determined by final judgment."[51] Collateral estoppel will work to bar relitigation of an issue only if all four criteria are met:

> (1) The identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior application, and (4) precluding relitigation of the issue will not work an injustice.[52]

29 We conclude, after reviewing the Louisiana decision, that the exact issue litigated in proceeding, and the facts involved, are not identical to the issue here. The question in the Louisiana case was whether intrastate access charges would apply to interstate ISP-bound VNXX traffic under tariff. In this case, the question focuses on intrastate ISP-bound VNXX traffic and whether compensation is due under the parties' interconnection agreements. For this reason, the doctrine of collateral estoppel does not bar Qwest from arguing that the VNXX traffic at issue here is subject to intrastate access charges. As the issue litigated in Louisiana is not identical to the relevant issue here, we need not determine the merits of the remaining criteria.[53] We deny the CLECs' petition on this issue.

30 Based on our review and analysis of the CLECs' petition and Qwest's answer, we deny the CLECs' petition for reconsideration of Order 12, the final order in this proceeding.

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[51] *Williams v. Leone & Keeble, Inc.*, 171 Wn. 2d 726, 731, 254 P.3d 818, 821 (2011), *citing State v. Vasquez*, 148 Wash.2d 303, 308, 59 P.3d 648 (2002).

[52] *Williams*, 171 Wn. 2d at 731, *citing Clark v. Baines*, 150 Wn. 2d 905, 913, 84 P.3d 245 (2004).

[53] Even if we concluded that the first three criteria had been satisfied, we believe application of the doctrine would unfairly impact Qwest. The CLECs argue that failing to apply the doctrine will work an injustice by allowing CenturyLink to game the regulatory system. However, the test is whether *applying* the doctrine will work an injustice. Given the long history of the parties in this proceeding and the very recent acquisition of Qwest by CenturyLink, it would work an injustice to apply the doctrine against Qwest/CenturyLink in this case for that recent action, potentially denying the company millions of dollars in compensation for unpaid access charges.

III. ORDER

31 **THE COMMISSION ORDERS** That the petition for reconsideration of Order 12 filed by Pac-West and Level 3 is denied.

DATED at Olympia, Washington, and effective February 10, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner