[Service Date: March 25, 2009]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent. PAC-WEST TELECOMM, INC., Petitioner v. QWEST CORPORATION, Respondent	)	Docket No. UT-053039 **LEVEL 3 COMMUNICATIONS, LLC'S OPPOSITION TO QWEST'S MOTION FOR SUMMARY DETERMINATION** Docket No. UT-053036

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") submits its Opposition to Qwest's Motion for

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

Summary Determination. 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") and on Qwest's counterclaims.

II. SUPPLEMENTAL FACTS

2. On February 25, 2009, the FCC requested comments on Blue Casa Communications, Inc.'s Petition for a declaratory ruling that ISP-bound VNXX traffic is subject to originating access charges because such traffic is carved out of section 251(b)(5) by section 251(g). Initial Comments were filed on March 12, 2009.[2] Reply Comments were filed on March 23, 2009.

III. ARGUMENT

A. Summary of Argument

3. Qwest concedes that the *2008 Order* governs interpretation of the Parties' Agreement.[3] However, Qwest ignores or dismisses the principal conclusions of the *2008 Order*. That Order found that ISP-bound traffic—which the FCC classified as interstate, *inter*exchange traffic—is subject to Section 251(b)(5)[4] and *rejected* claims that Section 251(b)(5) applies only to intraexchange (or "local") voice calls that originate on the network of one LEC and terminate in the same exchange on the network of another LEC.[5]

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[2] *Pleading Cycle Established for Petition of Blue Casa Communications, Inc. for Declaratory Ruling Concerning Intercarrier Compensation for ISP-Bound VNXX Traffic*, FCC DA 09-467 (rel. Feb. 25, 2009).

[3] Qwest Motion for Summary Determination, at ¶ 22 ("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").

[4] *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, at ¶ 6 (Nov. 8, 2008) ("*2008 Order*").

[5] *2008 Order*, at ¶¶ 8-10.

4. Qwest stubbornly maintains that 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."[6] Qwest claims federal law imposes a *geographic* test that requires the ISP customers' modems, point of presence ("POP"), or servers to be physically located within the local calling area in order to qualify for compensation. Qwest is wrong. First, the FCC said section 251(b)(5) applies to *inter*exchange ISP-bound calls. Second, Qwest can cite no FCC or District Court statement that requires the ISP point of presence to be physically located within the local calling area. To the contrary, the FCC cited calls to ISPs "in the same local calling area" as one *example* of the traffic at issue, the District Court gave this Commission discretion to define "within a local calling area" under state law by reference to telephone numbers,[7] and *Peevey* upheld the California Commission's determination that requiring compensation for ISP-bound traffic based on assigned telephone numbers is consistent with federal law.[8]

5. Qwest also stubbornly equates "interexchange" with Section 251(g) compensation, with no exceptions. In the attempt to advance this position, Qwest again simply ignores controlling law to the contrary. The FCC's finding that *inter*exchange ISP-bound traffic is subject to Section 251(b)(5),[9] the *WorldCom* court and the *2008 Order* findings that ISP-bound traffic exchanged between two LECs cannot qualify for Section 251(g) compensation, and the criteria imposed by Section 251(g) and the Agreement's definition of switched access services

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[6] Qwest Motion for Summary Determination, at ¶ 1.

[7] *Qwest Corporation v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, 1177 (W.D. Wash. 2007).

[8] *Verizon California, Inc. v. Peevey et al.*, 462 F.3d 1142, 1149-50, 1155-56 (9th Cir. 2006).

[9] Because locally-dialed ISP-bound traffic is subject to Section 251(b)(5), federal law precludes Qwest's attempt to impose originating transport charges on Level 3 for delivery of Qwest's traffic to the Point of Interconnection. 47 C.F.R. § 703(b).

are all in direct conflict with Qwest's propositions in their Motion for Summary Determination.

6. In a last ditch attempt to shore up its 251(g) argument, and in direct contradiction to its *res judicata* argument that no additional evidence is needed to resolve this case, Qwest for the first time makes an analogy between interstate foreign exchange ("FX") service and Level 3's service. Qwest's interstate FX analogy is wrong as a matter of law because the FCC has exempted CLECs from the Part 69 rules that impose access charges on interstate FX services. Qwest's interstate FX analogy is also wrong as a factual matter because Level 3's service is not "like" interstate FX services provided pre-1996.

7. Even assuming *arguendo* that the FCC defined ISP-bound traffic as traffic terminated to an ISP POP in the same local calling area, Qwest ignores the terms of the Interconnection Agreement that *expand* its compensation obligations beyond "local" ISP-bound traffic and the course of dealing under which Qwest paid Level 3 for all locally-dialed traffic. Locally-dialed ISP-bound traffic is classified as section 251(b)(5) because *WorldCom* and the *2008 Order* hold that ISP-bound traffic exchanged between two LECs cannot qualify for Section 251(g) compensation.[10] Further, Qwest agreed to exchange all Section 251(b)(5) traffic at the interim rates under the mandatory mirroring rule.[11] Moreover, Qwest paid Level 3 for all

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[10] *2008 Order*, ¶¶ 6, 16 ("ISP-bound traffic falls within the scope of section 251(b)(5) traffic"); ¶¶ 7-8 ("section 251(b)(5) is not limited to local traffic"); ¶ 16 ("the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5)").

[11] *Agreement for Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunication Services Provided by Qwest Corporation in the State of Washington with Level 3 Communications, LLC*, at § 7.3.4.3, UT-023042 (app. March 2003) ("2003 Interconnection Agreement"). *See also First Amendment to Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation*, UT-023042 (app. March 2006) ("First Amendment"). Excerpts of the 2003 Interconnection Agreement and First Amendment are attached hereto as **Exhibit 1.** Level 3 notes that Exhibit C to the Smith affidavit does not contain the interconnection agreement posted on the WUTC's website for Qwest and Level 3. Level 3 therefore provides excerpts from the 2003 Interconnection Agreement found at: http://www.wutc.wa.gov/rms2.nsf/vw2005OpenDocket/B5D5D228A5960B2688256CE30003E079, and

locally-dialed ISP-bound traffic for years and did not dispute charges for VNXX traffic until November 2004.[12]

8. As Level 3 showed in its Motion for Summary Determination, federal law is controlling and it does not matter how state law defines a "local" call.[13] Even assuming that it applies, state law that defines the geographic boundaries of exchanges is not relevant to the question of how a call is rated. State law, Qwest's tariffs, industry practice, and the Interconnection Agreements all *rate* calls as local based on whether the called party's *telephone number* is assigned to the same local calling area. Interpreting similar tariff provisions, both the California Commission[14] and the FCC[15] rejected ILEC arguments like Qwest's and found that locally-dialed calls to "VNXX numbers" are subject to terminating compensation at the FCC's rates.

9. Finally, Level 3's claims are not barred by the doctrine of *res judicata*. Even if one assumes that the WUTC were to adopt Qwest's legal theories at this stage of the proceeding, Qwest cannot succeed on a Motion for Summary Determination because material facts necessary to apply Qwest's theory are in dispute. Moreover, Level 3 reserves its right to contest the WUTC's jurisdiction over calls to ISPs with servers, modems or POPs outside of Washington if the WUTC rules for Qwest on summary determination.

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http://www.wutc.wa.gov/rms2.nsf/vw2005OpenDocket/6BAE78F3CF7972558825712A0057482F (the First Amendment to the 2003 Interconnection Agreement).

[12] Affidavit of Larry B. Brotherson In Support of Qwest Corporation's Motion for Summary Determination, Docket No. UT-053039, ¶ 6 ("Brotherson Affidavit").

[13] Level 3 Motion for Summary Determination, Docket No. UT-053039, at ¶¶ 30-31 (Feb. 9, 2009).

[14] *In re Competition for Local Exchange Service Rulemaking Proceeding*, 95-04-043, Interim Order 95-04-044, Decision 99-09-029, California Public Utilities Commission (Sept. 2, 1999), 1999 WL 1127635 (Cal. P.U.C.) at 11-13 (citing, among other things, Pacific Bell's toll tariff definition of "Toll Message" and the provision of "Message Telecommunications Service").

[15] *Starpower Communications, LLC v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278, Memorandum Opinion and Order, ¶ 15 (rel. Nov. 7, 2003) ("*Starpower Damages Order*").

B. Federal Law Does Not Limit Section 251(b)(5) Compensation Obligations to ISPs with a *Physical* Presence in the Local Calling Area

10. Without a single cite to an FCC statement on point,[16] and while ignoring law to the contrary, Qwest repeats its argument that the *ISP Remand Order* is limited to traffic where the ISP is *physically located* in the originating calling area.[17] Qwest's tenuous position rests on one ***introductory*** passage in the *ISP Remand Order*. In that passage, the FCC describes the issue addressed in its vacated 1999 ISP Declaratory Order as "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."[18]

11. Nothing in this statement requires the ISP's POP to be *physically* located in the local calling area. To the contrary, *Peevey* ***upheld*** the California Commission's determination that locally-dialed ISP-bound traffic should be subject to terminating compensation regardless of the physical location of the ISP server or modem.[19] As the Ninth Circuit noted, rating calls based on dialed numbers rather than based on location—treating VNXX ISP-bound calls the same as "local" ISP-bound calls—is "consistent with ... industry-wide practice" and reasonably

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[16] Without a supporting citation, Qwest claims that the *2008 Order* "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." Qwest Motion for Summary Determination, at ¶ 65. The *2008 Order* makes no such determination.

