BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-053036 DOCKET NO. UT-053039
LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent.	

QWEST CORPORATION'S RESPONSE TO LEVEL 3'S MOTION FOR SUMMARY DETERMINATION

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1 Qwest Corporation ("Qwest") submits the following response to the motion for summary determination filed by Level 3 Communications, LLC ("Level 3"). The Washington Utilities and Transportation Commission (the "Commission") should deny Level 3's motion.

I. INTRODUCTION

2 This is a proceeding on remand from the decision of the United States District Court for the Western District Court of Washington (the "District Court"). In *Qwest v. Washington Util. & Transp. Comm'n*,[1] the District Court remanded decisions of the Commission that had previously required Qwest to pay Level 3 and Pac-West Telecom Inc. ("Pac-West") reciprocal compensation on all Internet Service Provider ("ISP") traffic, including VNXX traffic. The issue in *Qwest* was whether the *ISP Remand Order*[2] required Qwest to pay intercarrier compensation to Level 3 on calls delivered to an ISP located outside of the caller's local calling area ("LCA"). The Court ruled that Qwest was not required to pay intercarrier compensation on such calls and then directed the Commission on remand "to classify the instant VNXX calls for compensation purposes, as within or outside a local calling area."[3]

3 In its motion, Level 3 argues that the FCC recent *ISP Mandamus Order*[4] requires the Commission to essentially disregard the District Court's determinations in *Qwest* and undertake a completely new analysis of the *ISP Remand Order*. (Level 3 Motion ¶¶ 32-33; *see also* ¶¶ *25*-31). According to Level 3, the *ISP Mandamus Order* retroactively "clarified" the meaning of the *ISP Remand Order* such that the *ISP Remand Order* now means that Qwest

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1 *Qwest Corp. v. Washington State Util. and Transp. Comm'n*, 484 F.Supp.2d 1160 (W.D. Wash. 2007) ("*Qwest*").

2 Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (Rel. April 27, 2001) ("*ISP Remand Order*").

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

4 Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of High-Cost Universal Service Support: Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, 2008 FCC LEXIS 7792, 2008 WL 4821547 (Rel. November 5, 2008)("*ISP Mandamus Order*"). Level 3 refers to this order as the "*2008 Order*."

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was all along required to pay Level 3 reciprocal compensation on calls placed to ISPs located outside of the caller's LCA ("VNXX ISP" traffic). (Level 3 Motion ¶ 26). Based on its flawed analysis of both the *ISP Mandamus Order* and the *ISP Remand Order*, Level 3 argues that it is entitled to summary determination in its favor in this remand proceeding.

4 Level 3 is simply wrong. The FCC's recent *ISP Mandamus Order* does not expand the scope of traffic compensable under the *ISP Remand Order* and does not lead to conclusions different than those reached by the District Court in *Qwest*. Under the *ISP Remand Order* and the *ISP Mandamus Order*, VNXX ISP traffic is interexchange traffic that was subject to pre-Act access charge rules. Thus, under both these orders, it is not subject to reciprocal compensation. Moreover, the *ISP Mandamus Order* postdates the period in dispute in this proceeding and was never incorporated into the Qwest/Level 3 interconnection agreement ("ICA") at issue. Thus, the ICA did not require Qwest to pay Level 3 reciprocal compensation on calls placed to ISPs located outside of the caller's LCA, regardless of how one interprets the *ISP Mandamus Order*.

II. LEVEL 3'S MOTION MUST BE DENIED BECAUSE THE WASHINGTON DISTRICT COURT HAS ALREADY CONSIDERED AND REJECTED LEVEL 3'S ARGUMENTS

5 Under Washington law, the standard for a summary judgment (or summary determination) is well established. Specifically, the Commission treats "all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party.'" *Homestreet, Inc. v. State Dept. of Revenue,* 139 Wash. App. 827, 162 P.3d 458, 464 (Wash. App. 2007). Thus, in deciding Level 3's Motion for Summary Determination, the Commission must resolve all disputed issues of fact in Qwest's favor and all facts or inferences from them should be treated in the light most favorable to Qwest.

