BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

I. BACKGROUND—PROCEDURAL HISTORY

1 In this remand proceeding, the Commission must classify VNXX calls, for compensation purposes, as taking place within a local calling area or outside of a local calling area. The Commission has already decided this issue in Docket No. UT-063038, holding that VNXX calls are interexchange calls and are compensable on a bill and keep basis. The FCC's *ISP Remand Order* applies only to calls to ISPs located in the caller's local calling area, and does not require or allow compensation for interexchange calls. Application of these rulings mandates that the complaints in this matter be dismissed and that Qwest's counterclaims against Level 3 and Pac-West be granted, as more fully set forth herein.

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2 The fundamental issue in this remand proceeding is straightforward. In 2005, Pac-West and Level 3 filed complaints requesting that the Commission order Qwest to pay them $.0007 per minute for *all* minutes of use of ISP ("Internet Service Provider") traffic. ISP traffic is traffic originated by customers subscribing to dial-up Internet access through ISP customers (e.g., companies such as Earthlink or MSN) of Pac-West and Level 3. Those requests, after extensive briefing and based on the Commission's interpretation of the then-current state of the law, were granted by th e Commission.[1]

3 The Commission's rulings were based on its conclusion that the FCC's 2001 *ISP Remand Order*[2] applies to *all* ISP traffic without regard to whether that traffic is local or interexchange in nature.

4 The rulings required that Qwest make refunds to Pac-West back to January 1, 2004 and to Level 3 back to October 8, 2004, the effective date of the *Core Forbearance Order.*[3] Qwest made refunds to both Pac-West and to Level 3 in the amounts set forth in the exhibits to the Affidavit of Larry B. Brotherson ("Brotherson Affidavit").

5 In addition, Qwest began making monthly payments to Pac-West and Level 3 on all Washington ISP traffic commencing with the billings following the Commission's February 2006 rulings. As set forth in the exhibits to the Brotherson Affidavit, Qwest made those payments on a monthly basis for approximately one year, but discontinued making them following the decision of the Western District of Washington in *Qwest Corp. v. Washington State Util. & Transp. Comm'n*, 484 F.Supp.2d 1160 (W.D. Wa. 2007) ("*Qwest*").

6 Along with its answers in Docket Nos. UT-053036 and UT-053039, Qwest asserted counterclaims

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1 Order Nos. 05 and 06, Docket No. UT-053036 (February 10, 2006 and June 9, 2006); Order Nos. 05 and 06, Docket No. UT-053039 (February 10, 2006 and June 9, 2006).

2 Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 16 FCC Rcd 9151 (April 27, 2001) ("*ISP Remand Order*").

3 Order, *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order*, 19 FCC Rcd. 20,179 (2004).

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against Level 3 and Pac-West seeking a variety of specific relief, including orders preventing Pac-West and Level 3 from engaging in VNXX-routing of traffic, a ruling that the interconnection agreements ("ICAs") between Qwest and both parties "[do] not require any compensation for . . . VNXX traffic,"[4] and orders "invalidat[ing] all . . . bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic described above."[5] The Commission denied Qwest's requests for relief.

7 Qwest appealed each order to federal court in the Western District of Washington, which consolidated the appeals for purposes of briefing and decision. In *Qwest*, the federal district court reversed the Commission's interpretation of the scope of the *ISP Remand Order*, ruling, among other things, that by "interpreting the *ISP Remand Order* to encompass *all* ISP-bound traffic, including VNXX traffic *outside* a local calling area ("LCA"), the WUTC violated federal law." *Id.* at 1175 (emphasis in original).

8 The court remanded the matter to the Commission, ordering the Commission, consistent with the ICAs between the parties, to "classify the instant VNXX calls, for compensation purposes, as within *or* outside a LCA, 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. . . . [T]he method by which that conclusion will be reached must not contravene federal telecommunications law and policy." *Id.* at 1177 (emphasis in original).

9 In the final orders in Docket Nos. UT-053036 and UT-053039, the Commission, even though dismissing Qwest's claims, noted that "[s]hould Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding

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[4] Qwest Answer and Counterclaims to claims of Pac-West (Docket No. UT-053036) dated June 15, 2005, ¶ 67.C; Qwest Answer and Counterclaims to claims of Level 3 (Docket No. UT-053039) dated June 28, 2005, ¶ 79.C.

[5] Qwest Answer and Counterclaims to claims of Pac-West (Docket No. UT-053036) (June 15, 2005) ¶ 67.E; Qwest Answer and Counterclaims to claims of Level 3 (Docket No. UT-053039) (June 28, 2005) ¶ 79.E.

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intercarrier compensation methods."[6]

10 Consistent with that invitation, Qwest filed a complaint (Docket No. UT-063038) against nine CLECs (including Pac-West and Level 3) on May 22, 2006, wherein it raised issues about the legal propriety of VNXX traffic and the intercarrier compensation regime that should apply to VNXX-routed ISP traffic under federal and state law.[7]

11 The *Qwest* decision was rendered prior to the hearings in Docket No. UT-063038.

12 In Docket No. UT-063038, after extensive hearings and briefing, the *Initial Order* (Order No. 05) was issued by the Administrative Law Judge on October 5, 2007. After additional briefing, the Commission issued its *Final Order* (Order No. 10) on July 16, 2008.

13 In Docket No. UT-063038, the Commission declined to consolidate the issues with this remand proceeding because it concluded such a consolidation would likely result in a delay in Docket No. UT-063038 "without meaningfully increasing efficiency or judicial economy."[8] Nonetheless, the Commission recognized that the issues it was addressing in Docket No. UT-063038 were directly relevant, and potentially determinative, of issues on the remand: "Given the closely related issues of law and fact in the complaint and remanded proceedings, however, principles of precedent and *res judicata* may apply to narrow the issues in dispute in the remanded proceedings."[9]

14 The Commission was correct in suggesting that decisions in Docket No. UT-063038 could have *res judicata* effect in the remand case. As demonstrated below, the *Final Order* in Docket No. UT-063038 resolves, as a matter of law, the central issues remanded to the Commission by the

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6 Order No. 05, Docket No. UT-053036 ¶ 43 (February 10, 2006); Order No. 05, Docket No. UT-053039 ¶ 40 (February 10, 2006).