[17] Qwest Motion for Summary Determination, at ¶ 18 ("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"); ¶ 23 ("First, it [*2008 Order*] ruled that the scope of the *ISP Remand Order* is limited *solely to calls placed to an ISP located in the caller's LCA"); ¶* 42 ("an issue clearly resolved by *Qwest* as confined to traffic to an ISP located within the caller's LCA").

[18] Qwest Motion for Summary Determination, at ¶ 66, *quoting*, *ISP Remand Order*, at ¶ 13.

[19] *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").

"recognizes essential differences between the … network architectures of ILECs and CLECs."[20] Therefore, the substantive result of *Peevey* supports Level 3's position on terminating compensation in this case. Likewise, as the *Qwest* court noted, "within a local calling area" can be defined by "the assigned telephone numbers," … "or any other chosen method within the WUTC's discretion."[21] Nowhere in the *ISP Remand Order* or the *2008 Order* does the FCC require the ISP's POP to be *physically* located in the local calling area.

12. Nor does the *2008 Order* use "intraexchange," "local," or any other modifiers to limit the universe of ISP-bound traffic that the FCC held is within the scope of the section 251(b)(5). In both the *ISP Remand Order* and the *2008 Order* the FCC used the broad term "ISP-bound traffic," not the narrower example seized upon by Qwest. Indeed, in the earlier ISP Declaratory Ruling, the FCC described delivery of calls to ISPs in the same local calling area as "one typical arrangement" in the context of ISP-bound traffic.[22] As the D.C. Circuit held, "agency explanations of a provision may naturally tend to focus on its most salient features," but the provisions may reach more broadly than the examples the agency uses.[23] In short, the FCC's description of an easy-to-explain example cannot overcome the plain language of the term "ISP-bound traffic." That term must be understood in the context of the entire Order.

13. The WUTC cannot logically limit the FCC's interim compensation regime for *inter*exchange ISP-bound traffic to calls to ISPs that do not cross exchange boundaries. Nor can

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20 *Id.* at 1155-56.

21 *Qwest,* 484 F.Supp.2d at 1177.

22 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation For ISP-Bound Traffic*, FCC 99-38, 14 FCC Rcd 3689, 3691, ¶¶ 4, 9 (1999) ("*ISP Declaratory Ruling*") (the FCC "has no rule governing inter-carrier compensation for ISP-bound traffic.").

23 *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

the WUTC limit the federal compensation regime to "local" ISP-bound traffic because the FCC rejected the distinction between "local" and "non-local" calls. In the *ISP Remand Order* the FCC stated that "[u]pon further review, we find that [we] erred [in the prior ISP 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 concluded in the *ISP Remand Order* 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 exception."[25] The Ninth Circuit recognized the FCC's shift in position governed the issue in *Pacific Bell* by describing the *ISP Remand Order* as "[a]bandoning the local versus interstate distinction" and concluding "that section 251(b)(5) applie[s] to all telecommunications traffic except for categories specifically enumerated in § 251(g)."[26]

14. The *2008 Order* is clear. It holds: "this [ISP-bound] interstate, interexchange traffic" falls "within the scope of section 251(b)(5);" "section 251(b)(5) is not limited to local traffic;" 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');" "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);" "we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local

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[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, at ¶ 26 (April 18, 2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) ("*ISP Remand Order*").

[25] *ISP Remand Order*, at ¶ 31.

[26] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003).

traffic;" "in the ISP Remand Order, the [FCC] reversed course on the scope of section 251(b)(5), finding that 'the phrase local traffic created unnecessary ambiguities, and we correct that mistake here.'"[27] In sum, the *2008 Order* is clear that (1) "section 251(b)(5) is not limited to local traffic;" (2) all locally-dialed "ISP-bound traffic falls within the scope of section 251(b)(5);" and (3) "ISP-bound traffic does not fall within the section 251(g) carve out from section 251(b)(5) as 'there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.'"[28] Accordingly, because the FCC has not carved out so-called "VNXX" as a subset of "ISP-bound" traffic for different treatment, *all* locally-dialed ISP-bound traffic exchanged between Qwest and Level 3 is subject to the FCC's compensation regime.

C. Under the Parties' Agreement and The Mirroring Rule All Section 251(b)(5) Traffic Must be Exchanged at the FCC's Interim Rates

15. Qwest mischaracterizes the Parties' 2001 and 2003 interconnection agreements to avoid the *2008 Order*'s determination that *inter*exchange ISP-bound traffic is section 251(b)(5) traffic.[29] Qwest argues that:

> 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*.[30]

16. Qwest both mischaracterizes the plain meaning of "ISP-bound traffic" and incorrectly describes the scope of the parties' agreement. Qwest quotes section 7.3.4.3 of the 2003 Agreement which implements the mandatory mirroring rule of the *ISP Remand Order* in its

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[27] *2008 Order*, at ¶¶ 6-9, 15-16.

[28] *2008 Order*, at ¶¶ 15-16 (emphasis in original; *quoting WorldCom*, 288 F.3d at 433).

[29] *2008 Order*, at ¶¶ 6-9, 15-16 ("As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).").

[30] Qwest Motion for Summary Determination, at ¶ 39 (emphasis added).

recital of the facts but manages to gloss over its significance.[31] Under the "mirroring rule" adopted in the *ISP Remand Order* the interim 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" without limitation.[32] Consistent with this mandate, Qwest agreed in section 7.3.4.3 of the Parties' 2003 Agreement to terminate all section 251(b)(5) traffic at the FCC's interim rates applicable to ISP-bound traffic without limitation (*i.e.,* regardless as to whether this traffic was so-called local or interexchange).[33] Qwest's agreement to exchange all section 251(b)(5) traffic at the FCC's interim rates is also clear in the Parties' earlier 2001 Agreement.[34]

17. Qwest was required to agree to exchange all section 251(b)(5) traffic at the FCC's interim rates to take advantage of the caps embodied in FCC's compensation regime.[35] The

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[31] Qwest Motion for Summary Determination, at ¶ 37; Exhibit 1, 2003 Interconnection Agreement, at § 7.3.4.3; Qwest Smith Affidavit, Exhibit C. The 2003 Interconnection Agreement expired on August 7, 2005 but remains in effect until replaced by a successor agreement. Level 3 Motion for Summary Determination, Affidavit of Mack Greene, at ¶ 10 (Aug. 15, 2005) ("Greene Affidavit").

[32] The mirroring rule was established because the FCC viewed it "unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to traffic to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps ... when the traffic balance is reversed." *ISP Remand Order*, at ¶¶ 89-90.

[33] *See, e.g.*, Exhibit 1, 2003 Interconnection Agreement, at §§ 7.3.4.3, 7.3.6.1. *See also* Exhibit 1, First Amendment, at § 2.1.

[34] *Interconnection Agreement between Level 3 and Qwest*, Docket No. UT013026, at Amend. 1, §§ 2, 3.1, 4 (approved Dec. 11, 2002) ("Qwest will adopt the rate-affecting provisions for both ISP bound traffic and (§251(b)(5)) of the Order, as of June 14, 2001.") ("2001 Agreement"). On January 26, 2006, Level 3 filed a petition for arbitration for a new interconnection agreement with Qwest. The WUTC decided several issues in the arbitration but declined to decide the issue of intercarrier compensation for ISP-bound VNXX traffic until resolution of Qwest's complaint in UT-063038. *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934*, Docket No. UT-063006, Order No. 12, at ¶¶ 19 (June 7, 2007) ("*Order 12 2007 Arbitration*"). Accordingly, in 2007 Level 3 and Qwest filed a conforming interconnection agreement that did not resolve that issue. ("2007 Agreement").

[35] *ISP Remand Order*, at ¶¶ 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.").

2008 Order confirms all ISP-bound traffic, including such locally-dialed traffic that utilizes VNXX arrangements, is section 251(b)(5) traffic.[36] Thus, pursuant to the mirroring rule and the Agreement, Qwest must compensate Level 3 at the FCC's interim rates for the exchange of all locally-dialed ISP-bound traffic and may not impose on Level 3 transport charges or any other charges for locally-dialed ISP-bound traffic that originates on Qwest's network.[37]

D. Qwest Cannot Ignore Federal Law On Call Rating which Is Incorporated in the Interconnection Agreement

18. In addition to creating a physical presence requirement where none exists, Qwest ignores the strict limitations of Section 251(g).[38] In *Bell Atlantic*, the D.C. Circuit vacated earlier FCC rules for ignoring these federal definitions (*e.g.*, "telephone exchange service" and "exchange access").[39] The Commission should not make the same mistake the FCC made in its ISP Declaratory Ruling.

19. Qwest mischaracterizes Level 3's position as seeking reciprocal compensation "for *all* minutes of use of ISP ("Internet Service Provider") traffic."[40] Level 3's petition involves compensation for all *locally-dialed* ISP-bound traffic that originates with Qwest's end users on

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[36] *2008 Order*, at ¶¶ 6-9, 15-16.