6 Level 3 is the complainant in this proceeding and has the burden of proof to demonstrate that it is entitled to intercarrier compensation from Qwest. Level 3 has failed altogether to meet its

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burden to show that VNXX traffic is compensable under the Parties' ICA. Indeed, Level 3 has not even demonstrated that it terminated the traffic in question. Accordingly, Level 3's motion for summary determination must be denied.

7 All of the key arguments that Level 3 makes in its motion were considered and rejected by the District Court in *Qwest*, which clearly held that Qwest's obligation to pay intercarrier compensation on VNXX calls hinged solely on whether VNXX calls are "within or outside of a local calling area." The District Court stated:

> Because the *ISP Remand Order* does not require Qwest to pay intercarrier compensation on calls placed to ISPs located outside the caller's local calling area—such as VNXX calls (unless the WUTC decides to define this traffic as within a local calling area)—Qwest is not, under the WUTC's present analysis, contractually obligated to pay Pac-West or Level 3 the interim compensation rates established by the FCC.[5]

8 The District Court recognized that under the *ISP Remand Order*, calls to ISPs are governed by one of two schemes: (1) the interim rate regime established by the *ISP Remand Order*; or (2) the pre-Act access charge regime.[6] Moreover, the District Court specifically rejected the argument Level 3 now makes that the *ISP Remand Order* eliminated the distinction between "local" and "interexchange" calls. (Level 3 Motion ¶ 28). The Court stated:

> Although the FCC did reevaluate its use of the term "local" in the ISP Remand Order, it did not eliminate the distinction between "local" and "interexchange" traffic and the compensation regimes that apply to each—namely reciprocal compensation and access charges. Indeed, as the First Circuit [in Global Naps I] recently explained, the ISP Remand Order itself "reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the [Act], did not intend to disrupt the pre-[Act] access charge regime under which LECs provided access services… in order to connect calls that travel to points—both interstate and intrastate—beyond the local exchange" (citations omitted).[7]

9 Furthermore, the District Court specifically rejected the argument that Level 3 makes in its

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5 *Qwest*, 484 F.Supp.2d at 1176-77.

6 *Id.* at 1170.

7 *Id*.

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motion that "ISP-bound" encompasses all calls to ISPs.[8] (Level 3 Motion ¶¶ 2, 31). The Court recognized that interpreting the term "ISP-bound" traffic as broadly as Level 3 advocates would run counter to the very policy considerations that gave rise to the *ISP Remand Order*:

> [I]nterpreting the ISP Remand Order narrowly—e.g., as not addressing VNXX traffic, and as leaving intact the access charge system for inter-exchange ISP-bound traffic—makes sense as a policy matter because the opposite approach, urged by the defendants, would likely *reverse* the direction in which payments for this traffic is ordinarily made. The defendant's approach "would create new opportunities for regulatory arbitrage, by requiring [Qwest] to pay compensation on calls to ISPs, including…calls to ISPs…for which [i]t had previously received compensation under established rules." (*Emphasis* in the original; citations omitted).[9]

The policy considerations underlying the rules in the *ISP Remand Order* were reaffirmed in the *ISP Mandamus Order*.[10]

10 Moreover, the District Court considered and rejected the arguments Level 3 now makes in its motion because those arguments were made by Pac-West in the proceedings before the District Court. Pac-West argued that VNXX calls were subject to reciprocal compensation and that Section 251(g) of the Act did not carve VNXX calls out of Section 251(b)(5) of the Act.[11] Pac-West claimed that there were no pre-Act intercarrier compensation rules with respect to "ISP-bound" traffic." Pac-West asserted that VNXX traffic did not involve a service provided to "interexchange carriers" or "information service providers." And Pac-West claimed that there were no "equal access and nondiscriminatory interconnection restrictions and obligations" with respect to VNXX traffic. In *Qwest*, the District Court expressly recognized that interexchange calls are subject to access charges and that under the *ISP Remand Order* both the interstate and intrastate access charge regimes were preserved.[12]

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8 *Id.* at 1175.

9 *Id*.

10 *ISP Mandamus Order*, ¶¶ 24-27.