7 In addition, the question whether the Commission should approve an amendment to the interconnection agreement between Qwest and MCI Metro Access d/b/a Verizon Access Transmissions Services (Docket No. UT-063055) was consolidated into Docket No. UT-063038.

8 Order 09, Docket No. UT-063038, ¶ 23 (February 15, 2008).

9 *Id.* ¶ 24.

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federal district court.

15 In the Commission's orders in Docket Nos. UT-053036 and UT-053039, the central legal issue was the scope of the *ISP Remand Order*. In its orders, the Commission concluded that the *ISP Remand Order* applies to *all* ISP-bound traffic and that Qwest, therefore, had an obligation under the ICAs between it and Pac-West and Level 3 to compensate them at $0.0007 for all ISP traffic, irrespective of its origination and termination points of the ISP traffic.[10]

16 In the virtually identical orders denying Qwest's reconsideration petitions in Docket Nos. UT-053036 and UT-053039, the Commission stated that the disputes before it relate to "the meaning of the parties' existing interconnection agreement, which incorporates the FCC's *ISP Remand Order as the standard for determining compensation for ISP-bound traffic*."[11] In other words, the issue could be stated as follows: given that the *ISP Remand Order* was incorporated into each ICA, either directly or by amendment, is Qwest required to pay intercarrier compensation on all ISP traffic at $0.0007 (the Pac-West/Level 3 position) or is Qwest only required to pay intercarrier compensation on calls to an ISP located in the caller's LCA (the Qwest position)?

17 In both cases, the Commission agreed with the interpretation of the scope of the *ISP Remand Order* offered by Pac-West and Level 3, and held that, given the language of the ICAs incorporating the *ISP Remand Order* into each ICA, Qwest had a legal obligation to pay terminating compensation on *all* ISP traffic.

18 On appeal, the *Qwest* court considered several federal circuit court cases that were unavailable to the Commission when it issued its original orders. *Global NAPs v. Verizon New England*, 444. F.3d 59 (1st Cir. April 2006) ("*Global NAPs I*"); *Global NAPs v. Verizon New England*, 454. F.3d

[10] Order Nos. 05 and 06, Docket No. UT-053036 (February 10, 2006 and June 9, 2006); Order Nos. 05 and 06, Docket No. UT-053039 (February 10, 2006 and June 9, 2006).

[11] Order 06, Docket No. UT-053036 ¶ 17 (June 9, 2006) (Pac-West); Order 06, Docket No. UT-053036 ¶ 17 (June 9, 2006) (Level 3).

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91 (2nd Cir. July 2006) ("*Global NAPs II*"); *Global NAPs v. Verizon New England*, 462 F.3d 1142 (9th Cir. September 2006) ("*Peevey*").[12] Relying on these cases, the *Qwest* court reversed the Commission and concluded unequivocally that the scope of the *ISP Remand Order* is limited solely to traffic to an ISP located in the caller's LCA and that the *ISP Remand Order*, therefore, *does not* prescribe intercarrier compensation for interexchange (VNXX) ISP traffic.

19 In the *Final Order*, the Commission applied the *Qwest* decision (and the federal circuit court decisions upon which *Qwest* relied), and ruled, in a complete reversal of its decisions in Docket Nos. UT-053036 and UT-053039, that the *ISP Remand Order* applies only to ISP traffic *within* a LCA.[13]

20 Since the time of the *Qwest* decision, and in addition to the developments in federal case law cited above that defined the scope of the *ISP Remand Order*, the FCC recently issued another order addressing, to a limited degree, issues related to ISP traffic. The *ISP Remand Order* had been remanded to the FCC for further proceedings by the D. C. Circuit Court of Appeals in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*"). Because the FCC had failed in the intervening six years to resolve the issues remanded to it, a CLEC sought a writ of mandamus from the D. C. Circuit to require the FCC to take action. The request was granted. *In re Core Communications*, 531 F.3d 849, 862 (D. C. Cir. 2008) (requiring "the FCC to respond to our 2002 *WorldCom* remand by November 5, 2008 . . . in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)").

21 On November 5, 2008, the FCC issued its *ISP Mandamus Order* in response to the D. C. Circuit's mandamus order.[14]

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[12] The Commission issued its orders in Docket Nos. UT-053036 and UT-053039 in February 2006, prior to the decisions of the First, Second, and Ninth circuits that held that the scope of the *ISP Remand Order* was limited to ISP traffic *within* a LCA.

[13] *Final Order* ¶¶ 40-53.

[14] Order on Remand and Report and Order, *In the Matter of High-Cost Universal Service Support, Federal State Joint*

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22 In other states, Level 3 has argued that the *ISP Mandamus Order* has resolved the issue of the breadth of the *ISP Remand Order*—Level 3 claims that *ISP Mandamus Order* requires that all ISP traffic be subject to the compensation regime of the *ISP Remand Order*. As will be discussed below, the *ISP Mandamus Order* fully supports Qwest's position in this proceeding and does not alter the Commission's conclusions in its *Final Order* in Docket No. UT-063038.