[37] *See, e.g.*, 47 C.F.R. §§ 703(b), 709. Pac-West does not expressly invoke the FCC's mirroring rule, but makes an argument, based on the text of its agreement with Qwest, state law, and course of dealing, that Qwest agreed to compensate Pac-West at the FCC's interim rates for termination of all section 251(b)(5) traffic which the *2008 Order* makes clear includes all locally-dialed ISP-bound traffic. Pac-West Motion for Summary Determination, Dockets UT-053036, UT-053039, ¶¶ 18-19, 21-22 (2009) ("therefore, the parties have agreed that if VNXX traffic is not 'ISP-bound' as defined by the FCC, that traffic is subject to reciprocal compensation under the ICA.").

[38] 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).

[39] *Bell Atlantic v. FCC*, 206 F.3d 1, 7-9 (D.C. Cir. 2000) ("There is an independent ground requiring remand—the fit of the present rule within the governing statute." The FCC failed to provide a satisfactory explanation why LECs that terminate calls to ISPs are not viewed as providing a telephone exchange service.).

[40] Qwest Motion for Summary Determination, at ¶ 2 (emphasis added).

Qwest's network and is terminated by Level 3 to its ISP customers, not all ISP-bound traffic.[41] The D.C. Circuit's 2002 decision in *WorldCom* held that locally-dialed ISP-bound traffic exchanged between two LECs (not a LEC and an IXC), 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 section 251(g) "grandfathered" only obligations that existed on February 8, 1996.[42] 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).[43]

20. Qwest attempts to shoehorn VNXX traffic into the access charge category by labeling it "interexchange traffic," a term that is not defined in the Act.[44] But the Act does not subject all interexchange traffic to access charges. To the contrary, the FCC clarified in the *2008*

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[41] *Level 3 Communications, LLC's Petition for Enforcement of Interconnection Agreement with Qwest Corporation*, Docket No. UT-053039, at 16 ("Level 3 Petition") ("Level 3 respectfully requests that the Commission issue an Order: (2) Compelling Qwest to pay all past due reciprocal compensation charges for Level 3's transport and termination of Qwest-originated ISP-bound traffic"). Level 3's Petition for enforcement of its agreement sought past due amounts for all of the *locally-dialed* Qwest-originated ISP-bound traffic, without regard to the geographic location of the ISP's facilities. Level 3 has not billed Qwest for traffic that was other than "locally-dialed." Thus, Level 3's petition did not raise the issue of or request compensation relating to calls placed to an ISP using 800 services or 1+ toll dialing that are exchanged with an IXC. That issue is beyond the scope of the petitions and this proceeding. Level 3's use of the term "all" ISP-bound traffic in its Petition refers to *all locally-dialed* traffic without regard to the physical location of the ISP's servers in order to distinguish Level 3's position from Qwest's position that compensation is due only for so-called "local" ISP-bound traffic that terminates at a physical location in the same exchange as Qwest's end user who originates the call. Level 3 Petition, ¶ 24.

[42] *WorldCom*, 288 F.3d 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."). The Initial Order in Docket No. UT-063038 also acknowledges that locally-dialed ISP-bound traffic exchanged over VNXX arrangements "has never been subjected to access charges." Initial Order, Docket No. UT-063038, at ¶ 72.

[43] *2008 Order*, at ¶ 16.

[44] *See, e.g.*, Qwest Motion for Summary Determination, at ¶¶ 66-67 ("Indeed, VNXX ISP traffic is interexchange traffic governed by Section 251(g) of the Act and is not subject to reciprocal compensation").

Order that ISP-bound traffic is interstate, *inter*exchange traffic that falls within the scope of section 251(b)(5) and is subject to the FCC's interim rates, not access charges.[45]

21. Instead of applying the terms of section 251(g) and the Act's definitions to VNXX traffic, Qwest claims that Level 3's statutory argument is a red herring.[46] Qwest is wrong. Section 251(g) preserves access charges for "exchange access" services provided by LECs in a LEC to IXC to LEC routing pattern. Locally-dialed ISP-bound calls, however, do not meet the statutory definition of "exchange access." The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[47]

22. Under the statutory definition, providing "exchange access" is inextricably tied to the offering of "telephone toll service" in which an interexchange carrier charges the calling party for toll service separately from that end user's local service. The Interconnection Agreement also defines "switched access services" as "the offering of transmission and switching services to *Interexchange Carriers* for the purpose of the origination or termination of *telephone toll service*."[48] Section 4.75 provides that terms not defined in the Agreement, such as telephone toll service, are defined as in the federal Act. Thus, the Agreement incorporates call rating requirements that substantially mirror federal law.

23. Federal law does not rate calls based on the physical location of the called party. "Telephone toll service" is defined as "telephone service *between stations* in different exchange areas for which there is made *a separate charge* not included in contracts with subscribers for

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45 *2008 Order*, at ¶ 6.

46 Qwest Motion for Summary Determination, at ¶ 62.

47 47 U.S.C. § 153(16).

48 Exhibit 1, 2003 Interconnection Agreement, § 4.67 (emphasis added).

exchange service."[49] The phrase "telephone service between stations in different exchange areas" encompasses the standard industry practice of rating a call based on NPA-NXX codes.[50] "Stations" is not defined, but it is reasonable to conclude that stations is analogous to telephone numbers, not physical location as Qwest alleges. Indeed, in the *Starpower Damages Order*, the FCC rejected the argument that station means physical location.[51] Therefore, under federal law and consistent with standard industry practice a call between customers whose telephone numbers are associated with the same local calling area is between two stations in the same exchange area, and is not a toll call.[52] Further, Qwest admits that the locally-dialed ISP-bound traffic in dispute does not meet the definition of exchange access traffic preserved by section 251(g).[53]

24. Calls to locally-dialed ISP numbers do not meet the statutory definition of "exchange access" because when the calling party dials a local number to reach his ISP, that calling

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[49] 47 U.S.C. § 153(48) (emphasis added).

[50] The FCC's Wireline Competition Bureau recognized in the *VA Arbitration Order* that it is standard industry practice to "rate calls by comparing the originating and terminating NPA-NXX codes" and rejected "Verizon's language that would rate calls according to their geographic end points." *Petition of WorldCom, Inc. Pursuant to Section 251(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia, Inc.*, CC Docket No. 00-218, DA 02-1731 (July 17, 2002) ("*VA Arbitration Order*"). In Docket No. UT-063038, WUTC Staff concedes that currently "the billing systems only record the originating and terminating telephone numbers" so that there is no viable means to determine the physical location of another company's customer. Docket No. UT-063038, Williamson Exh. No. RW-1T, 9:12-15.

[51] *Starpower Communications, LLC v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278, Memorandum Opinion and Order, ¶ 15 (rel. Nov. 7, 2003) ("*Starpower Damages Order*").

[52] *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 647 (D.C. Cir. 2004) (industry practice among LECs is that calls are rated as local or toll by comparing the phone numbers of the calling and called parties); *Starpower Damages Order*, at ¶ 17 ("industry practice among local exchange carriers ... appears to have been that calls are designated as local or toll by comparing the [phone numbers] of the calling and called parties"); *VA Arbitration Order*, at ¶ 301 ("We agree with the [CLECs] that Verizon has offered no viable alternative to the *current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes.* We therefore accept the [CLEC's] proposed language and reject Verizon's proposed language that would rate calls according to their geographic endpoints. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide.") (emphasis added)).

[53] Qwest Answer, ¶ 40.

party is not billed for making a toll call. Therefore, there is no "*separate charge* not included in contracts with subscribers for exchange service." Level 3's locally-dialed ISP-bound services are not telephone toll services. In the midst of all of the legal debate, Qwest has lost sight of the fact that the advent of commercial Internet services was premised on toll-free "dial-up" through an end user's local phone service. Had toll charges applied to locally-dialed ISP-bound traffic, the remedy of the *ISP Remand Order* never would have been necessary. A primary feature of ISP service is the ability to utilize these services without incurring toll charges and the physical location of the equipment used to provide Internet services has never factored into that service offering.

25. Contrary to Qwest's arguments, the "separate charge" argument is not a red herring[54]—it is a statutory requirement that Qwest itself incorporated into the Interconnection Agreement. The D.C. Circuit has vacated prior FCC rules when it ignored these important federal definitions.[55] Qwest cites the Second Circuit's three-year-old GNAPS II decision in support of its position, but that court noted the issue of "whether ISP-bound calls are subject to access charges" was not before it; rather, the case concerned whether the FCC had preempted the field as to ISP-bound traffic.[56] Thus, the court did not address the scope of section 251(g) and any statements by the court relating to this topic are mere dicta.[57] In GNAPS II, appellant Global NAPs' argument focused on the wrong service (that of the called party) and therefore the court

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54 Qwest Motion for Summary Determination, at ¶ 62.

55 *Bell Atlantic v. FCC*, 206 F.3d 1, 7-9 (D.C. Cir. 2000).

56 *Global Naps, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 97-98, n.6 (2d Cir. 2006) ("*GNAPS II*") ("we conclude that the question of whether ISP-bound traffic is subject to access fees is not before us.").

