

**BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,)	DOCKET UT-053036
)	
Petitioner,)	
)	
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	DOCKET NO. UT-053039
)	
Petitioner,)	
)	LEVEL 3 COMMUNICATIONS,
v.)	LLC'S MOTION FOR SUMMARY
)	DETERMINATION
QWEST CORPORATION,)	
)	
Respondent.)	
)	
.....)	

I. INTRODUCTION

1. Pursuant to WAC 480-07-375, 480-07-395, 480-07-380, the Washington Utilities and Transportation Commission's ("WUTC" or "Commission") Order No. 10 as modified, the conference held on November 19, 2008, and the letter submitted by the Parties on January 7,

2008,¹ Level 3 Communications, LLC (“Level 3”) moves for summary determination on the grounds that there are no issues of material fact, and as a matter of law Level 3 is entitled to judgment in its favor on all counts of its Petition for Enforcement of Interconnection Agreement with Qwest Corporation (“Petition”).²

2. The Federal Communications Commission (“FCC”) provided legal justification for the intercarrier compensation regime it established for locally-dialed ISP-bound traffic in its *2008 Order*.³ That Order (1) found that ISP-bound traffic is subject to section 251(b); (2) found that section 251(b)(5)’s “scope is **not limited geographically** (“local, “intrastate,” or “interstate”) or to particular services (“telephone exchange service,” telephone toll service,” or “exchange access”);”⁴ and (3) rejected claims that Section 251(b)(5) applies only to intraexchange (or “local”) voice calls that originate on the network of one local exchange carrier (“LEC”) and terminate in the same exchange on the network of another LEC.⁵ In short, Section 251(b)(5) reciprocal compensation is the default intercarrier compensation regime applicable to all telecommunications traffic absent a statutory carve-out. The FCC in its *2008 Order* found that section 251(g) is the *only* statutory carve-out to section 251(b)(5), and both *WorldCom* and

¹ Letter from Lisa Rackner to David Danner, dated January 7, 2009; Order No. 10, Docket Nos. UT-053039, 053036; Stipulated Motion to Revise Procedural Schedule, Docket Nos. UT-053039, 053036 (Jan. 2009); Pre-Hearing Conference Transcript, at 51:13-22 (Nov. 19, 2008).

² Although there are no material issues of fact relevant to Level 3’s request for summary determination that federal law requires compensation for ISP-bound traffic using VNXX arrangements, the same is not true with respect to Qwest’s contention. As Level 3 will establish in its Reply Brief, Qwest is not entitled to summary determination because, assuming *arguendo* that the Commission determines it must examine state law, disputed facts would still need to be resolved under Qwest’s theory of the case including, but not limited to, how much of the disputed ISP-bound traffic terminates to ISP modems in the local calling area.

³ *Developing a Unified Intercarrier Compensation Regime*, CC Docket Nos. 01-92, 99-68, 96-98, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (Nov. 8, 2008) (“*2008 Order*”).

⁴ *2008 Order* ¶¶ 6-9, 15-16.

⁵ *2008 Order* ¶¶ 8-10.

the 2008 Order hold that section 251(g) does not carve out ISP-bound traffic from the scope of that section (i.e., 251(b)(5)).⁶ Accordingly, all locally-dialed ISP-bound traffic exchanged between Qwest and Level 3 in Washington is subject to the FCC's compensation regime because the FCC did not carve out a category of traffic, namely "virtual NXX" or "VNXX," for different treatment. Any attempt to subject VNXX traffic to a compensation regime inconsistent with that adopted by the FCC violates federal law. The 2008 Order confirms that the WUTC's holdings in the *Level 3/CenturyTel Arbitration Order*,⁷ *Order No. 3*,⁸ and *Order No. 5*⁹ were correct—the scope of section 251(b)(5) is not limited to "local" traffic.

II. STATEMENT OF THE ISSUES AND EVIDENCE RELIED UPON

3. Level 3 requests that the WUTC interpret its 2003 interconnection agreement with Qwest ("Agreement"), which incorporates the FCC's *ISP Remand Order* and the *Core Forbearance Order*,¹⁰ and find that the Agreement and governing federal law require compensation at the FCC's interim rate of \$0.0007 for the parties' exchange of all locally-dialed

⁶ *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) ("*WorldCom*"); 2008 Order at ¶¶ 9, 15-16.

⁷ *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*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision ¶¶ 1, 7-10, 35 (February 28, 2003) ("*Level 3/CenturyTel Arbitration Order*") ("The substance of the [FCC] decisions makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic.").

⁸ *Level 3 Communications LLC v. Qwest Corp.*, Docket No. UT-053039, Order No. 3 ¶ 61 (Aug. 26, 2005) ("*Order No. 3*").

⁹ *Level 3 Communications LLC v. Qwest Corp.*, Docket No. UT-053039, Order No. 5 ¶¶ 25, n.7, 39-40, 58 (Feb. 10, 2006) ("*Order No. 5*").

¹⁰ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 ¶ 78 (Apr. 18, 2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) ("*ISP Remand Order*"); Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, WC Docket No. 03-171, FCC 04-241 ¶¶ 1, 7, 9, 20-21 (Oct. 18, 2004) ("*Core Forbearance Order*"). *See, e.g.*, Agreement ¶¶ 7.3.4.3, 7.3.6.1, Amendment 1 ¶ 2.1.

ISP-bound traffic. Level 3's Motion for Summary Determination relies upon the provisions of the Agreement quoted in this Motion and in Level 3's Petition, as well as federal law.

III. STANDARD OF REVIEW

4. Motions for summary determination are governed by WAC 480-07-380(2)(a), which provides:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

5. This rule instructs the Commission to consider the standards applicable to motions made under CR 56¹¹ of the Washington Rules of Superior Court, which governs summary judgment. Summary determination is appropriate if, based on all of the evidence, there are no issues of material fact and reasonable persons could reach but one conclusion.¹² A material fact is "one upon which the outcome of the litigation depends in whole or in part."¹³ The Commission must consider the facts in the light most favorable to the nonmoving party. However, once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the nonmoving party to set forth specific facts sufficient to rebut the moving

¹¹ CR 56(c) states that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

¹² CR 56; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805, 810 (2005) (en banc); *Order No. 3* ¶ 22.

¹³ *Samis v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477, 481 (2003).

party's contentions.¹⁴ Mere allegations or denials are not sufficient.¹⁵ If the nonmoving party fails to set forth any such facts, summary judgment is proper.¹⁶

6. Level 3 is entitled to summary determination on the issues raised in its Petition because, as clarified by the FCC in the *2008 Order*,¹⁷ as a matter of law, the Agreement requires Qwest to compensate Level 3 for transport and termination of *all* locally-dialed ISP-bound traffic without regard to the location of the ISP's modems or whether the traffic crosses an exchange boundary.

IV. STATEMENT OF FACTS

7. Level 3 is a limited liability company organized under to the laws of Delaware, with its principal place of business at 1025 Eldorado Boulevard, Broomfield, Colorado 80021. Level 3 is an international communications and information services company that operates one of the largest, most advanced communications and Internet backbones in the world, providing vital infrastructure to information services providers ("ISPs"), including ISPs that provide critical services to under-served rural areas, and other service providers.

8. Level 3 is a competitive local exchange carrier ("CLEC") and was the plaintiff in Docket No. UT-053039. Level 3 provides competitive local exchange telecommunications services in Washington pursuant to this Commission's authorization by orders dated April 22, 1998 in Dockets UT-980490 and UT-980492. Level 3 has established local interconnection with

¹⁴ See, *Atherton Condo. Apartment-Owner Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250, 257 (1990).