11 See excerpts from Pac-West Brief to District Court, pages 17-18, attached as Exhibit A.

12 *Qwest*, 484 F.Supp.2d at 1164-1165.

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11 As the District Court observed, the *ISP Remand Order* cannot lawfully be interpreted to extend to interexchange calls to ISPs:[13] "It is axiomatic that an agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.'"[14] In both the *Local Competition Order* and the *ISP Remand Order*, the FCC held that in enacting Section 251(b)(5), Congress did not intend to alter the pre-existing interstate and intrastate access charge regimes.[15] Under Level 3's interpretation of the *ISP Remand Order*, after reaffirming the existence of the interstate and intrastate access charge regimes, the FCC then changed them significantly, but silently and without explanation. Level 3's interpretation is contrary to federal law and cannot stand.

12 Level 3's interpretation of the *ISP Mandamus Order* suffers from the same deficiency. The *ISP Mandamus Order* cannot be interpreted to subject interexchange calls (as historically understood) placed to ISPs to reciprocal compensation because such a change would conflict directly with the FCC's regulations, orders and policies applicable to such traffic. To change those regulations, orders and policies, the FCC would by law be required to explain both that it was changing those regulations, orders and policies and provide its rationale for doing so.

13 In short, the *ISP Remand Order* and the *ISP Mandamus Order* cannot be lawfully interpreted to require the payment of reciprocal compensation on interexchange calls to ISPs as Level 3 advocates. As the *Qwest* Court recognized:

> [T]here is no doubt that the VNXX traffic at issue in this case has significant policy and economical implications for exchange carriers that have yet to be fully and fairly addressed. . . . ISP-bound VNXX traffic significantly alters one of the fundamental assumptions upon which the Act and its implementing regulations were based-i.e., the traditional distinction between local service and long-distance service, and the two separate compensation schemes attending to each. The *ISP*

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[13] *Id.* at 1176.

[14] *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) quoting *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[15] First Report and Order, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 ¶¶ 1033-34 (1996) ("*Local Competition Order*"); *ISP Remand Order* ¶¶ 11, 36-39.

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> *Remand Order* modified this longstanding system as it relates to telecommunications traffic and ISP-bound calls *within a local calling area*. Today's technology may render the traditional distinctions less meaningful or even obsolete, and it may also be true that the FCC's compensation regime has yet to fully catch-up with the technology. *However, this Court . . . rejects the defendants' suggestion that the FCC, in its ISP Remand Order, would have endorsed such a fundamental across-the-board change in intercarrier compensation without mentioning it was doing so.*[16]

14 Level 3 chose not to appeal the District Court's decision. Thus, it is bound by the Court's determinations under the doctrines of collateral estoppel and law of the case. Collateral estoppel bars the relitigation of issues of law and issues of fact adjudicated in prior litigation between the same parties.[17] Law of the case precludes reexamination of an issue previously decided by a higher court.[18] If Level 3 seeks to have the District Court's decision reconsidered, it must seek relief from the District Court.

III. LEVEL 3'S ARGUMENTS BASED ON THE ISP MANDAMUS ORDER ARE ERRONEOUS

15 In its motion, Level 3 erroneously asserts that the *ISP Mandamus Order* somehow renders the District Court's remand instructions moot. (Level 3 Motion ¶ 33). Level 3's argument should be rejected because it is based on a series of false premises. First, it is based on the false premise that the *ISP Mandamus Order* used the term "ISP-bound" to include all calls placed to ISPs. As discussed below, that is simply wrong. The *ISP Mandamus Order* addresses only the traffic that was addressed in the *ISP Remand Order*. Second, Level 3's argument is based on incorrect descriptions of the service Level 3 provides, the nature of VNXX traffic and the regulatory status of Qwest and Level 3 under the pre-Act intercarrier compensation rules. Third, Level 3's argument is based on the false premise that the *ISP Remand Order* and Section 251(g) do not carve out the VNXX traffic at issue in this proceeding from the scope of

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16 *Qwest*, 484 F.Supp.2d at 1176 (emphasis added).