II. ISSUES ON REMAND

23 The *Qwest* court made two decisions that govern this remand proceeding. First, it ruled that the scope of the *ISP Remand Order* is limited *solely to calls placed to an ISP located in the caller's LCA* and that the *ISP Remand Order*, therefore, *does not* govern intercarrier compensation for interexchange (VNXX) ISP traffic. Second, the court recognized that Washington statutes, rules, tariffs, and Commission decisions govern the question of call classification. The court declined to interpret the ICAs or to decide what ISP traffic is local in nature and what traffic is VNXX, instead giving the Commission the following charge on remand:

> "By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue. On remand, the WUTC is simply directed 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 LCA, 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*, 484 F.Supp.2d at 1177).

24 In light of that, the *Qwest* decision establishes three issues that must be addressed on remand for both Pac-West and Level 3:

Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resources Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, and IP-Enabled Services, 2008 WL 4821547 (FCC Nov. 5, 2008) ("*ISP Mandamus Order*").

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First, what are the relevant terms of the ICA or ICAs between the parties?

Second, as mandated by the *Qwest* decision and as applied to the terms of the ICAs between the parties and in light of relevant Washington state law, are VNXX ISP calls classified "as within or outside a local calling area"? (484 F.Supp.2d at 1177).

Third, assuming that, in its resolution of the first two issues, the Commission determines that Qwest has paid Pac-West and Level 3 terminating compensation that should now be refunded, how much (including interest) should be refunded to Qwest by Pac-West and Level 3?

25 The ALJ in this case asked the parties to address three separate questions that raise the same questions set forth above:

1. What is the effect of the 11/05/2008 order on the issues in this case?

2. Given the amount of time since the *ISP Remand Order* was entered, what is the law that applies to interpreting the parties' ICAs?

3. Address the issues raised by the federal court's remand order in these dockets.

26 Qwest will address each of these issues hereafter.

A. The Relevant Terms of the ICAs Between Qwest and Pac-West and Qwest and Level 3

1. The Relevant Terms of the Qwest/Pac-West ICAs

27 On February 14, 2001, the Commission approved an ICA between Pac-West and Qwest governing their relationship in Washington. The ICA approved by the Commission was based on Pac-West opting into the ICA previously entered into by Qwest and Northwest Telephone, Inc.

28 On May 24, 2002, Qwest and Pac-West entered into an amendment to the ICA, a copy of which was attached to Pac-West's Petition for Enforcement in Docket No. UT-053036, but for convenience is attached hereto as Exhibit D to the Brotherson Non-Confidential Affidavit ("*Pac-West/Qwest ISP Amendment*")

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29 In the recitals to the *Pac-West/Qwest ISP Amendment*, the parties noted that the FCC had issued an Order on Remand in FCC Docket 99-68 dealing with "Intercarrier Compensation for ISP-Bound Traffic" and that the purpose for the amendment was "*to reflect the aforementioned Order* under the terms and conditions contained herein." (Emphasis added).

30 Section 3.1 of the *Pac-West/Qwest ISP Amendment* states that "Qwest elects to exchange ISP-bound traffic at the *FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order* (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68 (FCC ISP Order), effective June 14, 2001 . . . ." (Emphasis added).

31 The February 14, 2001, ICA between Qwest and Pac-West, as amended from time to time, remains in effect and, as amended, continues to govern the interconnection relationship between Pac-West and Qwest in Washington.

32 In the ICA between Qwest and Pac-West, whether intercarrier compensation is due for ISP traffic hinges on the scope of the *ISP Remand Order* and whether, under the Commission's rules, ISP VNXX traffic is considered to be traffic delivered to an ISP located in the caller's LCA.

2. The Relevant Terms of the Qwest/Level 3 ICAs

33 The history of the Level 3/Qwest contractual relationship in Washington is somewhat more complicated. On April 25, 2001, the Commission approved an ICA between Level 3 and Qwest governing their relationship in Washington. The ICA ("*Level 3/Qwest 2001 ICA*") approved by the Commission was based on Level 3 opting into the ICA previously entered into by Qwest and COVAD.

34 On October 2, 2002, Qwest and Level 3 entered into an amendment to the ICA, a copy of which is attached hereto as Exhibit E to the Brotherson Non-Confidential Affidavit (hereinafter "*Level 3/ Qwest ISP Amendment*")

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35 In the recitals to the *Level 3/Qwest ISP Amendment*, the parties noted that the FCC had issued an Order on Remand in FCC Docket 99-68 dealing with "Intercarrier Compensation for ISP-Bound Traffic" and that the purpose for the amendment was "*to reflect the aforementioned Order* under the terms and conditions contained herein."

36 Section 3.1 of the *Level 3/Qwest ISP Amendment* states that "The Parties shall exchange ISP-bound traffic pursuant to the compensation set forth in the FCC ISP Order."

37 The *Level 3/Qwest 2001 ICA* was superseded on April 6, 2003 by the Commission's approval of a new ICA (hereinafter referred to as the "*Level 3/Qwest 2003 ICA*") between Level 3 and Qwest (signed on March 4, 2003) governing their relationship in Washington. The *Level 3/Qwest 2003 ICA* contains the following provisions relevant to the exchange of and compensation for ISP traffic:

> 7.3.4.3 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, *pursuant to the FCC ISP Order*. The FCC ordered rate for ISP-bound traffic will apply to EAS/Local and ISP-bound traffic in lieu of End Office call termination and Tandem Switched Transport. (Emphasis added).
>
> 7.3.6.1 The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the *FCC ISP Order*. (Emphasis added).

A copy of the cover page and the page containing these sections from the *Level 3/Qwest 2003 ICA* is attached as Exhibit F to the Brotherson Non-Confidential Affidavit.