¹⁵ CR 56(e).

¹⁶ *Atherton*, 115 Wn.2d at 516, 799 P.2d at 257.

¹⁷ *2008 Order* ¶¶ 6-9, 15-16 ("As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).").

Qwest in Washington and it maintains internet protocol (“IP”)-based switching and routing equipment at its Washington gateway located at 1000 Denny Way in Seattle, Washington.¹⁸

9. Qwest is a Delaware corporation with its principal place of business located in Denver, Colorado. Qwest is and, at all times relevant to this Petition, has been an incumbent local exchange carrier (“ILEC”) as defined in Section 251(h) and a Bell Operating Company within the definition of section 153(4) of the 1996 Act.¹⁹ Qwest is certified to provide local exchange service and intrastate interexchange service in Washington.

10. Level 3 and Qwest began exchanging ISP-bound traffic in March, 1999 pursuant to their original interconnection agreement. On or about March 7, 2003, following an arbitration proceeding concerning a dispute over the assignment of costs of interconnection facilities used to deliver ISP-bound traffic to Level 3, the Parties’ successor interconnection agreement was filed with the Commission, and approved in March 2003 in accordance with the Commission’s final order in Docket No. UT-023042 (“Agreement”).²⁰

11. As the WUTC found in *Order No. 3*, “Level 3 provides a tariffed local service called Direct Inward Dialing and also provides service to ISP customers in Washington State through VNXX arrangements.”²¹ These VNXX arrangements allow “Level 3 to serve customers in one or more LATAs or multiple states from a single server.”²²

¹⁸ *In the Matter of Level 3 Communications, LLC’s Petition for Enforcement of Interconnection Agreement with Qwest Corp.*, Docket No. UT-053039 ¶¶ 1-2 (June 20, 2005) (“Level 3 Petition”).

¹⁹ The term “Act” refers to the Communications Act of 1934 as amended. 47 U.S.C. § 151 *et seq.* The term “1996 Act” refers to the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

²⁰ Level 3 Petition ¶¶ 7-8; *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC, and Qwest Corp.* Pursuant to 47 U.S.C. Section 252, Docket No. UT-023042, Commission’s Final Decision ¶ 37, Feb. 5, 2003. (“Level 3 Arbitration Order”).

²¹ *Order No. 3* ¶ 61.

²² *Id.* ¶ 10.

12. When a dial-up Internet user calls an ISP served by a CLEC, the call is delivered by the ILEC serving the caller to the point of interconnection (“POI”) serving the local access and transport area (“LATA”) in which the caller is located. Because most LATAs contain multiple exchanges, the ILEC originating the call may transport the call out of the originating exchange and into the exchange in which the POI is located. In few instances, the ISP or its modem contractor may operate modems or gateways back in the originating exchange. In that case, the CLEC transports the call back to the originating exchange before the call is routed to the Internet. Although such a call crosses exchange boundaries *twice*—once when the ILEC takes the call out of the exchange to the POI, and once when the CLEC brings it back— there is no dispute that the *ISP Remand Order* and its compensation mechanisms apply to this call.

13. But this is only one way that locally-dialed calls reach the Internet. As a result of technological advancements, many ISPs now deploy their servers and other facilities at fewer dispersed locations because placing them in every exchange would require an inefficient and unnecessary duplication of facilities. While a regulatory requirement to duplicate facilities in every exchange would provide no advantages for dial-up services and have no bearing on the costs of the ILEC delivering traffic, it would dramatically raise the cost of providing dial-up services (the most affordable means of obtaining Internet access in today’s market), and could force ISPs to drop service in more sparsely populated areas. Because ISP facilities are centralized, the vast majority of ISP-bound calls are taken by the ILEC from the exchange in which they originate to the exchange where the POI for that LATA is located,²³ and from there by the CLEC to the ISP.

²³ Under FCC decisions, CLECs are permitted to have a single POI in each ILEC local access and transit area (“LATA”) for the exchange of ISP-bound traffic. *See, e.g., In the Matter of Application of SBC Communications,*

14. The calls at issue in this case, coined “VNXX” calls, are locally-dialed, ISP-bound calls that Level 3 accepts from Qwest at the POI and then directs to its ISP customers pursuant to their requirements. Level 3’s ISP customers may require Level 3 to change the routing of such calls dynamically throughout the day based on traffic volumes and other factors, and do not typically require Level 3 to return the traffic to equipment in the originating exchange. Again, the only difference between locally-dialed calls delivered back to the originating exchange (which Qwest concedes are ISP-bound calls subject to reciprocal compensation under the Agreement) and those that are not is what *Level 3* does with them after the hand-off at the POI. *Qwest* does nothing different and has no way of knowing whether *Level 3* carries the calls back to the originating exchange. Further, Qwest’s end-user customer calling the ISP can have the exact same Internet session using websites around the world in either scenario.

The FCC’s Orders and District Court Decision

15. In a series of decisions, the FCC classified Internet calls as interstate and asserted jurisdiction to regulate the compensation payable to a carrier that receives locally-dialed Internet calls from an originating carrier. In April 2001, the FCC released its *ISP Remand Order* and stated that “[u]pon further review, we find that [we] erred [in the prior Declaratory Ruling] in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of interpreting the relevant scope of section 251(b)(5).”²⁴ The FCC found that “[o]n its face” § 251(b)(5) requires LECs “to establish reciprocal compensation for the transport and termination of all ‘telecommunications’ they exchange with another telecommunications carrier, without

Inc. Pursuant to Section 271 to Provide In-Region, InterLATA Services in Texas, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390 ¶ 78 (2000).

²⁴ *Id.* ¶ 26.

exception.”²⁵ The FCC adopted a cap on the rates that ILECs would pay CLECs for terminating ISP-bound traffic that would step-down over time from \$0.0015 to the current rate cap of \$.0007 per minute.²⁶

16. In the *ISP Remand Order*, the FCC initially adopted certain additional limitations on a carrier’s ability to receive compensation for ISP-bound traffic. First, the FCC imposed growth caps on ISP-bound traffic, which limited the number of minutes for which a CLEC could claim terminating compensation.²⁷ The FCC also adopted new markets restrictions, which imposed a bill-and-keep compensation regime on ISP-bound traffic if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP Remand Order*.²⁸ Finally, the FCC adopted the “mirroring rule” in which the rate caps for ISP-bound traffic apply “only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate.”²⁹ As a result, Qwest agreed to terminate all section 251(b)(5) traffic at the FCC’s interim rates in the Agreement with Level 3.³⁰

17. In the *Core Forbearance Order*, the FCC determined that the growth caps and the new markets rules were no longer necessary or in the public interest because “arbitrage concerns have decreased” and “are now outweighed by the public interest in creating a uniform compensation regime.”³¹

²⁵ *Id.* ¶ 31.

²⁶ *Id.* ¶¶ 78.

²⁷ *Id.* ¶¶ 77-78, 81.

²⁸ *Id.* ¶¶ 77, 81.

²⁹ *Id.* ¶ 89.

³⁰ *See, e.g.,* Agreement ¶¶ 7.3.4.3, 7.3.6.1.

³¹ *Core Forbearance Order* ¶¶ 1, 7, 9, 20-21 (“Recent industry statistics indicate, however, that this expansion [of arbitrage opportunity] is not likely to occur given declining usage of dial-up ISP services.”).