17 *Steen v. John Hancock Mutual Life Ins. Co*., 106 F.3d 904, 910 (9th Cir. 1997).

18 *In re Wiersma*, 483 F.3d 933, 941 (9th Cir. 2007).

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Section 251(b)(5).

A. Contrary to Level 3's Assertions, Both the *ISP Remand Order* and the *ISP Mandamus Order* Use the Term "ISP-Bound" to Refer Only to Calls Placed to an ISP Located in the Caller's Local Calling Area

16 Level 3's argument that the *ISP Remand Order* and the *ISP Mandamus Order* require the payment of reciprocal compensation for all traffic destined for ISPs is simply wrong. From the very beginning, the FCC's orders addressing reciprocal compensation for "ISP-bound traffic" have used the term "ISP-bound" to refer to calls placed to an ISP point of presence ("POP") located within the caller's LCA. The *ISP Mandamus Order* is no different. This conclusion is made clear by the history of proceedings leading up to the *ISP Mandamus Order*.

17 On July 2, 1997, the FCC provided public notice of a pleading cycle to address the question whether local calls to ISPs were governed by the FCC's reciprocal compensation rules.[19] At the time of the notice, the only calls that were subject to reciprocal compensation under the FCC's rules were calls that originated and terminated within the same local calling area.[20] Thus, CLECs argued that calls to an ISP terminated at the ISP's modem or server located in the caller's local calling area.

18 On February 26, 1999, the FCC released the *ISP Declaratory Order*.[21] The issue the FCC sought to resolve in the *ISP Declaratory Order* was whether calls to an ISP located within the caller's LCA ("ISP-bound" calls) were local for purposes of reciprocal compensation. Thus, the FCC described the arrangement that it was addressing by stating that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." The FCC then framed the issue of whether reciprocal compensation was due for the traffic as a question of whether the calls to ISPs "terminate at the ISP's local

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[19] Public Notice with ALTS Letter, Attached as Exhibit B.

[20] *Local Competition Order* ¶ 1034.

[21] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Order*").

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server."[22] Throughout the *ISP Declaratory Order*, the FCC refers to the "ISP's local server."[23] Moreover, there are no references in the order to calls made to ISP POPs located outside of the caller's LCA. Thus, in *Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000), the D.C. Circuit confirmed that in the *ISP Declaratory Order*, the FCC "considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves 'local.'"

19 *The ISP Declaratory Order* was followed by the *ISP Remand Order*. In the *ISP Remand Order*, the FCC once again defined the issue it was addressing to be "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area* that is served by a competing LEC."[24] In *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002) ("*WorldCom*"), the D.C. Circuit again confirmed that the traffic referred to as "ISP-bound" in the *ISP Remand Order* were "calls made to internet service providers ("ISPs") located within the caller's local calling area."[25] In *WorldCom*, the DC Circuit remanded but did not vacate the *ISP Remand Order*.[26] Thus, the *ISP Remand Order* remains in effect.[27]

20 The *ISP Mandamus Order* is the FCC's decision on remand of the *ISP Remand Order*. Thus, the "ISP-bound traffic" that the FCC is addressing in the *ISP Mandamus Order* is the same traffic addressed in the *ISP Remand Order* – that is, calls placed to an ISP POP located in the caller's LCA. Nowhere in the *ISP Mandamus Order* does the FCC state that it is expanding the scope of the remand to encompass calls placed to ISP POPs located outside of the caller's

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22 *ISP Declaratory Order* ¶ 7.

23 *Id*. ¶¶ 8, 12 and 14.

24 *ISP Remand Order* ¶ 13 (emphasis added).

25 *WorldCom*, 288 F.3d at 430.

26 *Id.* at 434.

27 In the *ISP Remand Order*, the FCC prescribed certain caps limiting that amount that CLECs could collect for delivering calls to ISPs. The FCC eliminated two of these caps (the "new markets" and "growth") caps in *In Re Core Communications*, 19 FCC Rcd 20179 ¶ 26 (2004). However, by doing so, the FCC did not purport to create a uniform compensation regime applicable to all calls destined for ISPs. Rather, the FCC sought to create uniformity between CLECs so that certain CLECs would not be deprived of compensation for traffic in circumstances in which another CLEC could receive compensation for the very same traffic.