38 The *Level 3/Qwest 2003 ICA* was superseded on August 6, 2007 by the Commission's approval of a new ICA between Qwest and Level 3 that resulted from an arbitration conducted in Docket No. UT- 063006 ("*Level 3/Qwest 2007 ICA*"). However, in light of the pending appeal in *Qwest*, the Arbitrator declined to decide the appropriate compensation regime for ISP traffic until such time as the Commission were to make its decisions in Docket No. UT-063038, a decision that was

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affirmed by the Commission.[15]

39 Little argument need be made on the language of the ICAs between the parties. In each case, the clear intent of the parties, as reflected by the language of the ICAs, is that "ISP-bound" traffic be exchanged pursuant to the *ISP Remand Order*. Nothing in the language of the agreements suggests in any manner that the parties intended that a broader universe of traffic than the traffic included in the *ISP Remand Order* would be exchanged pursuant to the terminating compensation mechanism of the *ISP Remand Order*.

40 Washington, like most states, follows the rule of construction that requires that a contract be construed to give effect to the parties' intentions as disclosed by the plain meaning of the words used in the contract. *Hearst Communications v. Seattle Times Co.*, 154 Wash.2d 493, 503-04, 115 P.3d 262, 267 (2005) ("[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement . . . . We impute an intention corresponding to the reasonable meaning of the words used. . . . We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.") (citations omitted); *Groach Associates v. Titan Const. Corp.*, 126 Wash.App. 856, 867, 109 P.3d 830, 835 (2005) ("no rule permits us to ignore the plain language of the contract").

41 The ICAs, or amendments thereto, are crystal clear: the *ISP Remand Order* governs the compensation of the ISP-bound traffic subject to the *ISP Remand Order*—no more, no less.

42 In light of that, the issue of proper terminating compensation for ISP traffic is to be determined in light of the proper scope of the *ISP Remand Order* (an issue clearly resolved by *Qwest* as confined to traffic to an ISP located within the caller's LCA) and whether, under the Commission's interpretation of state law, ISP VNXX traffic is considered to be traffic *within* a LCA.

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[15] Order 12, Docket No. UT-063006, ¶ 19 (June 7, 2007).

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B. Classification of VNXX Traffic in Washington

43 Questions related to call classification were addressed in great detail in Docket No. UT-063038, not only by Qwest, but by Level 3 and Pac-West. Indeed, the precise question that the *Qwest* court has remanded to the Commission was one of the central issues of Docket No. UT-063038, and the Commission, in Order No. 9 of that docket, went so far as to note that the doctrine of *res judicata* could apply in this docket as to issues resolved in Docket No. UT-063038. In light of the extensive briefing in that docket and the Commission's definitive decision on the call classification issues, Qwest will provide only a summary here of the arguments made in Docket No. UT-063038. For a more detailed analysis, Qwest refers the Commission to the opening and response briefs in that case filed by Qwest, Level 3, and Pac-West.[16]

44 All relevant Washington authority mandates that VNXX calls be rated as non-local, interexchange calls. In addition, VNXX calls that are bound for an ISP are not "ISP-bound traffic" within the meaning of the *ISP Remand Order* because the *ISP Remand Order* applies only to traffic where the calling party and the called ISP are located within the same LCA.

1. Commission Rules

45 Pursuant to RCW 80.36.230, the Commission may prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies. The Commission has exercised that authority by promulgating rules, including WAC 480-120-021, wherein the Commission defines:

> "Exchange" as a *geographic* area established by a company for telecommunications service within that area.
>
> "Interexchange" means telephone calls, traffic, facilities or other items that *originate in one exchange and terminate in another*.
>
> "Interexchange company" means a company, or division thereof, that

[16] See the following briefs from Docket No. UT-063038: Qwest Opening Brief ¶¶ 21-50; Level 3 Initial Brief ¶¶ 20-34; Joint Opening Brief of PacWest, Global Crossing & Northwest Telephone ¶¶ 13-16; Qwest Reply Brief ¶¶ 16-48; Level 3 Reply Brief ¶¶ 14-33; Joint Reply Brief of PacWest, Global Crossing & Northwest Telephone ¶¶ 7-11.

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provides long distance (toll) service.

(Emphasis added).[17]

2. Qwest's Tariffs

46 Consistent with its rules, the Commission has accepted Qwest's tariffs, which have the force and effect of law.[18] These tariffs define Qwest's exchanges as geographic areas.[19] Qwest defines local calling based on geographic areas and the location of the customer's premises within or without that geographic area. Because, as discussed below, both Level 3 and Pac-West have concurred in the LCAs identified those tariffs, they are bound by the descriptions and definitions in them with regard to how local calling is defined.

47 Further, for purposes of defining local calling between carriers for purposes of determining the proper intercarrier compensation, Level 3 and Pac-West are bound to the definition in Qwest's tariffs by virtue of provisions in the ICAs between the parties. Qwest's tariffs plainly define calls based on the physical location of the calling and called parties. In all cases, VNXX calls are interexchange calls of a type where, absent the bill-and-keep regime ordered by the Commission, Qwest would be due access charges from the CLEC who acts as an interexchange carrier by enabling VNXX calls.

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[17] Several state statutes are relevant to this issue, including RCW 80.36.080; 80.36.140; 80.36.160; and, 80.36.170. The use of VNXX by Level 3 and Pac-West without charging their end users for that service violates RCW 80.36.080, which requires rates to be fair, just, and reasonable. Respondents' customers receive the benefit of access to Qwest's extensive local exchange network and to a state-wide toll network, without contribution to the costs of maintaining and supporting those networks. The use of VNXX is an unjust and unreasonable practice in violation of RCW 80.36.140, in that it requires Qwest to incur costs that should be compensated by the Respondents, who may then more appropriately obtain compensation from their end users. By implementing and promoting VNXX services with their end users, Respondents are engaging in unreasonable practices, resulting in a failure to utilize the toll networks of all telecommunications carriers equitably and effectively, in violation of RCW 80.36.160. By providing facilities and services to their customers at rates and on terms and conditions that avoid proper payment of access charges and/or toll rates, Respondents are subjecting Qwest and other ILECs in the state to undue prejudice or disadvantage in violation of RCW 80.36.170.