18. Following the *Core Forbearance Order*, Level 3 sought to update the Parties' Agreement to remove the growth caps and new market restrictions.³²

19. In 2005, Pac-West and Level 3 initiated Dockets UT-053036 and UT-053039, respectively, to enforce their interconnection agreements with Qwest. Among other items, Level 3 argued that as of the October 8, 2004 effective date of the *Core Forbearance Order*, Qwest owed Level 3 compensation for terminating all Qwest originated locally-dialed ISP-bound traffic in Washington at the current FCC mandated rate of \$0.0007 per minute of use, because the FCC lifted the growth caps and new markets restrictions on the amount of locally-dialed ISP-bound traffic subject to intercarrier compensation under its *ISP Remand Order*.³³

20. In orders issued in Dockets UT-053036 and UT-053039, the Commission rejected Qwest's arguments that locally-dialed ISP-bound calls must terminate in the same calling area from which they originate and found that Qwest owed Level 3 and PacWest compensation. The Commission reiterated its longstanding position that the FCC's interim compensation regime for ISP-bound traffic "applies to all traffic bound for an ISP, regardless of where the traffic originated or terminated."³⁴ In other words, the physical location of the ISP customer was not relevant to determining compensation for calls using a local dialing pattern to reach the ISP.

³² Level 3 Petition ¶¶ 20, Exhibit B (See December 13, 2004 letter from Rogier Ducloo, Director of Interconnection Services, to Qwest, *Exhibit B*).

³³ *Core Forbearance Order* ¶¶ 1, 7-9; Level 3 Petition ¶¶ 18-20, 28, 35-39 ("Qwest's failure to pay Level 3 for all Level 3's transport and termination of Qwest-originated ISP-bound Traffic as required by the *Core Forbearance Order* is a material breach of the Interconnection Agreement. Qwest's failure to pay Level 3 for Level 3's transport and termination of Qwest originated ISP-bound Traffic is a violation of Washington law and Commission and FCC rules and orders.").

³⁴ *Pac-West v. Qwest Corp.*, Docket No. UT-053036, Order 05 ¶¶ 30, n.1, 42-43 (Feb. 10, 2006), ("*PacWest Order*"); Order No. 5 ¶¶ 25, n.7, 39-40 (Feb. 10, 2006); see, e.g., Level 3/CenturyTel Arbitration Order, at ¶¶ 1, 7-10, 35 (February 28, 2003) ("ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements").

21. In *Order No. 5* and *Order No. 6* in Docket UT-053039, the Commission determined that 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.³⁵ Accordingly, the WUTC found “Level 3’s proposed amendment language appropriate to implement the changes in law as a result of the *Core Forbearance Order*” and directed the parties to adopt this language for the Agreement.³⁶

22. Qwest appealed *Order No. 5* and *Order No. 6* to the U.S. District Court for the Western District of Washington (“District Court”). On April 9, 2007, the District Court reversed and remanded the two Commission orders concerning VNXX compensation arrangements, finding that “while the WUTC likely had the authority to require [FCC] interim rate regime compensation for VNXX traffic, the route it chose to arrive at that conclusion violated federal law.”³⁷

23. During the pre-hearing conference conducted on November 19, 2008, ALJ Rendahl stated the parties’ briefs in support of their respective motions for summary determination should address the following topics: (1) the issues raised in the court’s remand order; (2) the effect of the FCC’s November 5th order on the issues in this case; and (3) given the amount of time that has gone by since the *ISP Remand Order* was entered, the state, and interpretation of that decision as applied to the parties’ interconnection agreement.³⁸

24. Level 3 addresses each of these topics below.

³⁵ Level 3 Communications, LLC v. Qwest Corporation, Docket No. UT-053039, Order Denying Petition for Reconsideration, *Order No. 6* ¶¶ 22, 47 (June 9, 2006) (“*Order No. 6*”).

³⁶ *Order No. 5* ¶ 58.

³⁷ *Qwest Corp. v. Wash. State Util. and Transportation Commission*, 484 F.Supp.2d 1160, 1176-77 (W.D. Wash. 2007) (“*Qwest v. WUTC*”).

³⁸ Pre-Hearing Conference Transcript, at 51:13-22 (Nov. 19, 2008).

V. ARGUMENT

A. What Is The District Court's Directive On Remand?

25. The remand from the District Court directed the WUTC to analyze applicable law and exercise its independent judgment to determine how the parties must compensate each other for the exchange of ISP-bound traffic under the Agreement.³⁹ First, the court directed the WUTC to reexamine applicable federal law. That analysis must now include the *2008 Order*. That Order provides the legal basis for the federal compensation framework for ISP-bound traffic that was incorporated in the Agreement.⁴⁰ Second, the District Court did not dictate the substantive compensation outcome but required the WUTC to provide a reasoned legal basis for the outcome it chooses. Third, the court made clear the WUTC could affirm its initial ruling requiring the payment of intercarrier compensation for all locally-dialed ISP-bound traffic exchanged between Qwest and Level 3 on different legal grounds, which the WUTC must do in light of the *2008 Order*.⁴¹

1. *The WUTC Must Reexamine Federal Law*

26. The primary directive of the District Court's remand decision requires the WUTC to "reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements."⁴² Because the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") applies federal law as

³⁹ *Qwest v. WUTC*, 484 F.Supp.2d at 1170.

⁴⁰ Arbitrated Interconnection Agreement Between Qwest Corporation and Level 3 Communications, LLC, Docket No. UT-023042 §§ 7.3.4.3, 7.3.6.1, 7.3.6.2.4, Amendment 1 § 2.1 ("The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order" as modified by the *Core Forbearance Order*).

⁴¹ *Qwest v. WUTC*, 484 F.Supp.2d at 1177 ("It is plausible that the ultimate conclusion reached by the WUTC will not change.").

⁴² *Id.*

it exists at the time a case is decided,⁴³ the WUTC must reinterpret the *ISP Remand Order* as clarified by subsequent FCC rulings, which includes the *2008 Order*. The *2008 Order* “explains [the FCC’s] legal authority to issue the pricing rules for ISP-bound traffic adopted in the *ISP Remand Order*.”⁴⁴ Because the *2008 Order* provides the legal foundation for the federal ISP-bound compensation regime,⁴⁵ and clarifies the governing rules in light of this new legal basis, the WUTC must analyze the *ISP Remand Order* as clarified and justified by the *2008 Order*.

27. In reversing the WUTC’s initial ruling, the District Court interpreted the *ISP Remand Order* as establishing “that ‘all telecommunications’ are subject to § 251(b)(5)’s reciprocal compensation scheme,” but found that “the same order, in no uncertain terms, removed ISP-bound traffic from that definition” such that ISP-bound traffic is “unequivocally excluded from the dictates of § 251(b)(5).”⁴⁶ The *2008 Order* makes clear that this fundamental precept on which the District Court relied was incorrect. Citing *WorldCom*, the FCC found that ISP-bound traffic does not qualify for the section 251(g) carve-out but “falls within the scope of section 251(b)(5).”⁴⁷

⁴³ See, *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-31, n.14 (9th Cir. 2003) (“all valid implementing regulations in effect at the time that we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable to our review of interconnection agreements”); *U.S. West v. Jennings*, 304 F.3d 950, 956-57 (9th Cir. 2002) (“Our reading of the reviewing court’s duty under § 252(e)(6) of the Act is consistent with the Supreme Court’s general view of a court’s duty to apply its new interpretations of law to pending cases.”).