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LCA. The *ISP Mandamus Order* does not even mention VNXX traffic.

21 In its motion, Level 3 argues that the *ISP Mandamus Order* must be interpreted to apply to all calls destined for an ISP because the Order does not carve out any category of ISP traffic from its scope. (Level 3 Motion ¶ 44). This argument rests entirely upon the incorrect premise that *all* ISP traffic was included in the Order in the first instance. As discussed above, that is not the case. Furthermore, this argument is directly contrary to the District Court's holding in *Qwest*, a decision that Level 3 did not challenge, and that is the binding law controlling this remand proceeding.

B. Level 3 Has Erroneously Characterized the VNXX Traffic at Issue, Its Regulatory Status With Respect to That Traffic, and the Pre-Act Intercarrier Compensation Regimes Applicable to That Traffic

22 In its motion, Level 3 completely mischaracterizes the VNXX traffic at issue in this proceeding, the regulatory status of the parties with respect to that traffic and the intercarrier compensation regimes that apply to it. In essence, Level 3 glosses over or ignores virtually all of the pre-Act rules applicable to VNXX ISP traffic.

23 To start with, the VNXX traffic at issue in this proceeding is interexchange traffic governed by federal and state access charge regimes. The pre-Act rules, orders and policies of the FCC provide that the carrier (or carriers) that originate calls that are delivered to an ISP POP located outside of the caller's LCA are to be compensated by the interexchange carrier ("IXC") who provides the interexchange service. In this case, Level 3 is the IXC because it is the carrier that employs VNXX arrangements to create a toll free interexchange service for its ISP customers.[28]

[28] *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at *41-*42 (Vt. PSB 2002) ("In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service and instead relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says the call is 'local.'").

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24 When Level 3 uses a VNXX arrangement, it combines access and transport components to create what is equivalent to an interstate foreign exchange (FX) arrangement. Level 3 engages in VNXX so that customers of the ISPs that Level 3 serves do not have to place toll calls in order to reach their ISP.[29] As the Commission has ruled, VNXX traffic is interexchange traffic because it involves calls that are placed by a caller in one local calling area and delivered to an ISP modem/server (or POP) located in a different LCA. Under federal law, state commissions have authority to define LCAs in their respective states.[30] In Washington, the Commission has defined geographic LCAs.[31] Thus, calls that originate and terminate in different LCAs are interexchange calls subject to applicable pre-Act access charge rules, regardless of the dialing pattern for these calls. [32]

25 The Act defines "exchange access" to mean "the offering of access to telephone exchange service or facilities for the purpose of the origination or termination of telephone toll services."[33] Level 3 does not dispute in its motion that Qwest provides part of the origination service/function for the VNXX calls at issue. Thus, Qwest is a "local exchange carrier" ("LEC") under the Act because it provides "exchange access" for the VNXX calls at issue.[34] Under federal law, access charges have historically applied to all interexchange services regardless of whether there is a separate charge for the service.[35] Thus, the FCC's access

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29 *Global NAPs, Inc. v. Verizon New England, Inc.*, , 454 F.3d 91, 102-103 (2nd Cir. 2006) ("*Global Naps II*").

30 *Local Competition Order* ¶ 1035.

31 *Qwest Corporation v. Level 3 Communications LLC, et al.*, Docket No. UT-063038, Order No. 10 ¶ 146 (July 16, 2008) ("*VNXX Final Order*").

32 *See, e.g.,* Order Ruling on Arbitration, *In re Petition of MCI Metro Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at *35 (S.C. PUC, January 11, 2006) ("The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for Virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls.").

33 47 U.S.C. § 153(16).

34 The Act defines a "local exchange carrier" to mean any person "that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. §153(26).

35 *Global Naps, Inc. v. Verizon New England, Inc*., 454 F.3d 91, 98 (2nd Cir. 2006) ("*Global NAPs II*").