[18] *GTE v. Bothell*, 105 Wn.2d 579; 716 P.2d 879 (1986).

[19] *See* Sections 2 (definitions, discussed below) and 5 (geographic descriptions of LCAs) of Qwest's Exchange and Network Services Tariff, WN U-40.

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48 Qwest's approved tariffs are consistent with the Commission's rules. Qwest's Exchange and Network Services Tariff contains the following definitions:

> "Exchange" is "[a] specified geographic area established for the furnishing of communication service. It may consist of one or more central offices together with the associated plant used in furnishing service *within that area*."
>
> "Local exchange" is an "[e]xchange *in which* the customer's *premises* are located."
>
> "Local service" is "[e]xchange access service furnished *between customer premises* located within the same local service area."
>
> "Local service area" is "[t]he area *within which* exchange access service under specific rates. The area may include one or more exchanges without the application of toll charges."
>
> (Emphasis added). [20]

49 Consistent with the Commission's rules, these tariffs focus on the geographic local service area, and the relevant points for call rating are "between customer premises located with the same" LCA. The term "premises" is a temporal term referring to "[a] house or building, along with its grounds."[21] It would be difficult to conceive of a clearer expression of the geographic nature of call rating in Washington; it would likewise be difficult to find a more explicit description of the fact that call rating is based on the actual physical location of customers.

3. Level 3's and Pac-West's Tariffs

50 CLECs in Washington are no longer required to file tariffs or price lists with the Commission. However, during the time when price lists were required, both Level 3 and Pac-West had price lists on file and it is clear that both companies have explicitly recognized and adopted geographical LCAs. For example, the price list filed by Level 3 in April 2004 identifies 52 Local

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[20] WN U-40 Exchange and Network Services § 2.1, at original page 6, (emphasis added).

[21] *Black's Law Dictionary* at 1219 (8th edition).

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Service Areas that are described this way: "Local Service are provided (pursuant to Section 9.2) in the following *geographic areas*."[22] After listing the areas, Level 3 states: "The Company will *match Local Calling Areas* for the above exchanges as defined in Qwest Corporation's Network and Exchange Services Tariff WN U-40, Section 5, and Verizon Northwest, Inc.'s tariff WN-7." (Emphasis added). The pages that follow these statements then list the other exchanges that can be called toll-free from those exchanges (thus defining the LCA for each exchange).[23] That section of the price list is introduced as follows by Level 3: "*Geographically-defined Local Calling Areas* are associated with each Local Service provided under Section 9.2. Local Services shall have the following local calling areas . . ."[24]

51 Pac-West likewise filed a price list dated June 10, 2003 that contained a "Service Area Map" that Pac-West described in these terms: "The Company provides local exchange service in Washington within the service territories of Verizon and Qwest. *The Company concurs in and hereby incorporates by this reference all current and effective service territory and local exchange boundary maps filed with the [Commission] by Verizon and Qwest*."[25] Pac-West's definitions are all consistent with geographic LCAs. For example:

> "'Exchange' means a *geographic area* established by a company for telecommunications service *within that area*."[26]
>
> "'Local calling area" means one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges."[27]
>
> "'Interexchange' means telephone calls, traffic, facilities or other items that

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[22] Exhibit 474 (Docket No. UT-063038), at Original Page 64 (emphasis added). Exhibit 474 is attached to the Affidavit of Ted D. Smith ("Smith Affidavit") as Exhibit A.

[23] *Id.* at Original Pages 65-68.

[24] *Id.* at Original Page 65 (emphasis added).

[25] Exhibit 518 (Docket No. UT-063038), at Original Page 13 (emphasis added). Exhibit 518 is attached hereto as Exhibit B to the Smith Affidavit.

[26] *Id.* First Revised Page 21 (emphasis added).

[27] *Id.* First Revised Page 22 (emphasis added).

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originate in one exchange and terminate in another."[28]

(Emphasis added)

4. The Level 3 and Pac-West ICAs with Qwest

52 The ICAs of Pac-West and Qwest and Level 3 and Qwest state that local traffic is defined for purposes of the ICA as traffic originated and terminated within the same LCA. Exhibit 477 in Docket No. UT-063038 contains excerpts of the December 2002 Level 3/Qwest ICA. Definition 4.24 (page 8) states that "'Exchange Service' or 'Extended Area Service (EAS/Local Traffic' means traffic that is originated and terminated within the same local calling area determined by the Commission." Exhibit 477 is attached hereto as Exhibit C to the Smith Affidavit. Definition 4.22 of Exhibit 519 in Docket No. UT-063038, the current ICA between Pac-West and Qwest, is virtually identical: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is originated with the local calling area as defined by Qwest's then current EAS/local serving areas, as determined by the Commission." Exhibit 519 is attached as Exhibit D to the Smith Affidavit.

53 The evidence in Docket No. UT-063038 demonstrates that companies like Level 3 and Pac-West, who concentrate on providing service almost exclusively to ISPs, have huge disparities in the traffic exchanged with Qwest. For Level 3 and Pac-West, well over 99 percent of the traffic is one-way. Exhibits 4C and 8C in Docket No. UT-063038 show, respectively, that Pac-West's traffic is 99.6 percent one-way, while Level 3's traffic is 99.93 percent one-way.[29] The traffic for both carriers is overwhelmingly one-way.

5. The Commission's Final Order in Docket UT-063038

54 The definitive decision on the call classification issue is the Commission's *Final Order* in Docket

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[28] *Id.* (emphasis added).

[29] In an abundance of caution, Exhibits 25 and 26 were filed by Qwest as confidential documents. However, at the hearing they were received as non-confidential exhibits. They are attached hereto as Exhibits E and F to the Smith Affidavit.