⁴⁴ *In re Core Communications, Inc.* 531 F.3d 849, 861-62 (D.C. Cir. 2008) (directing the FCC to respond to the court’s remand in the form of an appealable, final order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the *ISP Remand Order*); *2008 Order* ¶¶ 5-6.

⁴⁵ The court in *WorldCom* rejected the FCC’s prior foundation which erroneously presumed that section 251(g) removed ISP bound traffic from the ambit of 251(b)(5). *WorldCom v. FCC*, 288 F.3d 429, 429 (D.C. Cir. 2002), cert. den. 538 U.S. 1012 (2003) (“*Worldcom*”); *2008 Order*, FCC 08-262, at ¶ 4 (“The court held that section 251(g) did not provide a basis for the [FCC’s] decision.”).

⁴⁶ *Qwest v. WUTC*, 484 F.Supp.2d at 1169, 1170 (emphasis in original).

⁴⁷ *2008 Order* ¶ 16.

28. The U.S. Court of Appeals for the D.C. Circuit's ("D.C. Circuit") judgment in *WorldCom* is binding nationwide, because the D.C. Circuit had exclusive jurisdiction to review the *ISP Remand Order* pursuant to the Hobbs Act.⁴⁸ The District Court relied on non-binding precedent from the First and Second Circuit district courts and characterized them as finding "that the changes ushered by [the *ISP Remand Order*] apply only to ISP-bound traffic within a single local calling area."⁴⁹ However, that line of cases was never binding on the District Court and is no longer persuasive authority after the *2008 Order*. The *2008 Order* establishes that the local/long distance distinction relied on by those courts did not exist with respect to ISP-bound traffic by 2001.⁵⁰

29. It might be more accurate to say that some courts—which were not reviewing FCC decisions, and whose judgments are therefore not binding in this Circuit—recognized that the *ISP Remand Order* did not explicitly say one way or the other whether it was limited in the way Qwest believes, and that those courts, having failed to find such a clear and unequivocal statement, did not parse the order further.⁵¹ But to the extent that such cases support the conclusion that the *ISP Remand Order* addressed only the question of whether reciprocal compensation was appropriate for "local" traffic, those cases were mistaken. Those courts failed to recognize that in the *ISP Remand Order* the FCC concluded that whether traffic was "local" or

⁴⁸ 28 U.S.C. §§ 2341 *et seq.*; *see, e.g., Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (noting that another circuit's decision regarding an FCC order "is binding outside of" that circuit).

⁴⁹ *Qwest v. WUTC*, 484 F.Supp.2d at 1173.

⁵⁰ *2008 Order* ¶¶ 7-9 ("section 251(b)(5) is not limited to local traffic.").

⁵¹ *See, e.g., Global Naps, Inc. v. Verizon New England*, Case No. 05-2657, 449 F.3d 59, 74 (1st Cir. 2006) ("*GNAPS*") (concluding that there was a lack of clarity in the *ISP Remand Order* and that that lack of clarity was fatal to a claim that the FCC had preempted state law).

not has nothing to do with whether reciprocal compensation was appropriate—a point the FCC reiterated again in the *2008 Order*.⁵²

30. Thus, the WUTC was correct when it determined that the First Circuit’s decision in *GNAPs* “is limited to the issue of preemption, and is not a determination of the proper scheme for VNXX traffic.”⁵³ The WUTC correctly concluded that *GNAPs* “is not on point,” and “[t]o 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.”⁵⁴ Consistent with Level 3’s position, the Ninth Circuit in *Pacific Bell* also described the *ISP Remand Order* as “[a]bandoning the local versus interstate distinction” and concluded “that section 251(b)(5) applie[s] to all telecommunications traffic except for categories specifically enumerated in § 251(g).”⁵⁵

31. Further, the *2008 Order* is clear that Section 251(b)(5) governs all “telecommunications” regardless of whether they are “local” and regardless of the customer’s physical location. As explained herein, the *2008 Order* makes clear that the FCC’s compensation regime, which requires compensation for the terminating LEC and prohibits the originating LEC from imposing originating charges,⁵⁶ are *not* limited to calls to ISPs within a

⁵² See *2008 Order* ¶ 7 (the *ISP Remand Order* “concluded that it was a mistake to read section 251(b)(5) [providing for reciprocal compensation] as limited to local traffic”), *id.* ¶ 13 n.49 (the scope of §251(b)(5), and accordingly the ISP-bound traffic rules that apply to a subset of §251(b)(5), is not “tied to whether this traffic is local or long distance”).

⁵³ *Order No. 6* ¶¶ 19-20 (*commenting on GNAPs*, 444 F.3d 59).

⁵⁴ *Id.*

⁵⁵ *Pac. Bell*, 325 F.3d at 1131.

⁵⁶ 47 C.F.R. §§ 51.703(b) (“A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”); In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corporation, Docket No. UT-023042, Fourth Supplemental Order ¶¶ 33-39 (Feb. 5, 2003) (Rule 709(b) “makes plain that when the interconnecting carrier (Level 3) sends no traffic back to the providing carrier (Qwest), the interconnecting carrier is not obligated to pay anything for the interconnection facilities. Rather, the cost is the originating carrier’s responsibility.”); *see, e.g., Southwestern Bell Tel. Co. v. Tex. PUC*, 348 F.3d 482, 487 (5th Cir. 2003); *MCI Metro Access Transmission Services, Inc. v. BellSouth*, 352 F.3d 872, 881 (4th Cir. 2003) (“Rule 703(b) is unequivocal in

local calling area. The *2008 Order* confirms the WUTC's initial holding in this case and its long-standing precedent that, as a matter of federal law, all locally-dialed ISP-bound traffic the parties exchange under their Agreement is subject to the FCC's interim compensation regime as of June 14, 2001.⁵⁷ The WUTC should analyze the FCC's *2001 ISP Remand Order*, *WorldCom*, the *Core Forbearance Order*, and the *2008 Order* together and affirm its prior holdings that federal law requires compensation for all locally-dialed calls Level 3 terminates for Qwest, including calls to ISPs over VNXX arrangements.⁵⁸

2. The Court Did Not Dictate the Outcome on Remand

32. Rather than dictating the outcome of the remand, the District Court directed the WUTC to exercise its independent judgment. The Court found that "while the WUTC likely had the authority to require [FCC] interim rate regime compensation for VNXX traffic, the route it chose to arrive at that conclusion violated federal law."⁵⁹

33. Although the District Court also directed the WUTC to determine *how* Washington law defines local calls for purposes of intercarrier compensation,⁶⁰ after the *2008*

prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.").

⁵⁷ 66 F.R. 26800 (2001).

⁵⁸ Pac-West Order, Docket No. UT-053036, Order 05 ¶¶ 30, n.1, 42-43 (Feb. 10, 2006); *Order No. 5* ¶¶ 25, n.7, 39-40 (Feb. 10, 2006); *see, e.g.*, Level 3/CenturyTel Arbitration Order, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, at ¶¶ 1, 7-10, 35 (February 28, 2003) ("ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements").

⁵⁹ *Qwest Corp. v. WUTC*, 484 F.Supp.2d at 1176-77.

⁶⁰ Specifically, the District Court directed the Commission to:

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.*

Qwest v. WUTC, 484 F.Supp.2d at 1170.