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charge regulations provide that "[c]arrier's carrier charges shall be computed and assessed upon all IXCs that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." [36] This regulation does not carve out IXCs that do not assess a separate charge for their service.

26 Historically, Regional Bell Operating Companies ("RBOCs") such as Qwest that provide originating or terminating access for interstate interexchange traffic have been required to deliver or receive their traffic at a single point of interconnection ("POI") in each LATA.[37] This was the genesis of the rule that the FCC adopted for interconnection under Section 251(c)(2) of the Act that requires ILECs to permit requesting telecommunications carriers to interconnect at a single POI in each LATA. When Qwest's local exchange facilities are used by an IXC to originate an interexchange call and Qwest transports the call to a single POI in the LATA, the origination and transport are part of switched access and Qwest is entitled to charge access charges for the transport it provides.[38] Qwest provides this service as an ILEC, not as an IXC.

27 Level 3 asserts in its motion that Qwest is the carrier that transports traffic between "exchanges." In fact, Level 3 has established points of interconnection ("POIs") in the larger LCAs in Washington.[39] The vast majority of the VNXX traffic at issue in this proceeding was transported by Level 3 from these POIs, often across LATA boundaries, to its Media Gateway in the Seattle LCA. During the period at issue in this proceeding, Qwest Corporation, the ILEC, could not transport traffic across LATA boundaries because the Section 272 separate

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[36] 47 C.F.R. § 69.5(b).

[37] Memorandum Opinion and Order, *In the Matter of Annual 1985 Access Tariff Filings*, 1985 FCC LEXIS 2519 ¶¶ 100-105 (1995). *See also* Memorandum Opinion and Order, *In the Matter of Local Exchange Carrier Blocking of Feature Group B Traffic Transiting Access Tandems*, 61 Rad. Reg.2d 437 (1986) (prohibiting requirement that IXCs interconnect at every end office and permitting interconnection at access tandems).

[38] 47 C.F.R. §§ 69.4(b)(5), (6) and (9). *See also* Memorandum Opinion and Order, *In the Matter of Annual 1985 Access Tariff Filings*, 1985 FCC LEXIS 2519 ¶¶ 100-05 (1995).

[39] Response Declaration of Larry Brotherson ¶ 10.

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affiliate requirement barred it from doing so.[40] Thus, Level 3 both offered the VNXX interexchange service at issue in this proceeding and provided the interLATA transport used with that service.

28 In its motion for summary determination, Level 3 claims that it is a "competitive local exchange carrier" and that it offers "competitive local exchange telecommunications services" in Washington pursuant to the Commission's Orders dated April 22, 1998 in Docket Nos. 980490 and 980492. (Level 3 Motion ¶ 8). Whether true or not, it is irrelevant. When Level 3 engages in VNXX, it is functioning as an IXC. In fact, Level 3 sought authority in those dockets to offer both interexchange and local exchange services, including toll free long distance services.[41] Moreover, both the Commission and Level 3 have acknowledged that Level 3's service known as Direct Inward Dialing and Level 3's service provided using VNXX arrangements are distinct.[42] Thus, a pertinent issue in this case is Level 3's classification (*i.e.*, local exchange carrier, IXC, or both).

29 Level 3 implies in its motion that it is a CLEC for all purposes. (Level 3 Motion ¶ 8). However, Level 3 is an IXC when it engages in VNXX. A carrier's classification depends upon the service it provides and the traffic at issue, and carriers may be LECs for some purposes, and IXCs for other purposes.[43] Level 3 is indisputably an IXC when it employs VNXX arrangements because it is the carrier that offers the toll free service to its ISP customers that allow dial-up subscribers to call Level 3's ISP customers located in other local

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[40] *Section 272 Sunsets for Qwest Communications International Inc. in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming by Operation of Law on December 23, 2005 pursuant to Section 272(f)(1),* 20 FCC Rcd 20396 (Rel. December 23, 2005).

[41] *In the Matter of the Applications of Level 3 Communications, LLC for an Order Authorizing Registration as a Telecommunications Company and to Provide Local Exchange Services and Authorizing Provision of Intraexchange Telecommunications Services*, 1998 Wash. UTC LEXIS 57, *1 (Wash UTC April 22, 1998).