57 *GNAPS II*, 454 F.3d at 97-98.

misapprehended the real issue.[58] Level 3 is not expanding the geographic scope of Qwest's local calling area by offering VNXX service. Instead, Level 3 provides a competitive alternative to Qwest's VNXX-like (*e.g.* Wholesale Dial, One Flex) and traditional intrastate FX services.[59] In both cases, the party initiating the call is not billed a separate "toll charge" by Qwest, the call is rated as local pursuant to state law, Qwest's tariffs, and the Interconnection Agreement and the call cannot qualify as telephone toll service to which access charges apply under Section 251(g) and the Agreement's definition of switch access service.

26. Ignoring the FCC's and *WorldCom's* holdings that there were no pre-1996 Act rules governing the compensation for locally-dialed ISP-bound traffic, Qwest argues "VNXX ISP traffic, like *all* other calls to a remote customer premises, is interexchange traffic that falls within the pre-1996 Act access charge rules."[60] Qwest does not cite to any cases involving locally-dialed ISP-bound services that access the Internet in support of its argument, let alone a service equivalent to Level 3's Direct Inward Dialing ("DID") service offered to ISP customers. Rather, Qwest makes a tortured analogy to interstate services offered by IXCs a generation ago, such as private line service, CCSA service, and generic interstate FX services.[61] The cases relied upon by Qwest involve specific services provided prior to 1996 jointly by an incumbent LEC under Part 69 of the FCC's rules and an IXC, such as the former AT&T or MCI, that are differ-

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[58] In contrast, the D.C. Circuit vacated the FCC's original ISP order because the FCC failed to determine whether the call to the ISP fell within the statutory definition of exchange access—which relies on the definition of telephone toll service—or telephone exchange service. *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[59] Level 3 Reply Brief, Docket No. UT-063038, at ¶ 81.

[60] Qwest Motion for Summary Determination, at ¶¶ 67, 71-72 (emphasis added).

[61] *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, CC Docket No. 87-530, Notice of Proposed Rulemaking, at ¶ 12, n.3 (1987) ("*1987 NPRM*").

ent from the locally-dialed ISP-bound services at issue.

27. Qwest's new argument fails as a legal matter. The FCC has historically treated CLECs as exempt from these pre-1996 access charge rules on which Qwest relies, and codified that practice by amending the access charge rules so that they apply only to ILECs.[62] Even if one assumes that VNXX shares some similarities with pre-1996 interstate FX services, the FCC has taken affirmative action to supersede such rules under Section 251(g).

28. However, because VNXX is not like interstate FX, Qwest's argument fails as a factual matter. The interstate FX services Qwest cites were provided jointly by one IXC and two ILECs, involve a LEC-IXC-LEC routing pattern not used for locally-dialed ISP-bound services, and are terminated to a fixed "closed end" location rather than the Internet. The locally-dialed ISP-bound services provided by Level 3 share none of these principal characteristics. In the mid-1980s RBOCs were banned from providing interLATA services, so the physical arrangement of the interstate FX and other services cited by Qwest involved a LEC providing facilities on each end of the call, with an IXC's facilities in the middle linking the two LECs (*i.e.*, a LEC-IXC-LEC routing pattern). In sharp contrast, no IXC is involved at all in Level 3's locally-dialed ISP-bound services which follow a LEC to LEC routing pattern. Further, these services are materially different from the local switched services offered by Level 3 which are provisioned by a

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[62] *Access Charge Reform*, CC Docket No. 92-262, First Report and Order, FCC 97-158, Appendix C (released May 16, 1997), *amending* 47 CFR § 69.2(hh) ("Telephone company or Local exchange carrier as used in this part means an incumbent local exchange carrier as defined in section 251(h)(1)"); *See, e.g., Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (exempting CLECs from mandatory tariffing for the provision of interstate exchange access services); *In the Matter of Access Charge Reform,* Seventh Report and Order, CC Docket No. 96-262, 16 FCC Rcd 9923, ¶¶ 8, 12-13, 15, 21 (April 27, 2001) ("*Seventh Access Charge Order*") (In the *Access Charge Reform Order*, the [FCC] declined to adopt regulations governing CLEC terminating access charges, or to address the issue of CLEC originating access charges.").

LEC, not an IXC, do not utilize a dedicated private line, and terminate via the Internet to web-sites and servers located all over the world rather than to a fixed point.[63]

29. The services Qwest cites were provided pursuant to federal tariff by IXCs that were prohibited from offering local services in competition with the ILEC. For example, Qwest analogizes VNXX to services such as FX private line voice-grade services provided in the 1980s and early 1990s pursuant to federal interstate tariffs by the (then) dominant IXC—AT&T.[64] FX service was provided by the IXC to the end user on the condition that the FX services be terminated at one end, the "open end", at a fixed "telephone company local exchange switching center" through a local exchange service *which was not provided by the IXC.* Thus, the end user typically received two separate bills, one for the dedicated private-line FX service provided by the IXC and the other for the associated local exchange service provided by a RBOC.[65] Under the NPRMs and some of the cases cited by Qwest, the RBOC was entitled to impose switched

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[63] *Bell Atlantic*, 206 F.3d at 332 ("In a single Internet session an end user may communicate with multiple destination points, either sequentially or simultaneously."). *See also Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22419 ("[Vonage's service] harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet's inherently global and open architecture obviates the need for any correlation between [Vonage's service] and its end users' geographic locations.") *See also American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("Internet protocols were designed to ignore rather than document geographic location.").

[64] Pursuant to Tariff 260, AT&T offered ten types of Series 2000 dedicated voice-grade private line services including foreign exchange ("FX") service (Type 2006) and point-to-point voice-grade service (Type 2001). *General Services Administration v. AT&T and the associated Bell System Companies*, 6 FCC Rcd. 5873, File No. E-81-36, Memorandum Opinion and Order, at ¶¶ 2, 5, (1991) ("*GSA Order*").

[65] *GSA Order*, at ¶¶ 6, 17. In some instances the IXC acted as an agent for the customer and ordered the local services on its behalf from the LEC. However, the IXC did "not offer the use of exchange facilities as part of its FX services." *Id.* at 6.

access charges under FCC Part 69 rules.[66]

30. As the WUTC found in Level 3 Order No. 3, Level 3 provides a tariffed local exchange service called Direct Inward Dialing ("DID") to ISP customers in Washington.[67] This service allows ISPs to obtain numbers associated with certain local calling areas and, in that particular respect, is similar to the local exchange service provided by the RBOC in the FX configuration discussed above. However, the "channels [provided by the IXC] connect directly to the local exchange switch[,]"[68] were offered by an IXC, and used a dedicated line.[69] In contrast, Level 3 provides switched, not dedicated, services to the ISP that terminate to an ISP's server, modems, website or other facilities located throughout the world as determined by the ISP customer—a choice not dictated by Level 3. Moreover, the NPRMs and cases cited by Qwest focused on technological developments and services offered in the private network market and not the market for ISP-bound services.[70] Thus, these cases are inapposite.

31. As a matter of law, Qwest ignores three other important distinctions between the cited services and Level 3's. First, many of the supposedly analogous services used to terminate interstate interexchange traffic, such as so-called "leaky" PBX services, some Centrex, and other services were from their inception exempt from the interstate, usage-based switched access

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66 *See, e.g., 1987 NPRM*, at ¶¶ 12, n.3.

67 *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order No. 3, at ¶¶ 9, 61 (Aug. 26, 2005) ("*Level 3 Order No. 3*").

68 *GSA Order*, at ¶ 17, n.14.

69 Qwest Motion for Summary Determination, at ¶ 70 (interstate FX services "are configured by connecting a private line between the FX subscriber and the foreign exchange switching facilities."); *1987 NPRM*, at ¶ 12, n.3.

70 *See, e.g., 1987 NPRM*, at ¶ 6, 15, 19, 44-45, 48.

charges.[71] The FCC has always dealt with similar interstate services on a case-by-case basis as technology and competitive markets developed.[72] Among other reasons, some PBX and Centrex services were not subject to usage-based switched access charges because of difficulties in measuring usage, which is likewise an intractable problem for the locally-dialed ISP-bound services at issue in the present dispute.[73] Instead, the FCC developed special surcharges to apply to those services in lieu of switched access charges.[74]

32. Second, the FCC has treated FX service as falling outside the category of exchange access for the purposes of its separations rules. These rules provide that "interstate FX" and CCSA revenues are to be attributed to the interstate "basic local service revenue" account.[75]

33. Third, Qwest's argument fails because it is not enough to say that the locally-

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[71] *1987 NPRM*, at ¶¶ 2, 48, 64 ("Because these calls patched from an interstate private line through a PBX and into the local exchange appeared to the LEC as local calls, the LEC was unable to identify the interstate calls for the purposes of applying access charges."); ¶ 48 ("conventional Centrex and PBX switches continue to serve different functions that do not compete directly with CCSA" … and this "may continue to justify" not imposing switched access charges.); ¶ 65 ("Additional enforcement and efficiency problems may arise *if we apply* the switched access charges to PBX-ETS, and because of measurement difficulties, we conclude that we should continue to exempt conventional PBX from switched access charges.").

[72] *See, e.g., 1987 NPRM*, at ¶ 6, 15, 19, 44-45, 48. In fact, in the *1987 NPRM* cited by Qwest, the FCC solicited information on the "changed circumstances relating to the technical and competitive characteristics of the private network switching services and their use of local, public, switched networks" in order to assess its access charge rules regarding CCSA, Centrex, PBX and other services. The FCC recognized that it may continue to be "infeasible" to impose switched access charges on some of these services. Id. at 49-50.