Order, that direction is moot.⁶¹ As affirmed by the *2008 Order*, federal law requires compensation for all locally-dialed ISP-bound calls exchanged between Level 3 and Qwest regardless of whether they cross local exchange boundaries.⁶² Therefore, the WUTC should analyze and rely on federal law as clarified by the *2008 Order* and need not reach the question of how state law defines a local calling area.⁶³

3. ***The Court Did Not Reverse the WUTC's Finding that Terminating Compensation Is Due but Gave the WUTC the Option of Affirming Its Outcome on Alternative Grounds, which It Should Do in this Case***

34. As explained above, the Court gave the WUTC the option of affirming its substantive result that required intercarrier compensation for terminating VNXX traffic. The *2008 Order* has confirmed the WUTC's prior interpretations of the *ISP Remand Order* in the 2003 Level 3/CenturyTel Arbitration, *Order No. 3*, *Order No. 5*, and *Order No. 6* in this docket, and Commission precedent. In light of the *2008 Order*, the Commission should affirm these precedents.

The District Court provided the Commission with considerable discretion to choose the method of classifying locally-dialed ISP-bound traffic, including a method that is consistent with its past decisions mandating intercarrier compensation for VNXX ISP-bound traffic. *Qwest v. WUTC*, 484 F.Supp.2d at 1177.

⁶¹ In Docket UT-063038, rather than examining state law to determine *how* to classify VNXX calls, the Commission engaged in a narrow analysis to "determine whether VNXX calls, including ISP-bound traffic, *stay within or cross local-exchange area boundaries.*" Final Order, Docket No. UT-063038, at ¶¶ 141. Rather than classifying VNXX calls as "within or outside a local calling area," the WUTC presumed that a call crossing local exchange boundaries was disqualified from the FCC's compensation regime. In reaching this conclusion, the Commission failed to follow the Court's directive to determine *how* Washington state law defines local calls for purposes of intercarrier compensation. In short, the complaint proceeding skipped the legal analysis necessary to determine whether VNXX calls are within or outside of a local calling area. *Qwest v. WUTC*, 484 F.Supp.2d at 1175 (finding that by skipping analysis of whether VNXX traffic is subject to the FCC's compensation regime, the WUTC violated federal law). It should not make that same mistake a third time.

⁶² *2008 Order* ¶¶ 7-9, 15-16.

⁶³ The definition of a "local calling area" under Washington rules is devoid of any geographical references and is focused on the area in which "a customer can place [i.e., originate] calls" without incurring toll charges, not the location of the terminating facilities. By focusing on the physical location of an ISP's facilities in its decisions in docket no. UT-063038, the WUTC ignored state law that defines local calling based on the party originating the call. See, e.g., WAC 480-120-021; CenturyTel Order, at 4, 10; 2001 US West Order ¶ 28.

35. Consistent with the *2008 Order*, the WUTC has repeatedly held that the FCC's *ISP Remand Order* is not limited to ISP-bound traffic that originates in a given local calling area and terminates at an ISP modem located in the same local calling area. For example, in the 2003 Level 3/CenturyTel Arbitration, the WUTC rejected the arguments made by Qwest in this docket and observed:

The FCC's *ISP Remand Order* begins with the straightforward statement that: 'In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).' *The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends.* The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that its result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application [i.e. "local" ISP traffic]. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls.⁶⁴

36. The WUTC went on to note that, "[t]he fundamental issue in this arbitration is whether the FCC's reciprocal compensation rules for ISP-bound traffic, as established in the FCC's *ISP Remand Order*, apply when the ISP's premise (i.e., modem bank) is outside the local calling area."⁶⁵ The WUTC concluded that:

CenturyTel emphasizes the use of the word "local." We believe CenturyTel reads too much into what are very general characterizations by the FCC and the appeals court of the issue before it. The substance of the decisions *makes no distinction based on the location of the ISP's modems*, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic. We believe the arbitrator properly rejected CenturyTel's argument."⁶⁶

⁶⁴ *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*, Docket No. UT-023043, Fifth Supplemental Order Arbitrator's Report and Decision ¶ 35 (Jan. 2, 2003) (emphasis added).

⁶⁵ Level 3/CenturyTel Arbitration Order, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, ¶¶ 1, 7-10, 35 (Feb. 28, 2003).

⁶⁶ Seventh Supplemental Order ¶ 7, 10, Feb. 28, 2003.

37. Similarly, in the *2001 US WEST Order*, the WUTC was presented with the question of how ISP-bound traffic should be compensated when exchanged between two LECs. In that case, the Joint CLECs contended traffic sent to ISPs should be treated as local and within section 251(b)(5), and that a contrary determination would permit Qwest to require CLECs purchase more costly special access services, while Qwest could provide its ISP customers with local exchange service. Such a result would be inconsistent not only with FCC orders but with principles of nondiscrimination. The WUTC agreed, holding that “[t]his Commission has consistently ruled that ISP traffic is local and there is no reason to differentiate such traffic on the basis of how the loop carrying that traffic is regulated.”⁶⁷

38. In the Qwest Arbitration in 2003, the WUTC held that traffic bound to ISPs should be included in “relative use” calculations to determine financial responsibility for the recurring costs of interconnection facilities. Again, the WUTC did not treat ISP-bound traffic any differently from other section 251(b)(5) traffic in the context of interconnection rules.⁶⁸

39. In 2005, in the WUTC’s *Pac-West Order No. 3*, the WUTC clarified that under prior WUTC interpretation, VNXX service is functionally identical to Qwest’s foreign exchange (“FX”) service from a customer perspective.⁶⁹ Consistent with the Commission’s other orders concerning the treatment of ISP-bound traffic it stated: “ISP-bound calls enabled by VNXX

⁶⁷ See, *In the Matter of the Investigation into US WEST Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc.’s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order at 28 (Workshop Three) (July 2001) (“*2001 US WEST Order*”).

⁶⁸ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corporation*, Docket No. UT-023042, Fourth Supplemental Order ¶¶ 33-39 (Feb. 5, 2003) (The *ISP Remand Order* “does not affect Qwest’s obligation under Rule 703(b) to transport [ISP-bound] traffic to the POI.”).

⁶⁹ *Pac-West Telecomm, Inc. v. Qwest*, Docket No. UT-053036, *Order No. 3*, Recommended Decision to Grant Petition, at 13 n. 37 (Aug. 23, 2005) (“*Pac-West Order No. 3*”).

should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.”⁷⁰

40. In the Commission’s 2006 *Order No. 5* and *Pac-West Order No. 5*, the WUTC found the locally-dialed ISP bound services offered by Level 3 and Pac-West to be compensable under the interconnection agreements between those companies and Qwest.⁷¹ Specifically, in *Order No. 5*, the WUTC (1) “interpret[ed] the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic”; (2) rejected Qwest’s interpretation that ISP-bound traffic subject to the FCC’s regime was limited to calls originated and terminated within a local calling area; (3) contrasted the FCC’s discussion of a “typical” arrangement in which a call is placed to a modem within the local calling area with the FCC’s definition of information access which does not require the transmission to terminate in the originating exchange area; and (4) concluded 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.”⁷²

41. As required by the *ISP Remand Order* as clarified by the *Core Forbearance* and *2008 Order*, the WUTC should return to this long-standing line of precedent and require compensation for all locally-dialed ISP-bound calls.

42. The Ninth Circuit’s *Peevey*⁷³ case demonstrates that the WUTC’s prior substantive finding—locally-dialed ISP bound traffic is subject to intercarrier compensation at the FCC’s interim rates—is correct. In *Peevey*, the Ninth Circuit upheld the California

⁷⁰ *Pac-West Order No. 3* at 14.

⁷¹ *Order No. 5* at 4; *Pac-West Order No. 5* at 3.