[42] Level 3 Motion ¶ 11; Order No. 3, *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-05039, 2005 Wash UTC LEXIS 423, *4 (August 26, 2005).

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

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calling areas.

30 In this case, Level 3 also had to participate in the origination of the interexchange VNXX traffic in dispute. To interconnect and exchange interexchange traffic with Qwest pursuant to Section 251(c)(2) of the Act, Level 3 must be providing exchange access to IXCs.[44] Thus, if Level 3 is correct that it was entitled to exchange VNXX traffic with Qwest under the ICA, Level 3 must have been providing exchange access to itself or other IXCs for the VNXX traffic at issue. When two carriers (here, Qwest and Level 3) collaborate to provide exchange access to an IXC (here, Level 3), the term that is used for this arrangement is jointly provided switched access.[45] This is true whether the IXC doubles as a LEC, or whether the IXC is an unrelated carrier. Pre-Act FCC orders address this situation and provide that the two LECs will charge the IXC for whom the origination is provided.[46] Indeed, Section 7.5.3 of the ICA provides that for jointly provided switched access ("JPSA") traffic "Qwest and CLEC will each render a separate bill to the IXC, using the multiple bill, multiple tariff option."[47]

31 If one assumes that Level 3 did in fact terminate the VNXX traffic in dispute in this case by delivering the calls to ISPs, Level 3 also performed this function for itself (*i.e.*, for its own interexchange service), not for Qwest. Under the pre-Act intercarrier compensation rules, a terminating LEC does not charge the originating LEC (or LECs) for terminating an interexchange call. Rather, the terminating LEC charges the IXC who offers the interexchange service.[48]

32 However, regardless of how many "hats" Level 3 wears, it remains the case that Level 3 offers

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[44] *Local Competition Order* ¶¶ 190-91.

[45] *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518 (1987), reconsideration 3 FCC Rcd 13 (1987).

[46] *In the Matter of Access Billing Requirements for Joint Service Provision; Application for Review*, 4 FCC Rcd 7914, ¶ 3 n. 2 (Rel. November 8, 1989); Under the pre-Act JPSA rules, the second originating LEC in the traffic flow is not permitted to charge the first originating LEC.

[47] Response Declaration of Larry Brotherson, Attachment A; Qwest Level 3 ICA, Section 7.5, 7.5.3.

[48] *Local Competition Order* ¶ 1034.

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an interexchange service and provides termination for itself, not Qwest. It also remains the case that for VNXX traffic, Qwest provides telephone exchange facilities and services (originating access) that Level 3 uses to provide a toll-free interexchange service to the ISPs it serves. Under these circumstances, the pre-Act rules provide that Qwest receives, rather than pays, intercarrier compensation when it provides these services to Level 3 so that Level 3 can provide service to ISPs using VNXX arrangements.

C. Section 251(g), as Interpreted in the *ISP Remand Order*, Preserves Pre-Act Interstate and Intrastate Intercarrier Compensation Rules Applicable to Calls Delivered to an ISP POP Located Outside of the Caller's Local Calling Area

33 Level 3 erroneously argues in its motion that Section 251(g) preserves rules applicable to only a subset of traffic that qualifies as interexchange traffic. (Level 3 Motion ¶¶ 2, 27-31). However, Level 3's argument was expressly rejected by the FCC in the *ISP Remand Order*, where the FCC stated:

> This limitation in section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access. Before Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points - *both interstate and intrastate* - beyond the local exchange. *In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationship.* Accordingly, Congress *excluded all such access traffic* from the purview of section 251(b)(5).[49] (Citations omitted)

The FCC reaffirmed its determinations in the *ISP Mandamus Order*:

> [W]e agree with the finding in the ISP Remand Order that traffic encompassed by section 251(g) is excluded from section 251(b)(5) *except to the extent that the Commission acts to bring that traffic within its scope*. Section 251(g) preserved the pre-1996 Act regulatory *regime* that applies to access traffic, *including rules* governing 'receipt of compensation.'[50]

Under Section 251(g), the regulatory regimes applicable to "exchange access, information

[49] *ISP Remand Order* ¶ 37 (emphasis added).