[73] *Mountain Communications*, 355 F.3d 647 (industry practice among LECs is that calls are rated as local or toll by comparing the phone numbers of the calling and called parties); *Starpower Damages Order*, at ¶ 17 ("industry practice among local exchange carriers … appears to have been that calls are designated as local or toll by comparing the [phone numbers] of the calling and called parties"); *VA Arbitration Order*, at ¶ 301 ("We agree with the [CLECs] that Verizon has offered no viable alternative to the *current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes.*" (emphasis added)). *See, e.g., 1987 NPRM*, at ¶¶ 44, 50, 64 (The FCC recognized "that it continues to be infeasible, because of costs and other difficulties, to require usage measurements and switched access charges for some or all private lines interconnected with exchange access facilities.").

[74] *See 1987 NPRM*, at ¶¶ 17, 19; 47 C.F.R. §§ 69.5 & 69.115.

[75] 47 C.F.R. § 36.212(B).

dialed ISP-bound services in dispute are analogous to an IXC's interstate FX services. Under *WorldCom,* there must have been pre-Act rules requiring compensation between two competing local exchange carriers and the orders Qwest cites require access compensation from one IXC to one RBOC, not between two LECs. Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the FCC to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5).[76] In other words, the "access" traffic described in Section 251(g) is limited to traffic exchange obligations that existed as of February 8, 1996. As *WorldCom* clearly held and the *2008 Order* confirms, there were no federal rules governing the locally-dialed ISP-bound services at issue in the present dispute that could be preserved by section 251(g).[77] Qwest did not appeal this determination, U.S. Courts of Appeals have sole authority to review FCC determinations, and Qwest may not collaterally attack that determination here.[78] Thus, locally-dialed ISP-bound traffic is not subject to access charges.

34. Further, the D.C. Circuit underscored that Section 251(g) only governs service provided to interexchange carriers and information service providers, not services LECs provide to other LECs. The Court held that "LEC's services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[79] The interstate FX services in the cases relied upon by Qwest involved services provided by one LEC to one IXCs. In sharp contrast, the present

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[76] *WorldCom*. . , 288 F.3d at 432-434. . .

[77] *2008 Order*, at ¶¶ 15-16; *WorldCom*, 288 F.3d at 433 ("there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic"); *ISP Declaratory Ruling*, FCC 99-38, 14 FCC Rcd 3689, 3691, ¶¶ 4, 9 (the FCC "has no rule governing inter-carrier compensation for ISP-bound traffic.").

[78] *See 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).

[79] *WorldCom*, 288 F.3d at 434-35.

dispute involves the exchange of traffic between two LECs. Because there were no pre-Act rules governing the exchange of traffic between two competing LECs in the situation posed by the Petition, there is no intercarrier compensation mechanism preserved by Section 251(g). Thus, Qwest's analogy is inapposite and does not support the finding that the locally-dialed ISP-bound traffic at issue in this case falls within section 251(g).

35. Finally, Congress enacted section 251(b)(5) to preserve, on a temporary basis, the pre-1996 Act regulatory environment of certain traffic until such time that the Commission could bring that traffic within the scope of the 1996 Act's reciprocal compensation provisions. Congress did so only grudgingly—in general, the Act sought to *eliminate* implicit subsidies such as access charges. But Congress recognized that where such subsidies already existed, the FCC would need some time to adjust the regulatory regime. It would be entirely contrary to Congress' intent, however, to add *new* forms of traffic—traffic that could not have existed, involving entities that did not exist (*i.e.*, CLECs)—to this category of traffic governed by the pre-1996 Act rules.[80]

E. Washington Rules Do Not Define a Local Calling Area, and Qwest's Tariffs Do Not Rate Local Calls, Based on the Location of a Customer's Servers or Modems

36. As Level 3 showed in its Motion for Summary Determination, the *2008 Order* establishes that federal law is controlling and that how state law defines a "local" call is not germane to the issues of reciprocal compensation for locally-dialed ISP-bound traffic.[81] The WUTC got it right in the *Level 3/CenturyTel Arbitration* and other decisions concluding that the "substance of the [FCC] decisions make no distinction based on the location of the ISP modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treat-

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[80] *2008 Order*, ¶¶ 6-9, 15-16; *WorldCom*, 288 F.3d 432-34.

[81] *See, e.g.*, Level 3 Motion for Summary Determination, at ¶¶ 31, 44-45.

ment of ISP-bound traffic."[82] Nevertheless, Level 3 will address Qwest's state law arguments to demonstrate why the WUTC must reject them.

37. Qwest's interpretation of Washington state law is incorrect because it ignores rules that *define a local calling area* and determine how calls are rated. The Court asked the WUTC to decide whether calls are within or outside a "local calling area," not whether calls are within or outside an "exchange."[83] When Qwest argues that "Washington authority mandates that VNXX calls be rated as non-local, interexchange calls" based upon the physical location of the called ISP's modems and servers,[84] it misses the point. Although Qwest's tariffs arguably define local exchanges based on geography, state law does not. Further, neither state law nor Qwest's tariffs *rate calls* based on geographic location. State law, Qwest's tariffs, and the Interconnection Agreement rate calls based a comparison of the calling and called numbers and on the charge (local or toll) assessed on the calling party.

38. The relevant WUTC rule defines local calling area and makes no reference to a customer's physical location or the location of its servers or modems. WAC 480-120-021 provides "'[l]ocal calling area' means one or more rate centers within which a customer can

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82 *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, at ¶¶ 1, 7-10, 35 (February 28, 2003) ("*Level 3/CenturyTel Arbitration*"). *See, e.g.,* Pac-West Telecomm, Inc. v. Qwest, Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition, at 13 n. 37, 14 (Aug. 23, 2005) ("ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements"); *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order No. 05, ¶¶ 4, 25-29, n.7, 39-40, 58, 70, and 80 (Feb. 10, 2006) (the WUTC "interpret[ed] the *ISP Remand Order* to apply to all [locally-dialed] ISP-bound traffic, regardless of the point of origination and termination of the traffic"); *Pac-West v. Qwest Corporation,* Docket No. UT-053036, Order 05, ¶¶ 30, n.1, 42-43 (Feb. 10, 2006).

83 *Qwest,* 484 F.Supp.2d at 1177.

84 *See, e.g.,* Qwest Motion for Summary Determination, at ¶¶ 44, 47.

place calls without incurring long-distance (toll) charges."[85] Washington law defines a "local calling area" based on the area in which "a customer can place [i.e., originate] calls" without incurring toll charges. There is not requirement based on the location of the terminating facilities. Qwest ignores this state law definition of local calling area that the Court asked the WUTC to review.

39. Qwest likewise cites definitions of geographic exchanges and ignores the relevant call rating provisions of its tariff. Qwest's tariff provides that: "Local calling refers to calls *placed to telephone numbers* where *message toll charges do not apply*.[86]" The Qwest tariff rates calls as local based upon telephone numbers and whether or not the calling party is charged a toll charge for placing the call, not the location of the terminating facilities.[87]

40. Because Qwest cannot rebut the application of its call rating rules, Qwest ignores them and instead argues that "exchange" is defined as a geographic area established by a company for telecommunications service within that area.[88] However, the geographic-based definition of an "exchange" is irrelevant to the WUTC's rules and call rating provisions in Qwest's tariff. Qwest also argues that its tariff defines "local services" as "[e]xchange access service furnished between customer premises located within the same local service area."[89] While it is true that an exchange is a "geographic" area,[90] the definition of a "local calling area" within

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85 WAC 480-120-021 (emphasis added).

86 Qwest's Exchange and Network Services Tariff, § 5.1.A.2 (emphasis supplied).

87 "Local service area" is "[t]he area within which exchange access service is furnished under specific rates. The area may include one or more exchanges without the application of toll charges." Qwest's Exchange and Network Services Tariff, § 2.1 (emphasis supplied).

88 WAC 480-120-021; Qwest Motion for Summary Determination, at ¶ 45.

89 Qwest Motion for Summary Determination, at ¶ 48.

90 WAC 480-120-021.

which local calls can be placed is devoid of any geographical underpinnings.[91] Even Qwest's tariff provides that a "local calling area" can consist of multiple exchanges, with no requirement that they be contiguous.[92] By definition, a call between noncontiguous exchanges would cross the geographic boundaries of the local service area, but Qwest cannot possibly contend that this "interexchange" call is not rated as "local." Consequently, locally-dialed ISP bound traffic is, by the terms of the WUTC's rules, Qwest's tariffs, and the Agreement, not toll. Therefore, all locally-dialed ISP-bound traffic is subject to Section 251(b)(5) reciprocal compensation.

41. Contrary to Qwest's argument,[93] the Interconnection Agreement incorporates the concept of a "local calling area" in the definition of Exchange Service or EAS/Local Traffic, *not* the geographic definition of an exchange.[94] Thus, the Interconnection Agreement also rates calls based on whether the calling party is assessed a toll charge. Because the calling party is not assessed a toll charge for locally dialed calls to his ISP, nor could it be under the requirements of the Act, the Interconnection Agreement dictates that such calls be compensated at the FCC ordered rate.[95]

42. The Commission's Order No. 10 in Docket No. UT-063038 provides, at Appendix B, a list of other state VNXX decisions with a brief description of each. Under "California" the Commission cites a 1999 California Public Utilities Commission decision for the proposition that "[f]or routing purposes, VNXX is considered interexchange, but is rated as local traffic,

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[91] "Local calling area" means one or more rates centers *within which* a customer can place calls without incurring long distance (toll) charges." WAC 480-120-021 (emphasis supplied).