⁷² *Level 3 Order No. 5* ¶¶ 25-29, 70, and 80.

⁷³ *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006).

regulator's determination that VNXX traffic should be subject to reciprocal compensation—\$.0007 for ISP-bound traffic under the *ISP Remand Order*—whether or not it terminates within the “local” calling area of the dialing party.⁷⁴ That is, in *Peevey* the Court affirmed a state commission determination that VNXX traffic to ISPs should be compensated at the *ISP Remand Order* rate of \$.0007 per minute.⁷⁵ As the Ninth Circuit noted, rating calls based on dialed numbers rather than based on location—treating VNXX calls the same as “local” calls, as the WUTC originally determined in this case—is “consistent with ... industry-wide practice” and reasonably “recognizes essential differences between the ... network architectures of ILECs and CLECs.”⁷⁶ Moreover, relying on the holding in *Peevey* and its assessment of the *ISP Remand Order*, the District Court recognized that “[i]t is plausible the ultimate conclusion reached by the WUTC will not change”—*i.e.*, compensation is due for VNXX traffic at the FCC's interim rates.⁷⁷

43. The *2008 Order* has confirmed the WUTC's prior interpretations of the *ISP Remand Order* in the 2003 Level 3/CenturyTel Arbitration, *Order No. 3*, *Order No. 5*, and *Order No. 6*, and Commission precedent. Further, the Ninth Circuit in *Peevey* affirmed a state commission determination that VNXX traffic to ISPs should be compensated at the *ISP Remand Order* rate of \$.0007 per minute. The WUTC should exercise the discretion granted by the

⁷⁴ *Peevey*, 462 F.3d at 1149-50, 1155-56 (explaining state commission's determination that compensation did not depend on whether the call terminated in the same local calling area, and rejecting ILEC's challenge to the state's decision “to impose reciprocal compensation on Virtual NXX traffic”).

⁷⁵ Because the FCC held in the *2008 Order* that ISP-bound traffic is section 251(b)(5) traffic, the second holding in *Peevey*, which affirmed the California Commission's imposition of originating transport charges for ISP-bound traffic, is now clearly inconsistent with federal law. *Peevey*, 462 F.3d at 1157-59.

⁷⁶ *Peevey*, 462 F.3d at 1155-56.

⁷⁷ *Qwest v. WUTC*, 484 F.Supp.2d at 1177.

District Court to affirm that the Agreement requires the parties to exchange all locally-dialed ISP-bound traffic pursuant to the FCC's compensation regime.

B. What did the FCC Do? What is the Impact of the Mandamus Order?

44. On July 8, 2008, the D.C. Circuit granted a writ of mandamus directing the FCC to respond to its 2002 remand in *WorldCom* by November 5, 2008, in the form of a final, appealable order that explains the legal authority for the FCC's interim intercarrier compensation rules.⁷⁸ On November 5, 2008, the FCC issued an order in response to the *WorldCom* remand that provides the sole legal basis for its interim compensation rules for ISP-bound traffic promulgated in the *ISP Remand Order*.⁷⁹ The *2008 Order* reiterates that reciprocal compensation is not limited to "local" telecommunications and determined that Section 251(b)(5) "is broad enough to encompass ISP-bound traffic" that is "exchanged between a LEC and another carrier."⁸⁰ In the *2008 Order*, the FCC rejected claims that Section 251(b)(5) applies only to intraexchange (or 'local') calls that originate on the network of one LEC and terminate on the network of another LEC operating in the same exchange.⁸¹ The FCC underscored that section 251(b)(5)'s "scope is **not limited geographically** ("local, "intrastate," or "interstate") or to particular services ("telephone exchange service," telephone toll service," or "exchange access")."⁸² The FCC held that "[b]ecause Congress used the term "telecommunications," the broadest of the statutes' defined terms, we conclude that section 251(b)(5) is not limited to only the transport and termination of certain types of telecommunications traffic, such as local

⁷⁸ *In re: Core Communications, Inc.*, 531 F.3d 849, 861-61 (D.C. Cir. 2008).

⁷⁹ *WorldCom*, 288 F.3d at 434.

⁸⁰ *2008 Order* ¶¶ 7, 10 ("the better view is that section 251(b)(5) is not limited to local traffic.").

⁸¹ *2008 Order* ¶¶ 7-9, 15-16.

⁸² *2008 Order* ¶ 8.

traffic.”⁸³ Thus, section 251(b)(5) reciprocal compensation, **absent a statutory carve-out**, is the default intercarrier compensation regime applicable to *all* telecommunications traffic. Accordingly, *all* locally-dialed ISP-bound traffic exchanged between Qwest and Level 3 is subject to the FCC’s compensation regime because the FCC did not carve out a category of such traffic, namely VNXX, for different treatment.

45. Qwest’s analysis of “ISP-bound traffic” in the *ISP Remand Order* is backwards. Qwest argues that the scope of section 251(b)(5) traffic and ISP-bound traffic as used in the *ISP Remand Order* is limited to traffic that terminates in the local calling area from which it originates.⁸⁴ To the contrary, because the *ISP Remand Order* and *2008 Order* found that § 251(b)(5) applies “on its face” to *all* “telecommunications,”⁸⁵ the term “ISP-bound traffic” is understood to mean what it says *unless* it is expressly limited.⁸⁶ As the Commission recognized in its original decision in the present case, neither the *ISP Remand Order* nor the Agreement limit the scope of the term “ISP-bound traffic.”⁸⁷ In light of the *2008 Order*, Qwest’s arguments

⁸³ *2008 Order* ¶ 8.

⁸⁴ *In the Matter of Level 3 Communications, LLC’s Petition for Enforcement of Interconnection Agreement and Counterclaims*, Docket No. UT-053039, Qwest Corporation’s Answer ¶¶ 25-27, 38 (“Qwest’s Answer”) (“ISP-bound traffic, as that term is used in the *ISP Remand Order*, is limited to ISP-bound calls that originate and terminate in the same local calling area.”); *Order No. 6* ¶ 8 (“Qwest reiterates its argument that the *ISP Remand Order* addresses only local traffic, and that VNXX traffic is not local traffic.”).

⁸⁵ *ISP Remand Order*, 16 FCC Rcd at 9166, 9155-57 ¶ 31; *2008 Order* ¶ 15; *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-31 (2003) (“the FCC itself abandoned the distinction between local and interstate traffic as the basis for determining whether the reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic”).

⁸⁶ For this reason, the FCC’s *amicus* brief to the First Circuit in *Global NAPS*, 444 F.3d 59 (1st Cir. 2006), does not undermine Level 3’s position. In the brief, FCC litigation counsel merely argued that the FCC had not *explicitly* said one way or the other whether the *ISP Remand Order* includes VNXX ISP-bound traffic within the scope of ISP-bound traffic. But, again, because the *ISP Remand Order* rejected the local/non-local distinction, the term “ISP-bound traffic” should be understood to include all such calls *unless* it is explicitly limited.

⁸⁷ *Order No. 5* ¶¶ 19, 25, 29, 70, and 80 (We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic.”); *Pac-West Order No. 5* at 3.

that section 251(b)(5) is limited to “local” calls, and that locally-dialed ISP-bound traffic using VNXX is carved out from section 251(b)(5), must fail.