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UT-063038.[30]

55 Focusing specifically on the issue remanded to it by the federal court, the Commission concluded "that VNXX traffic does not originate and terminate within the same LCA."[31] While noting that VNXX, like FX, is interexchange in nature, the Commission chose not to make it subject to intrastate access charges.[32]

56 The Commission also upheld the *Initial Order's* conclusion that a geographic test applies for the determination whether traffic is VNXX, noting, among other things, its statutory authorization to prescribe exchange boundaries, its rules defining LCAs on a geographical basis, the approved tariffs of companies like Qwest that define calls based on geographic exchanges, and the fact that in numerous ICAs in Washington, CLECs have adopted the same LCAs as Qwest.[33] Consistent with this analysis, the Commission *rejected* the claim of Level 3 "that the distinction between local and long distance traffic no longer exists, that geography is not an appropriate basis for classifying traffic, and that local calls should not be defined based on ILEC local calling areas."[34]

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[30] Several prior Commission orders provide guidance on the issue of whether VNXX is local or interexchange traffic, and whether it is in the public interest. There is a long history in Washington of carriers and companies that have attempted to avoid the payment of toll and access charges though various schemes designed to make long distance calls look like local calls. The most common of these schemes has been "toll bridging," where a company takes advantage of overlapping LCAs or EAS areas by using a "bridging" device that allows customers to avoid payment for what is otherwise a toll call. The Commission has consistently seen through these schemes and ordered the participants to pay their fair share of the costs associated with the use of the telephone network. *See* Commission Orders *In the Matter of Determining the Proper Classification of: U.S. MetroLink Corp.*, Second Supplemental Order, Docket No. U-88-2370-J (1989), 1989 Wash. UTC LEXIS_40, at *6-*7 ("*MetroLink*"), and *In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network*, Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, Docket No. UT-971515 (1999) ("*U & I CAN*").

[31] *Final Order* ¶ 130.

[32] *Id.* ¶ 134.

[33] *Id.* ¶ 148 ("We are authorized by statute to 'to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies.' The state supreme court has determined that this language enables us 'to define the geographical limits of a company's obligation to provide service on demand, and to delineate boundaries between local and long distance calling.' Our rules define a local calling area as 'one or more rate centers within which a customer can place calls without incurring long distance (toll) charges.' In addition, the geographic areas that distinguish between local and long distance calling are defined in exchange maps in the Commission-approved tariffs of local exchange companies with Qwest, CLECs have adopted the same LCAs as Qwest.") (footnotes omitted).

[34] *Id.* ¶ 150.

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The Commission thus continued the use of a geographic test for determining whether traffic is local or interexchange in nature.

57 The Commission, instead of banning VNXX traffic, as at least two states have done, concluded that it should be exchanged by parties to an ICA, but that it should be exchanged on a bill-and-keep basis.[35]

58 Finally, the Commission unequivocally concluded that the "FCC's interim compensation rate [$.0007] is not intended for traffic, such as VNXX, that does not originate and terminate in the same local calling area."[36] Instead, "the FCC's interim rate of $.0007 per MOU applies *only* to ISP-bound traffic within a local calling area."[37] (Emphasis in original).

59 Qwest, pursuant to Commission orders that have been reversed, has paid both Pac-West and Level 3 terminating compensation at $.0007 per MOU on billions of minutes of VNXX traffic.

60 The ICAs between the parties represent explicit agreements between the parties, either in ISP amendments or in other ISP provisions, that it was the parties' intention to implement compensation for ISP traffic consistent with the meaning of the *ISP Remand Order*. The federal courts and the Commission have now ruled definitively that the *ISP Remand Order* applies only to traffic where the ISP is located within the caller's LCA. In light of those rulings, Qwest is entitled to refunds from Pac-West and Level 3, with interest thereon, for the payment of intercarrier compensation on ISP traffic that is beyond the scope of the *ISP Remand Order* and the ICAs implementing the *ISP Remand Order*.

6. The "No Separate Charge" Argument Has No Merit

61 As it has done in the past, Level 3 is likely to argue that whether VNXX calls are local or toll calls

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35 *Id.* ¶¶ 152-55.

36 *Id.* ¶ 160.

37 *Id.* ¶ 161.

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subject to access charges depends upon whether there is a separate charge for the calls. This argument is without merit.

62 This precise argument was made in *Global NAPs II* and soundly rejected. In that case, the issue arose in the context of what traffic was subject to access charges. Global NAPs argued that, because it does not impose a "separate charge" for the service it provides to ISPs, the traffic was not VNXX (and therefore not subject to access charges). The Second Circuit rejected this argument, noting that "[t]his argument attributes far too much significance to the term 'separate charge.'" 454 F.3d at 98. The Second Circuit analyzed the issue in terms of who has the authority to establish local calling areas for intercarrier compensation purposes, the CLECs or the local commission; in other words, if the "no separate charge" argument were accepted, the CLECs would in effect be able to establish their own calling areas for compensation purposes and thus transform interexchange traffic into "local" traffic. The court stated:

> "But, if carriers were free to define local calling areas for the purposes of intercarrier compensation, the door would be open to overweening conduct by the CLECs. ILECs are currently fixed in state-commission-imposed regimes and, in that framework, provide the infrastructure for CLECs. *Local calling areas defined by CLECs would permit such areas to be so broad as to eliminate all intercarrier compensation for ILECs. Permitting CLECs to define local service areas and thereby set the rules for the sharing of infrastructure would eventually require ILECs to absorb all the costs and allow CLECs to reap all the profits.*
>
> The significant factor added to the considerations under discussion--namely the ISP-bound nature of the traffic--requires attention to the *2001 Remand Order*. The ultimate conclusion of the *2001 Remand Order* was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation."
>
> *Id.* at 99 (Emphasis in first paragraph added).