[92] "Local service area" is "[t]he area within which exchange access service is furnished under specific rates. The area may include *one or more exchanges* without the application of toll charges." Qwest's Exchange and Network Services Tariff, § 2.1 (emphasis supplied).

[93] Qwest Motion for Summary Determination, at ¶ 52.

[94] Exhibit 1, 2003 Interconnection Agreement, at §4.24.

[95] Exhibit 1, 2003 Interconnection Agreement, at §7.3.4.3.

subject to state determined reciprocal compensation... ."[96] Likewise, under "Virginia" the Commission cited the *Starpower Damages Order*, and provided the following summary: "NPA/NXX of originating and terminating callers determines rating of call, *based on tariff's silence on whether customer's location depends on physical presence or number assignment.*"[97] However, a side-by-side comparison of the Qwest Washington Exchange and Network Services Tariff's terms and conditions with those tariff terms at issue in the California[98] and Virginia[99] decisions (which were reviewed and cited by the California Public Utility Commission and the FCC respectively), shows none of the three rely on geography for purposes of call rating. Like the applicable California and Virginia tariffs, the Qwest tariff definition of "local service area," description of "local calling," and definition of "toll service" do not rely on geographic end-points, but rather *on whether toll charges or rates are applied to the call.* For the Commission's convenience, a side-by-side comparison of the applicable AT&T California, Verizon Virginia, and Qwest Washington tariff terms is attached hereto as **Exhibit 2.**[100]

F. FCC Rules Bar Qwest from Charging Level 3 for Originating Transport to the POI

43. In the *2008 Order* the FCC reiterated that one-way, interexchange ISP-bound traffic is subject to section 251(b)(5) notwithstanding Verizon's argument that one-way traffic

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[96] Docket No. UT-063038, Order No. 10, at Appendix B, p.1 (citing *Re Competition for Local Exchange Service Rulemaking.* Proceeding 95-04-043, Interim Order 95-04-044, Decision 99-09-029, California Public Utilities Commission (Sept. 2, 1999)).

[97] Docket No. UT-063038, Order No. 10, at Appendix B, p.3 (emphasis added) (citing *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, 18 FCCR 23,625 (2003)).

[98] The tariff at issue in California was the AT&T/Pacific Bell (CA) Network and Exchange Services Tariff.

[99] The tariff at issue in the Virginia decision was the Verizon South (VA) General Customer Services Tariff.

[100] Copies of the applicable tariff sheets are also provided in **Exhibit 2.**

cannot be reciprocal.[101] Qwest ignores that finding and again complains that CLEC "customer's 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."[102] Under well established FCC rules and decisions, CLECs are permitted to have a single POI in each ILEC local access and transit area ("LATA") for the exchange of section 251(b)(5) traffic, which includes locally-dialed ISP-bound traffic.[103] It is Qwest's responsibility to bring traffic originated by its end users to the POI in the LATA and bear its costs on its side of the POI. The CLEC bears the costs on its side of the POI.[104]

44. FCC rules provide that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[105] Consistent with the FCC's rules, the WUTC has determined in Level 3's arbitration with Qwest that the FCC rule "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

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101 *2008 Order*, at ¶ 13 & n.49.

102 Qwest Motion for Summary Determination, n.17.

103 *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corporation*, Docket No. UT-023042, Fourth Supplemental Order, at ¶¶ 34-35 (Feb. 5, 2003) ("Fourth Supplemental Order in UT-023042"); *see, e.g.,* Application of SBC Communications, Inc. Pursuant to Section 271 to Provide In-Region, InterLATA Services in Texas, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390 ¶ 78 (2000); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*").

104 Fourth Supplemental Order in UT-023042, at ¶¶ 33-39; *VA Arbitration Order* at ¶¶ 51-53, 67.

105 47 C.F.R. § 51.703(b); *see, e.g., Southwestern Bell Tel. Co. v. Texas PUC*, 348 F.3d 482, 487 (5th Cir. 2003); *MCImetro Access Transmission Services, Inc. v. BellSouth*, 352 F.3d 872, 881 (4th Cir. 2003) ("Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15,499, at ¶ 1042 (1996).

for the interconnection facilities. Rather, the cost is the originating carrier's responsibility."[106] Because all locally-dialed ISP-bound traffic is Section 251(b)(5) traffic, it is subject to these FCC rules that prohibit Qwest from charging originating transport.[107]

45. Ignoring the FCC's *2008 Order*, Qwest alleges that a significant amount of Level 3's traffic is one-way and implies that fact alone justifies no terminating compensation.[108] The volume and one-way nature of the traffic are the very considerations that lead the FCC to adopt the terminating compensation rules Level 3 seeks to enforce in the first instance and they in no way change the applicability of the FCC's well-established interconnection rules.[109] In *TSR Wireless,* the FCC found that ILECs must absorb the costs of delivering their customers' traffic to the POI between the ILEC network and the network serving the "exclusively one-way" paging companies.[110] The FCC found that "the cost of the facilities used to deliver this traffic is the originating carrier's responsibility" and the originating carrier "recovers the costs of these facilities through the rates it charges its own customers for making calls."[111] Further, the FCC clarified beyond doubt the relationship between Rules 51.703(b) and 51.709(b): "Section 51.709(b) applies the general principle of section 51.703(b) … to the specific case of dedicated

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106 47 C.F.R. § 51.709(b); Fourth Supplemental Order in UT-023042, at ¶¶ 33-39 (Feb. 5, 2003).

107 Fourth Supplemental Order in UT-023042, at ¶¶ 28, 37.; *VA Arbitration Order*, at ¶¶ 51-53, 67; *Intercarrier Compensation NPRM*, at ¶ 72, 112.

108 Qwest Motion for Summary Disposition, at ¶ 53.

109 *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, at ¶¶ 7, 18, 25-26, 31 34 (rel. Jun. 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001).

110 *TSR Wireless*, at ¶ 7.

111 *TSR Wireless*, at ¶ 34.

facilities."[112] Thus, "the *[Local Competition] Order* requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver *traffic that it originates*."[113] In sum, *TSR Wireless* addressed the application of FCC Rule 51.709(b) for two-way dedicated facilities used to carry one-way locally dialed interstate traffic and found the originating carrier was responsible for the costs of the dedicated facilities.

46. In *Mountain Communications*, the FCC reversed an earlier order ("Initial Order")[114] and re-affirmed on remand from the D.C. Circuit that pursuant to rules 51.703(b) and 51.709, ILECs are prohibited from imposing charges on an interconnecting carrier for delivering traffic originating on their networks to the POI.[115] Mountain brought a complaint before the FCC alleging that Qwest violated rules 51.703 and 51.709 by imposing charges on one-way paging traffic that originated on Qwest's network. In its Initial Order the FCC found for Qwest.[116] However, upon appeal the D.C. Circuit vacated and remanded and concluded that the FCC departed in the initial order, without explanation, from *TRS Wireless* in which the "facts seem—and are conceded to be—identical, but the results are the opposite, and came into "direct conflict" with rule 51.703(b)."[117] On remand, the FCC granted Mountain's Complaint and found that Qwest's imposition of charges for transporting to Mountain Qwest-originated one-way

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112 *TSR Wireless*, at ¶ 26.

113 *TSR Wireless*, at ¶ 25 (emphasis added).

114 *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, (Feb. 4, 2002) ("*Initial Mountain Order*"), *vacated by Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 646-47 (D.C. Cir. 2004).

115 *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, (Oct. 6, 2006) ("*Mountain Communications*").

116 *Initial Mountain Order*, at ¶ 1, 13,

117 *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 646-47 (D.C. Cir. 2004) ("we are befuddled at the Commission's efforts to explain away its *TSR* decision").

paging traffic violated rules 51.703(b) and 51.709(b).[118]

47. Moreover, the Court of Appeals for the Ninth Circuit in *Cook* rejected ILEC arguments that paging companies were not entitled to reciprocal compensation because, among other items, the traffic and the corresponding compensation flows were only one way and "inherently not reciprocal" in violation of sections 251(b)(5) and 252(d)(2).[119] The Court rejected the ILEC's arguments and agreed with the paging company that the term "reciprocal" in section 251(b)(5) means that "no interconnection agreement may provide for an uncompensated flow of traffic from an originator to a terminator."[120] Further, it held that the "Act forbids originating carriers from refusing to pay compensation for terminating carriers."[121]

48. Qwest has repeatedly argued that locally-dialed ISP-bound traffic should not be subject to terminating compensation because of the volume and one-way nature of the traffic.[122] The FCC long ago addressed such concerns by lowering the terminating compensation rate for such traffic below the rate for other Section 251(b)(5) traffic.[123] Then, more recently in the *2008 Order* it again rejected these same basic arguments in clarifying that section 251(b)(5) is the legal basis for the remedy established in the *ISP Remand Order*. Recognizing that the cost of terminating a call does not vary based on the type of customer, the FCC adopted the mirroring

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118 *Mountain Communications*, at ¶ 6.