46. Qwest views the line between §251(b)(5) and §251(g) as a distinction between “local” and “long distance” traffic—which is precisely what the FCC rejected in the *ISP Remand Order* and again in the *2008 Order*.⁸⁸ As the FCC explained, “the *ISP Remand Order* . . . concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that ‘local’ is not a term used in section 251(b)(5).”⁸⁹ Rather, under the “broad language of section 251(b)(5) . . . the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime” of §251(b)(5), except for traffic “excluded” by §251(g).⁹⁰

47. Qwest argues that VNXX ISP-bound traffic is “interexchange” or “long distance” and therefore is “excluded” by 251(g).⁹¹ But as the FCC emphasized in the *2008 Order*, “the scope of Section 251(b)(5) is no longer tied to whether this traffic is local or long distance.”⁹² The only “interexchange” or “long distance” calls that are excluded from Section 251(b)(5) compensation requirements (including the FCC’s ISP-bound compensation regime) are those that

⁸⁸ See, e.g., *Order No. 5* ¶ 25; *ISP Remand Order* ¶¶ 26, 31, n.61, and 45-46 (“use of the term ‘local traffic’ created unnecessary ambiguities, and we correct that mistake here”); *2008 Order* ¶ 15, n.49 (“Because our conclusion in this order concerning the scope of section 251(b)(5) is no longer tied to whether this traffic is local or long distance, we need not address arguments made by parties as to whether ISP-bound traffic constitutes ‘telephone exchange service’ under the Act.”).

⁸⁹ *2008 Order* ¶ 7.

⁹⁰ *2008 Order* ¶¶ 15, 16 (emphasis added).

⁹¹ Qwest’s Answer at ¶ 7.

⁹² *2008 Order* at n.49.

*meet the tests of Section 251(g).*⁹³ In short, the fact that a call crosses exchange boundaries does not automatically qualify it for the Section 251(g) carve-out from terminating compensation.

48. The D.C. Circuit's 2002 decision in *WorldCom* held that ISP-bound traffic exchanged between two LECs, such as Qwest and Level 3, is *not* subject to the Section 251(g) carve-out because such traffic was not subject to any intercarrier interconnection obligations before the 1996 Act and §251(g) "grandfathered" only existing obligations.⁹⁴ The *2008 Order* cites the *WorldCom* holding to support the FCC's determination that "ISP-bound traffic falls within the scope of Section 251(b)(5)" and not 251(g).⁹⁵

49. The *WorldCom* court found a second problem with trying to fit ISP-bound traffic into §251(g). Specifically, §251(g) applies only to services provided "to interexchange carriers and information services providers," and LECs providing services to each other do not fall into either category.⁹⁶

50. The *WorldCom* court's and FCC's 2008 classification of ISP-bound traffic as *outside* the scope of Section 251(g) applies equally to *all* locally-dialed ISP-bound traffic. Neither *WorldCom* nor the FCC make a distinction between "local" or "non-local" ISP-bound traffic. First, if no obligations existed with respect to ISP-bound traffic before the 1996 Act, there also were no obligations respecting the subset of ISP-bound traffic utilizing VNXXs to be preserved by 251(g). For that matter, since VNXX traffic was not exchanged between an ILEC

⁹³ *2008 Order* ¶¶ 8, 15-16 (Section 251(b)(5)'s "scope is not limited geographically ('local', 'intrastate', or 'interstate') or to particular services").

⁹⁴ *WorldCom*, 288 F.3d at 433 ("there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic; Declaratory Ruling, 14 FCC Rcd. 3689, at ¶ 9 (1999) (the FCC "has no rule governing inter-carrier compensation for ISP-bound traffic.")).

⁹⁵ *2008 Order* ¶ 16.

⁹⁶ *WorldCom*, 288 F.3d at 433-34 ("And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP.").

and a CLEC competing in the same market prior to the 1996 Act, no obligations could have existed with respect to that traffic. Second, a LEC assigning local telephone numbers and terminating traffic to an ISP remains a LEC whether that traffic is VNXX traffic or not—it is neither an “interexchange carrier” nor an “information service provider” within the meaning of the Act. Finally, in the *2008 Order*, the FCC clarified that Section 251(b)(5) obligations are not limited to LECs exchanging traffic with other LECs, but encompass a LEC’s exchange of traffic with other telecommunications carriers.⁹⁷

51. At the time the parties entered their Agreement in early 2003, more than ten months after *WorldCom* was decided by the D.C. Circuit, it was clear that ISP-bound traffic did not fall under section 251(g) and that there was no carve out of “VNXX” ISP-bound traffic.⁹⁸ Again, under the *ISP Remand Order*, it makes no difference whether VNXX traffic is “local” or not, because section 251(b)(5) “is not limited geographically.”⁹⁹ To the extent that the FCC did not carve VNXX ISP-bound traffic out of its interim compensation regime, it addressed *all* ISP-bound traffic. Likewise, the Parties’ Agreement does not carve out VNXX traffic from the term “ISP-bound traffic.”

52. Even if there had there been any doubt at the time the parties entered their Agreement, the *2008 Order* eliminates such doubts. The FCC reiterated that “section 251(b)(5) is not limited to local traffic,” and its conclusion that “the scope of section 251(b)(5) is no longer tied to whether this traffic is local or long distance.”¹⁰⁰ Section 251(b)(5)’s “scope is **not limited geographically** (“local,” “intrastate,” or “interstate”) or to particular services (“telephone

⁹⁷ *2008 Order* ¶ 10.

⁹⁸ *WorldCom* was decided on May 3, 2002.

⁹⁹ *2008 Order* ¶ 8.

¹⁰⁰ *2008 Order* ¶ 7 & n.49.

exchange service,” telephone toll service,” or “exchange access”).”¹⁰¹ Now that the FCC has made clear that geographic boundaries, such as local calling areas, do not exclude traffic from section 251(b)(5), the WUTC is not at liberty to hold that VNXX traffic that crosses local calling area boundaries is excluded from the FCC’s compensation regime. ISP-bound traffic is subject to compensation unless it is exempted from §251(b)(5) by §251(g), and *WorldCom* and the 2008 Order find that no such exemption exists.

C. What is the Law that Controls the Parties’ Interconnection Agreement?

1. *Because the Parties’ Agreement incorporates federal law, the WUTC must review the Agreement for compliance with existing federal law*

53. The *ISP Remand Order*, as clarified by subsequent FCC orders, applies to the Agreement because the parties incorporated federal law into their Agreement. As the WUTC held in *Order No. 6*, the “*ISP Remand Order* controls our decision not because of the FCC’s preemptive authority, but because the parties have made it controlling by specifically incorporating the *ISP Remand Order* into their interconnection agreement.”¹⁰² The 2008 Order does not change any of the FCC’s rules; rather it clarifies and provides the legal basis for the rules adopted by the FCC in 2001, and these clarifications of law apply retroactively.

54. The WUTC and the Ninth Circuit, review interconnection agreements, if appealed, for compliance with federal law in existence at the time of their review.¹⁰³ In

¹⁰¹ 2008 Order ¶ 8.

¹⁰² *Order No. 06* ¶¶ 19-20; *see, e.g.*, Agreement §§ 7.3.6.1, 7.3.4.3, Amendment 1.

¹⁰³ *See, Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-31, n.14 (9th Cir. 2003) (“all valid implementing regulations in effect at the time that we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable to our review of interconnection agreements”); *U.S. West v. Jennings*, 304 F.3d 950, 956-57 (9th Cir. 2002). (“Our reading of the reviewing court’s duty under § 252(e)(6) of the Act is consistent with the Supreme Court’s general view of a court’s duty to apply its new interpretations of law to pending cases.”).