The court thus concluded that state commissions (not CLECs) "have authority to define local calling areas with respect to intercarrier compensation." *Id.* As discussed above, the Commission has accepted the LCAs in Qwest's tariffs as the appropriate LCAs for intercarrier compensation

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purposes, and both Level 3 and Pac-West affirmatively opted into those same LCAs. Thus, the "no separate charge" argument is a red herring that should be ignored by the Commission.

7. The Doctrine of *Res Judicata* Applies to this Case

63 As noted above, the Commission in Docket No. UT-063038 concluded that its decisions in that case could have *res judicata* effect in the current case. Under the Washington *res judicata* standard, it is clear that the Commission was correct on that point. The standard for the application of *res judicata* in Washington is whether there is a "concurrence of identity" with a prior decision. The areas of concurrence are: "(1) subject matter, (2) cause of action, (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Rains v. State*, 100 Wash.2d 660, 663, 674 P.2d 165, 168 (Wash. 1983).

64 All of those elements are met here. First, the central subject matter—the proper application of the *ISP Remand Order* and the determination under Washington of the means to determine proper call classification—are identical in the current case and Docket No. UT-063038. Second, while the current case arose out of claims made against Qwest by Pac-West and Level 3 and Docket No. UT-063038 arose out claims made by Qwest against Pac-West and Level 3 (and other CLECs), the causes of action arose out of the same "nucleus of facts" and involves "substantially the same evidence" in both dockets. *Id.* Third, Qwest, Pac-West, and Level 3 are parties to both actions. Finally, there is nothing to suggest that Pac-West or Level 3 were unable to mount a vigorous defense of their legal and factual positions in Docket No. UT-063038. Thus, this case fits all the elements for the application of the doctrine of *res judicata*.

III. THE *ISP MANDAMUS ORDER* SUPPORTS QWEST'S POSITION IN THIS CASE

65 On November 5, 2008, the FCC issued the *ISP Mandamus Order* in response to the writ of mandamus granted by the D. C. Circuit directing the FCC to respond to its prior remand of the FCC's *ISP Remand Order*. In the *ISP Mandamus Order*, the FCC concluded that Section

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251(b)(5) of the Act is broad enough to encompass the ISP-bound traffic addressed in the *ISP Remand Order*. That traffic, as held by the Washington district court in *Qwest* and multiple other federal courts, is limited to calls delivered to an ISP located in the caller's LCA. The FCC also concluded in the *ISP Mandamus Order* that it had authority under 47 U.S.C. §§ 201(b) and 251(i) to impose the rules it adopted in the *ISP Remand Order* because the ISP-bound traffic at issue is interstate traffic subject to the FCC's jurisdiction. The FCC also reaffirmed that an Internet Service Provider point of presence ("POP") is to be treated as an end user premises for purposes of determining whether switched access charges apply to traffic to and from the POP.

66 The *ISP Mandamus Order* fully supports Qwest's position in this proceeding that Level 3 and Pac-West are not entitled to charge Qwest intercarrier compensation for delivering VNXX ISP traffic. First, like the *ISP Remand Order*, the *ISP Mandamus Order* does not purport to make VNXX ISP traffic subject to Section 251(b)(5) of the Act. In the *ISP Remand Order*, the question was "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end user customer to an ISP in the same local calling area that is served by a competing LEC."[38] Thus, as the Washington federal district court held, the Order is plainly limited to ISP calls that originate and terminate in the same LCA. The same limitation necessarily applies to the *ISP Mandamus Order*, because that order results directly from the D.C. Circuit's remand of the *ISP Remand Order*. Because the *Mandamus Order* was entered through a remand, the scope of that Order is defined by the scope of the Order—the *ISP Remand Order*—that was remanded in the first place. And that scope, as made clear by the district court, is limited to ISP calls originating and terminating in the same LCA. By definition, VNXX ISP traffic involves calls placed to an ISP located outside of the caller's LCA, and that traffic is therefore outside the scope of the *ISP Remand Order* and, in turn, the *ISP Mandamus Order*. Indeed, VNXX ISP traffic is interexchange traffic governed by Section 251(g) of the Act and is not subject to reciprocal

[38] *ISP Remand Order* ¶ 13.

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compensation. It is not within the category of traffic that the FCC refers to as "ISP-bound traffic" in the *ISP Remand Order* and the *ISP Mandamus Order*.

67 Second, the conclusion that the *ISP Mandamus Order* does not apply to VNXX traffic is further reinforced by the FCC's recognition in that Order that traffic encompassed by Section 251(g) is not within Section 251(b)(5). In paragraph 16 of the *ISP Mandamus Order*, the FCC determined that "traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing 'receipt of compensation." VNXX ISP traffic, like all other traffic to a remote customer premises, is interexchange traffic that falls within the pre-1996 Act access charge rules. Accordingly, under both the *ISP Remand Order* and the *ISP Mandamus Order*, VNXX ISP traffic is not subject to reciprocal compensation under Section 251(b)(5) of the Act.

68 The FCC's access charge regime was implemented upon divestiture of the consolidated AT&T.[39] Prior to the Act (and continued after the Act under Section 251(g) of the Act), local exchange carriers receive compensation from interexchange carriers for the origination and termination of long distance calls in the form of interstate and intrastate access charges.[40] In the access charge structure, interexchange carriers purchase both originating and terminating exchange access from ILEC's pursuant to tariff (rather than contract).[41] This includes the carriage of traffic to and from the premises of enhanced service providers ("ESPs"). That is, interexchange carriers must pay switched access for the use of local exchange switching facilities to provide interstate telecommunications services.[42] "Interstate interexchange carriers are required to purchase federal

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39 *Nat'l Ass'n of Regulatory Util. Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

40 Memorandum Opinion and Order, *In the Matter of Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118, ¶ 2 (2007).

41 The access charge rules are set forth in 47 C.F.R. Part 69.

42 47 C.F.R. § 69.5(b)*; In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 ¶ 14 (2004).