119 *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1243-44 (9th Cir. 1999) ("*Cook*").

120 *Cook*, 197 F.3d at 1244.

121 *Cook*, 197 F.3d at 1245 ("we read 47 C.F.R. § 51.701(e) as meaning that, *when* traffic originates with one carrier and terminates with another, the terminating carrier must receive compensation") (emphasis in original); 47 C.F.R. § 51.701(e).

122 Qwest Motion for Summary Determination, at ¶ 53.

123 *ISP Remand Order*, at ¶¶ 78, 89.

rule so that Qwest was required to exchange all traffic at this lower rate.[124] Further, the FCC determined in the *Core Forbearance Order* that "arbitrage concerns have decreased" with respect to ISP-bound traffic and "are now outweighed by the public interest in creating a uniform compensation regime."[125] Qwest's concerns have already been addressed. Qwest cannot be permitted to gain further relief by imposing inappropriate origination charges on Level 3 that are inconsistent with FCC rules. Based upon this precedent, the only conclusion the WUTC can reach in this proceeding, which will also drive the resolution of this open issue from the arbitration between Level 3 and Qwest in Docket No. UT-063006, is that locally-dialed ISP-bound traffic originating on Qwest's network must be considered in relative use calculations because carriers are prohibited from imposing originating charges for such traffic under FCC rules 51.703(b) and 51.709 as interpreted above.[126]

G. The Doctrine of *Res Judicata* Does Not Apply

49. Qwest argues that the WUTC's conclusions in Docket No. UT-063038 have a *res judicata* effect in this case.[127] But the Ninth Circuit recognizes that the doctrine of *res judicata* is "not to be applied to administrative decisions with the same rigidity as their judicial counter-

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[124] *ISP Remand Order*, at ¶¶ 79-80.

[125] 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." *Core Forbearance Order*, at ¶¶ 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.").

[126] In the most recent arbitration between Level 3 and Qwest in Docket No. UT-063006 the WUTC determined to "refrain from deciding the issue of how to apply the relative use factor until the Commission resolves the pending complaint in UT-063038 and enters a remand order in Dockets UT-053036 and UT-053039." *Order 12 2007 Arbitration*, at ¶¶ 1, 22.

[127] Qwest Motion for Summary Determination, at ¶¶ 63-64.

part."[128] Moreover, because a reviewing federal court applies the law in effect at the time it reviews a state commission decision and the WUTC did not consider the *2008 Order* in Docket No. UT-063038, it must reevaluate its findings in light of that Order.

50. Citing *Rains v. State*, Qwest points out that in Washington, the doctrine of *res judicata* bars claims actually resolved by prior proceedings and related claims that should have been resolved in the prior proceeding, whether or not pursued, when there is identity of "(1) subject matter; (2) cause of action; (3) persons and parties' and (4) the quality of persons for or against whom the claim is made."[129] Qwest does not, however, cite to the portion of the *Rains* decision that establishes the criteria courts in Washington, and indeed the WUTC, use to determine whether two causes of action are the same. The additional four criteria applied by the WUTC and Washington courts include: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transaction nucleus of facts."[130]

51. Here, the two causes of action are not the same. First, the cases do not involve the "same nucleus of facts" or "substantially the same evidence" as alleged by Qwest. In fact, the WUTC declined to consolidate the proceedings because it recognized that "[c]onsolidation would require us to reopen the record to provide an opportunity to present additional evidence, a

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[128] *U.S. v. Lasky* 600 F.2d 765, 768 (9th Cir. 1979) *citing American Heritage Life Insurance Co. v. Heritage Life Insurance Co.,* 494 F.2d 3, 10 (5th Cir. 1974).

[129] *Rains v. State*, 100 Wn. 2d 600, 663, 674 P. 2d 168 (1983).

[130] Docket No. UT-980860, Order No. 9, *citing Rains,* 100 Wn. 2d at 664.

hearing on this evidence, and additional briefing."[131] As the WUTC acknowledged in that case, the interpretation of Level 3's and PacWest's interconnection agreements was not before the WUTC in the UT-063038.[132] Further, the relevant facts are not the same because prior to its Final Order in UT-063038, the WUTC had never considered the location of the ISP's servers or modems relevant to compensation for the exchange of locally-dialed ISP-bound traffic and Level 3 was denied an opportunity to submit evidence showing that many ISP servers and modems are located outside the state of Washington.[133] Rather, without any evidentiary basis, the Commission reached its conclusions about VNXX in Washington based upon an assumption that ISPs' servers and modems that were located outside the local calling area would be *within* the State of Washington.[134] In addition, Level 3 appealed the WUTC's Final Order before the Superior Court and the federal district court.

52. Moreover, at the time UT-063038 was decided the FCC had not released its *2008 Order* that provides the legal justification for the ISP Remand Order and substantially clarifies that Order. The WUTC and the federal district courts and Ninth Circuit, if appealed, review interconnection agreements for compliance with federal law in existence at the time of their

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131 Docket No. UT-063038, Order No. 09, at ¶¶ 18-19, 22.

132 Docket No. UT-063038, Order No. 10, at ¶¶139 ("we cannot resolve how our decision here ought to apply to Pac-West's and Level 3's existing interconnection agreements with Qwest"), 290 (same), 351 (same).

133 In finding that the doctrine of *res judicata* was applicable in *Rains*, the Court found it significant that, *inter alia*, the "evidence necessary in both cases is identical." *Rains*, 100 Wn. 2d at 664.. The evidence required in the instant case regarding the location of the ISP customer's modems or services (should the WUTC adopt Qwest's position to necessitate such an inquiry) was not even available, yet alone in the record, at the time of the Final Order in Docket No. UT-063038.

134 Docket No. UT-063038, Order No. 10, at ¶¶ 133, 203, 330, 332, 340 (VNXX traffic is "intrastate interexchange traffic").

review.[135] In *Jennings*, 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.[136] 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.[137] 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."[138] The *Jennings* court then held that all valid implementing regulations in effect at the time the court reviews state regulatory commission decisions, including regulations and rules that took effect after the state regulatory commission rendered its decision, are applicable to its review of interconnection agreements.[139] Therefore, "if any ruling or directive in the *FCC Remand Order* or other regulations issued by the FCC after the [state commission] issued its decision rendered the [state commission's] decision violative of the Act, [the court] would apply the new regulations and invalidate the [state commission's] orders."[140] Because the *2008 Order*

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135 *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.").

136 *Jennings*, 304 F.3d at 956-57.

137 *Id.* at 956.

138 *Id.*

139 *See Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003).

140 *Pacific Bell*, 325 F.3d at 1130.

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*. The *2008 Order* provides that ISP-bound traffic, although *inter*exchange, is section 251(b)(5) traffic and the "local" versus "interexchange" distinction that Qwest relies upon is defunct.

H. The WUTC Orders Provide That Use of VNXX Is Not Unreasonable

53. Qwest reiterates its arguments that the use of VNXX by Level 3 and PacWest constitutes an unjust and unreasonable practice and violates various state statutes including, but not limited to RCW 80.36.080, 80.36.140, 80.36.160, and 80.36.170.[141] Qwest also argues that the use of VNXX arrangements violates the WUTC's orders on toll-bridging.[142] Qwest raised these identical issues as counterclaims in the present docket. The WUTC dismissed Qwest's counterclaims[143] and suggested Qwest could pursue these issues in a separate docket, which it did—Docket No. UT-063038.[144] Moreover, the WUTC rejected these identical arguments in Docket No. UT-063038 concluding that VNXX arrangements are permissible under state law, are not per se illegal, and do not constitute toll bridging.[145] Qwest did not appeal that decision or the Final Order in Docket No. UT-063038 and both are *res judicata* as to Qwest's counterclaims

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141 Qwest Motion for Summary Determination, n.17.

142 Qwest Motion for Summary Determination, n.30.

143 *Pac-West v. Qwest Corporation,* Docket No. UT-053036, Order 05, at ¶ 43 (Feb. 10, 2006); *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order 05, at ¶ 40 (Feb. 10, 2006).

144 *Qwest Corporation v. Level 3 Communications, et al.*, Complaint of Qwest for an Order Prohibiting VNXX, Docket UT-063038, ¶¶ 21-40 (May 22, 2006).

145 *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order 05, Initial Order; *IMO MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corp. for Approval of Negotiated Agreement Under the Telecommunications Act of 1996,* Docket No. UT-063055, Order 02, Initial Order (Oct. 5, 2007) at ¶ 55.

and similar claims in UT-063038. Thus, these issues are not before the WUTC in present docket and should once again be summarily dismissed.

I. Qwest's Affidavits Are Not Relevant at this Summary Determination Stage on Legal Issues

54. During the status conference, the parties agreed to file Motions for Summary Determination on the legal issues in dispute. The parties agreed that "in the event there were factual issues that the Commission found needed to be addressed, then those could proceed to an evidentiary hearing."[146] Thus, it was not contemplated that any factual matters would be raised in the Motions for Summary Determination. Notwithstanding this procedural agreement, Qwest has raised numerous factual issues including its view of the percentage of traffic exchanged with Pac-West and Level 3 that constitutes VNXX traffic. Qwest's affidavits on factual matters are premature and should be ignored. Nonetheless, in an abundance of caution, Level 3 maintains that Qwest has the facts wrong.