Jennings,¹⁰⁴ the Ninth Circuit addressed the “threshold issue of whether [FCC] regulations that have taken effect after the [state commission’s] decisions are applicable to the interconnection agreements” that have been arbitrated and approved by the state commission.¹⁰⁵ The court faced a situation in which provisions of the interconnection agreement did not comply with regulations that were reinstated by the U.S. Supreme Court and new regulations that were issued by the FCC after the agreement was arbitrated and approved.¹⁰⁶ The court concluded that it “must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreement.”¹⁰⁷

55. The primary issue in this remand has now become how does current federal law define ISP-bound traffic subject to the FCC’s interim rates? Because the *2008 Order* both clarified and provided the legal justification for the FCC rules adopted in 2001, the WUTC must apply the FCC’s ISP-bound compensation rules as clarified by subsequent orders, including the *2008 Order*.

2. *The Commission must apply standard contract interpretation principles and analyze the plain language of the Agreement*

56. Standard principles of contract law require the WUTC to start its inquiry by analyzing the text of the Agreement.¹⁰⁸ Where a contract is plain on its face, the reviewing court

¹⁰⁴ *U.S. WEST v. Jennings*, 304 F.3d 950 (9th Cir. 2002).

¹⁰⁵ *Id.* at 956-57 .

¹⁰⁶ *Id.* at 956.

¹⁰⁷ *Id.*

¹⁰⁸ See *Corbay v. Stevenson*, 98 Wash.2d 410, 415 (1982) (“contracts should be construed to reflect the intent of the parties, and courts, under the guise of construction or interpretation, should not make another or different contract for the parties.”) (internal citations removed); see also *Atkins v. Praxair Inc.*, 2006 WL 1477653 (C.A.9 (Wash.)), *2 (2006) (noting that under Washington law, “[w]hen a contract is unambiguous, courts must enforce its terms according to their plain meaning,” citing *Syrovoy v. Alpine Res., Inc.*, 122 Wash.2d 544 (1993)).

or agency may not look beyond the plain meaning.¹⁰⁹ The Agreement provides that the “Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.”¹¹⁰ Amendment 1 to the Agreement provides that “[c]ompensation for ISP-bound traffic will be at the rate of \$0.0007 per minute of use without limitation as to the number of MOU,” and the “Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC *Core Order*.”¹¹¹

57. The rate schedule incorporated in the Agreement “is taken from the FCC ISP Order” and provides that “[i]ntercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC will be billed as follows: . . . \$0.0007 per MOU from June 14, 2003.”¹¹² None of the provisions of the Agreement regarding intercarrier compensation for ISP-bound traffic incorporates a “local” restriction, nor do they in anyway remove VNXX traffic from the FCC’s compensation regime. The plain meaning of the text of the Agreement establishes that compensation at the FCC’s \$0.0007 rate is due for *all* locally-dialed ISP-bound traffic.

58. The only place “local” is used in the intercarrier compensation provisions of the Agreement is to illustrate the section 251(b)(5) traffic subject to reciprocal compensation. For example, the Agreement provides that the “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.”¹¹³ The word “local” does not modify “ISP-bound” traffic. Instead, the Agreement defines ISP-bound traffic as the FCC defines it. As described herein, the *2008 Order* confirms the WUTC’s

¹⁰⁹ *Syrovoy v. Alpine Res., Inc.*, 122 Wash.2d 544 (1993) (“*Syrovoy*”).

¹¹⁰ Agreement § 7.3.6.1. *See also*, Agreement § 7.3.4.3.

¹¹¹ Agreement, Amendment 1 §§ 7.3.6.2.3, 7.3.6.2.3.3, and 7.3.6.2.4.

¹¹² Agreement §§ 2.1, 2.2.

¹¹³ Agreement § 7.3.4.3 (emphasis added).

initial conclusion that the FCC's interim rules govern compensation for all locally-dialed ISP-bound traffic exchanged by Qwest and Level 3, without exception, and without regard to the geographic location of the customer's facilities.

59. The Agreement also requires Qwest to compensate Level 3 for ISP-bound traffic pursuant to the mirroring rule. Qwest was required to agree to exchange all section 251(b)(5) traffic at the FCC's interim rates in order to take advantage of the FCC's compensation regime.¹¹⁴ That is precisely what Qwest did in Section 7.3.4.3 when it agreed to exchange all 251(b)(5) and ISP-bound traffic at the FCC's interim rates. As the *2008 Order* established, all ISP-bound traffic, including such traffic that utilizes VNXX arrangements, is section 251(b)(5) traffic. Thus, pursuant to the mirroring rule and the Agreement, Qwest is required to pay the FCC's interim rates for locally-dialed ISP-bound traffic, including such traffic using VNXX arrangements, and may not impose on Level 3 charges for originating ISP-bound traffic.

60. The "local" restriction that Qwest continues to rely upon was rejected by the Court in *WorldCom* and the FCC in the *ISP Remand Order* and the *2008 Order*. On its face, the contract incorporates the FCC's definition of ISP-bound traffic and requires compensation at the FCC's interim rates for all section 251(b)(5) traffic, which now includes all locally-dialed ISP-bound traffic without limitation.

3. ***Applying the clarified federal law is consistent with fundamental notions of fairness and equity***

61. The *2008 Order* is not a change in law. The *2008 Order* does not change any of the FCC's rules. Rather, the *2008 Order* provides the legal basis for the *ISP Remand Order* and finds that ISP-bound traffic is section 251(b)(5) traffic. Assuming, arguendo, that the *ISP*

¹¹⁴ *ISP Remand Order* ¶¶ 8, 89 ("The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate.").

Remand Order, standing alone, did not require compensation for all locally-dialed ISP-bound traffic but left that decision to state commission discretion, the question becomes whether it is appropriate to apply the clarifications in the *2008 Order* to the parties' Agreement. An FCC decision that clarifies, corrects, or otherwise applies existing law, is presumed to apply retroactively.¹¹⁵ Because the *2008 Order* provides the legal justification for the FCC's 2001 ISP-bound compensation rules, the *2008 Order* applies retroactively and clarifies existing rules.¹¹⁶

VI. RELIEF REQUESTED

62. For the reasons stated herein, Level 3 respectfully requests that the Commission enter an order pursuant to WAC 480-07-380: (i) granting summary determination in Level 3's favor; (ii) determining that for all locally-dialed traffic to ISPs, including those using VNXX arrangements, Qwest is obligated under its interconnection agreement with Level 3 to pay compensation at the FCC's interim rate of \$0.0007 per minute of use and Qwest may not impose originating transport charges on Level 3; and (iii) provide such other relief as the Commission deems appropriate.

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¹¹⁵ See, *Jennings*, 304 F.3d at 956-57 ("Our reading of the reviewing court's duty under § 252(e)(6) of the Act is consistent with the Supreme Court's general view of a court's duty to apply its new interpretations of law to pending cases.") ("that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open . . ."); *AT&T Communications Systems v. Pacific Bell*, 203 F.3d 1183, 1187 (9th Cir. 2000).

¹¹⁶ See, *infra.*, fn.99.



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Dated: February 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of February, 2009, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I hereby certify that I have this 9th day of February, 2009, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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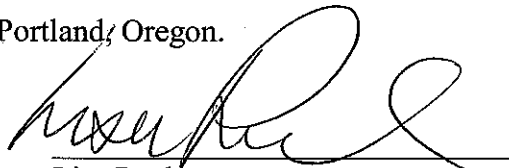
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of February, 2009, at Portland, Oregon.



Lisa Rackner