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access when they provide interstate transmission for ESPs that lack their own interstate networks."[43]

69 Under the pre-Act rules, enhanced service providers ("ESPs"), including those ISPs whose services are offered over common carrier facilities, are treated as end-users for purposes of applying access charges.[44] The FCC's access charge rules do not distinguish between ESPs and other end users.[45] This treatment of ESPs as end users is commonly referred to as the ESP Exemption. However, "rather than directly exempting ESPs from interstate access charges, the [FCC] defined them as "end users" – no different from a local pizzeria or barber shop."[46]

70 The FCC has, from the inception of the access charge rules at the time of divestiture, had a method of dealing with the access charge treatment of services that enabled an end user to receive a call from a distant exchange in which the calling party called a local number—in essence a toll call that looked like a local call.[47] These services, the principal one of which is known as interstate foreign exchange or "FX" services, are configured by connecting a private line between the FX subscriber and the foreign exchange switching facilities.[48] When an end user in the foreign exchange calls the local telephone number assigned to the FX subscriber, the call traverses the local switch in the foreign exchange (the "open end") and is transported to the local calling area of the FX subscriber (the "closed end"). Under the FCC's rules, the local exchange carrier who provides the switching at the open end is entitled to charge switched access to the carrier who

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[43] Memorandum Opinion and Order on Reconsideration, *In the Matter of Filing and Review of Open Network Architecture Plans*, 5 FCC Rcd 3084 ¶ 44 (1990).

[44] *ISP Remand Order* ¶ 11.

[45] Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 4 FCC Rcd 3983, ¶¶ 39, 42, fn. 92 (Rel. May 9, 1989).

[46] *ACS of Anchorage, Inc. v. Federal Communications Commission*, 290 F.3d 403, 409 (D.C. Cir. 2002).

[47] *General Services Administration v. American Telephone and Telegraph Company*, 6 FCC Rcd 5873 ¶ 6 (1991).

[48] *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd. 7441, 7442, ¶ 2, fn. 3 (1987).

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provides the interstate FX service.[49]

71 VNXX traffic is indistinguishable from interstate FX service for the purpose of determining whether access charges apply. VNXX traffic is interexchange traffic under the pre-Act rules because, as with interstate FX service, the caller and the ISP end user to whom the traffic is delivered are in different LCAs.[50] Under federal law, these calls, like interstate FX services, are subject to access charges.[51] Level 3 and Pac-West are the parties who offer the VNXX interexchange service and thus qualify as interexchange carriers under federal law.[52]

72 Because these rules predate the 1996 Act, they remain in place under Section 251(g) until the FCC takes action to eliminate them. Accordingly, VNXX traffic could not be subject to the statutory reciprocal compensation provisions unless the FCC took affirmative action to eliminate the application of access charges and to impose reciprocal compensation. The FCC has not taken such action with respect to VNXX traffic. Accordingly, under the Section 251(g) principle that pre-existing access rules shall remain in place until they are "explicitly superseded by regulations prescribed by the [FCC]."[53] VNXX traffic, like interstate FX service, continues to be governed by the rules and regulations relating to access charges.

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49 *Id.* ¶ 12.

50 *In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act*, Arb 665, 2007 WL 978413, *3 and footnotes 5-6, 71, 153, 164 (Oregon PUC, March 14, 2007); Decision Denying Application for Rehearing, Reargument or Reconsideration, *In the Matter of Level 3 Communications LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation*, Decision No. C07-0318, 2007 WL 2163000 ¶ 22 (Colo. PUC, April 23, 2007).

51 *In re: Petition of MCIMetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, 2006 S.C. PUC LEXIS 2, 35-43 (S.C. PSC Jan. 11, 2006)("The [South Carolina] Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation, These calls are subject to access charges.").

52 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶19, fn. 80 (2004)("Depending upon the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [Rule 69.5(b)].")

53 47 U.S.C. § 251(g).

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IV. REFUNDS OWED TO QWEST

73 Based on Qwest's analysis of its traffic between itself and Pac-West in Washington for the period from January 1, 2004, through April 2008 (the period in which Qwest has paid terminating compensation on VNXX traffic to Pac-West), the amount owed by Pac-west in refunds (including interest) to Qwest is the total set forth on Confidential Exhibit C of the Brotherson Affidavit. As set forth in the Non-Confidential Affidavit of Larry Brotherson (in particular Exhibits G and H) and the Affidavit of Phil Linse, Qwest has strong reason to believe that Pac-West does not now and probably has never maintained the necessary Internet equipment such as modems and servers in Washington to qualify any of its Washington traffic as non-VNXX traffic. Given that, Qwest is entitled to a refund of all terminating compensation paid to Pac-West for VNXX traffic since January 1, 2004.

74 Based on Qwest's analysis of its traffic between itself and Level 3 in Washington for the period from October 8, 2004, to April 2008 (the period in which Qwest has paid terminating compensation on VNXX ISP traffic to Level 3), the amount owed by Level 3 in refunds (including interest) to Qwest is the total set forth on Confidential Exhibit B of the Brotherson Affidavit.

V. RELIEF REQUESTED

75 Qwest respectfully requests the Commission order the following relief:

A. Rule that Qwest is not obligated to pay Pac-West or Level 3 intercarrier compensation for VNXX ISP traffic, and order a refund for all such compensation paid by Qwest to Pac-West and Level 3.

B. Order that interest be paid on all refunded amounts as specifically required by the ICAs by the parties.

C. Invalidate all Pac-West and Level 3 bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic

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described above;

D. Any and all other relief that the Commission deems appropriate.

DATED this 9th day of February, 2009.

QWEST

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