55. If the WUTC adopts Level 3's position, the determination of the amount owed to Level 3 is straightforward. Qwest owes compensation to Level 3 for all section 251(b)(5) traffic, including all Qwest-originated, locally-dialed ISP-bound traffic at the FCC's interim rate of $0.0007 back to the date Qwest stopped paying Level 3. Qwest admits that it "re-commenced withholding of termination compensation" on locally-dialed ISP-bound traffic "commencing with the May 2007 Level 3 bill."[147] The WUTC should order Qwest to make the payments it has withheld for termination of all locally-dialed ISP-bound traffic originated by Qwest customers

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[146] Prehearing Conference, Docket No. UT-053039, Nov. 19, 2008, Tr. 0046:13-17; 0047, 0048:4-9.

[147] Brotherson Affidavit, ¶ 12; Affidavit of Jamie Moyer, at ¶¶ 17. Level 3's May 2007 invoice billed Qwest principally for April 2007 usage. The Affidavit of Jamie Moyer is attached hereto as **Exhibit 3**.

and exchanged with Level 3 commencing with Level 3's May 2007 invoice.

56. On the other hand, if the WUTC rules in Qwest's favor or adopts the new compensation regime it established in the Final Order in Docket No. UT-063038 for so-called VNXX traffic, additional factual and legal issues must be explored. The WUTC's new regime requires that CLEC's ISP-bound traffic be classified on the basis of the location of the ISP customers' modems and servers[148] and the bill-and-keep rate of zero applies to ISP-bound traffic that does not meet this new geographic location test.[149] As Level 3 shows in the Affidavit of Jamie Moyer, **Exhibit 3,** based on Internet architecture principles, an ISPs' servers and modem are most often deployed in multiple locations, including outside of Washington.[150] Whether a single locally-dialed ISP-bound session is routed to a particular server or modem may vary by call, and even during a single call.[151] In fact, ISP-bound traffic is routed on the basis of Internet addresses that do not translate to a physical location.[152] Moreover, multiple different types of "servers" may be involved in a single ISP-bound session, and the WUTC has not defined servers for its new physical location test.[153]

57. In short, neither Level 3 (nor Qwest for that matter) has sufficient knowledge of

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148 *Qwest Corporation v. Level 3 Communications, et al.*, Order Granting In Part Motion For Clarification And / Or Petition For Reconsideration; Denying Motion For Leave To Answer, Docket UT-063038, ¶ 27 (WUTC, Aug. 13, 2008) ("Order No. 11") ("the FCC's *ISP Remand Order* governs compensation for ISP-bound traffic when the calling party and the ISP server or modem are physically located in the same local calling area").

149 Final Order, *Qwest Corporation v. Level 3 Communications, et al,* Docket No. UT-063038, Order No. 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review, at ¶¶ 168, 308 (July 16, 2008) ("Final Order").

150 Exhibit 3, Affidavit of Jamie Moyer, ¶ 12.

151 Exhibit 3, Affidavit of Jamie Moyer, ¶ 12.

152 Exhibit 3, Affidavit of Jamie Moyer, ¶ 13.

153 Exhibit 3, Affidavit of Jamie Moyer, ¶ 13.

where the ISP customer's servers are located or which ISP servers are relevant, in order to apply the WUTC's new geographic test in the first instance. In fact, Qwest admits that it does not know the locations of the ISP's servers.[154] Qwest concedes that it "cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area."[155] Thus, Level 3 rejects Qwest's calculations regarding the percentage of non-compensable VNXX minutes set forth in its Motion and associated affidavits as there can be no sound basis for these calculations due to the inherent impracticality and ambiguity of the WUTC's test and Qwest's admissions that it has no information as to the actual physical location of the relevant ISP's servers and modems in order to comply with the WUTC's new test.[156]

58. In the Final Order, the WUTC "presume[s] that Qwest and CLECs can devote sufficient technical resources to enable the parties to segment VNXX traffic from local traffic," and suggests, without any supporting evidence, that "traffic studies or switch programming" can be utilized "to track, record, and classify" VNXX traffic.[157] Contrary to the WUTC's presumptions, switch programming cannot be used to distinguish locally-dialed ISP-bound calls routed over VNXX arrangements from all other "local" calls.[158] Nor is it practical to design traffic studies based upon the location of the ISP customer's facilities when calls to a single number can

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154 Qwest Corporation's Answer to Level 3 Communication's Petition for Enforcement of Interconnection Agreement and Counterclaims, Docket No. UT-053039, ¶ 41 ("Qwest Answer") ("As a threshold matter, only Level 3 knows the exact location of the end-user ISP server or modem bank for this traffic.").

155 Qwest Answer, ¶ 41.

156 Exhibit 3, Affidavit of Jamie Moyer, ¶¶ 12-13. Qwest Motion for Summary Determination, Brotherson Affidavit, 6-7.

157 Final Order, ¶¶ 205, 209-11, 334.

158 Exhibit 3, Affidavit of Jamie Moyer, ¶ 15.

be dynamically routed to different ISP facilities, even during a single session.[159] Thus, even if the WUTC were to conclude that there is a relevant sub-set of ISP-bound traffic called "VNXX" in this proceeding, there are significant evidentiary and factual issues that must be addressed to determine how such a new regime could be implemented in practice.

59. However, even with further clarification, a new classification methodology may still be unworkable, especially when reviewing traffic exchanged in prior years. Level 3 generally does not know the physical location of where an ISP customer deploys its servers and modems, its ISP customers may not keep such historical records, and even if they do, they may not share such records with Level 3.

60. Any WUTC ruling for Qwest on summary determination must specify the methodology that determines how to classify traffic as VNXX in sufficient detail so that Level 3 and Qwest may present evidence to quantify the amount of VNXX traffic the parties exchanged in phase two of this proceeding, if necessary.

61. Finally, if the WUTC rules for Qwest on summary determination, consistent with its appeal,[160] Level 3 reserves its right to contest in the second phase of this proceeding the WUTC's jurisdiction to determine compensation where the ISP equipment is located outside the State of Washington.

VI. CONCLUSION

62. In its Motion for Summary Determination, Qwest equates "interexchange" traffic with Section 251(g) compensation, with no exceptions, and ignores controlling law to the

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159 Exhibit 3, Affidavit of Jamie Moyer, ¶¶ 12-13, 15.

160 *Level 3 v. Washington Utilities and Transportation Commission and Sidran et al.*, Docket No. 3:08-cv-05563-RBL, Level 3 Complaint (filed Sept. 17, 2008).

contrary. The FCC's finding in the *2008 Order* that *inter*exchange ISP-bound traffic is subject to Section 251(b)(5),[161] the *WorldCom* court and the *2008 Order* findings that ISP-bound traffic exchanged between two LECs cannot qualify for Section 251(g) compensation, and the criteria imposed by Section 251(g) and the Agreement's definition of switched access services are all in direct conflict with Qwest's propositions in their Motion for Summary Determination.

63. Further, calls to locally-dialed ISP numbers do not meet the statutory definition of "exchange access" and do not fall within the section 251(g) carve-out because when the calling party dials a local number to reach his ISP, that calling party is not billed a "separate charge" for making a toll call. In the midst of all of the legal debate, Qwest has lost sight of the fact that the advent of commercial Internet services was premised on toll-free "dial-up" through an end user's local phone service. Had toll charges applied to locally-dialed ISP-bound traffic, the remedy of the *ISP Remand Order* never would have been necessary. A primary feature of "dial-up" ISP service is the ability to utilize these services without incurring toll charges and the physical location of the equipment used to provide Internet services has never factored into that service offering.

64. The *2008 Order* is clear that (1) "section 251(b)(5) is not limited to local traffic;" (2) all locally-dialed "ISP-bound traffic falls within the scope of section 251(b)(5);" (3) and "ISP-bound traffic does not fall within the section 251(g) carve out from section 251(b)(5) as 'there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.'"[162] Accordingly, because the FCC has not carved out so-called "VNXX" as a subset of

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[161] Because locally-dialed ISP-bound traffic is subject to Section 251(b)(5), federal law precludes Qwest's attempt to impose originating transport charges on Level 3 for delivery of Qwest's traffic to the Point of Interconnection. 47 C.F.R. § 703(b).

[162] *2008 Order*, at ¶¶ 15-16 (emphasis in original; *quoting WorldCom*, 288 F.3d at 433).

"ISP-bound" traffic for different treatment, *all* locally-dialed ISP-bound traffic exchanged between Qwest and Level 3 is subject to the FCC's interim compensation regime. Finally, Qwest agreed to exchange all Section 251(b)(5) traffic at the FCC's interim rates, which clearly includes all locally-dialed ISP-bound traffic, as it was required to do under the mandatory mirroring rule of the *ISP Remand Order*.[163] Consistent with these principles, Qwest actually paid Level 3 for all locally-dialed ISP-bound traffic for years and did not dispute charges for VNXX traffic until November 2004.[164]

VII. RELIEF REQUESTED

65. 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; (iii) dismissing once again or denying Qwest's counter-claims; and (iv) provide such other relief as the Commission deems appropriate.

Signature Page Follows

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163 Exhibit 1, 2003 Interconnection Agreement, at § 7.3.4.3.

164 Brotherson Affidavit, ¶ 6.

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