[50] *ISP Mandamus Order* ¶ 16 (emphasis added).

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access[51] and exchange services for such access" preserved by Section 251(g) is preserved until they "are explicitly superseded by regulations" prescribed by the FCC.[52]

34 By its terms, Section 251(g) preserves the pre-Act intercarrier compensation regime created by any "any court order, consent decree, or *regulation, order, or policy* of the [FCC]."[53] (Emphasis added). However, the FCC specifically held as part of its analysis of Section 251(g) in the *ISP Remand Order*, that "traffic subject to parallel intrastate access regulations" is also excluded from the scope of section 251(b)(5).

35 Level 3 argues that all traffic that is ultimately destined for an ISP is subject to reciprocal compensation under the *ISP Mandamus Order* and argues that no traffic for an ISP was ever subject to pre-Act intercarrier compensation rules preserved by Section 251(g). (Level 3 Motion ¶ 48). This is incorrect. In fact, there were at least four sets of intercarrier compensation regulations, orders, and policies that applied to calls delivered to an ISP POP located outside of the caller's LCA.

36 First, under the FCC's pre Act rules, all interexchange traffic was subject to access charges unless exempted by the FCC. Thus, the FCC's access charge regulations provide that "[c]arrier's carrier charges shall be computed and assessed upon all IXCs that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[54] If a call was between different LCAs, it was and is today subject to access charge rules.[55] Whether access charges applied did not depend upon the dialing pattern used to

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[51] The FCC has determined that "information access" and "exchange access" are not mutually exclusive categories. Order on Remand, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 3 (1999), *vacated on other grounds, WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

[52] *See Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997) ("*CompTel*"), an appeal from the FCC's *Local Competition Order*. In *CompTel*, the Eighth Circuit held that under Section 251(g) of the Act, "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates."

[53] 47 U.S.C. §251(g).

[54] 47 C.F.R. § 69.5(b).

[55] *Global Naps II*, 454 F.3d at 98.

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accomplish the interexchange call. Indeed, there is nothing in the FCC's regulations to suggest that the dialing pattern makes access charges inapplicable. [56]

37 Access charges have consistently applied to all interexchange traffic. In *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63 (1st Cir. 2006) ("*Global NAPs I*"), the First Circuit concluded that in its regulations "the FCC made clear that it was leaving in place the pre-existing access charge regime that applied to *interexchange calls*." (Emphasis added). The Ninth Circuit reached the same conclusion in *Verizon California, Inc. v. Peevey*.[57] It agreed with a California commission ("CPUC") decision, that as a matter of federal law, "VNXX traffic is interexchange traffic that is *not* subject to the FCC's reciprocal compensation rules" and that the FCC's rules require that "any call rated as a toll call within a local access and transport area is exchange access traffic."[58]

38 In *Peevey*, the Ninth Circuit analyzed VNXX traffic under both state and federal law. The Court held that it was permissible for the Arbitrator to classify VNXX traffic as local traffic under an ICA predating the *ISP Remand Order* and governed by state law. However, the Ninth Circuit also recognized that the CPUC did not make this determination under federal law, the Act or the FCC's reciprocal compensation rules. The Ninth Circuit affirmed the CPUC's determination that "VNXX traffic is interexchange traffic that is not subject to the FCC's reciprocal compensation rules."[59]

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[56] In *Global NAPs II*, the Second Circuit made it clear that the end result, not the dialing pattern, is the relevant consideration: " Global wants to use virtual NXX to disguise the nature of its calls-that is, to offer its customers local telephone numbers that cross Verizon's exchanges instead of the traditional long-distance numbers attached to such calls. . . . [W]here a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business." 454 F.3d at 102-03 (emphasis added).

[57] 462 F.3d 1142 (9th Cir. 2006).

[58] *Id.* at 1157.

[59] *Id.* at 1158. Level 3 also erroneously claims that a commission " may not impose on Level 3 charges for originating ISP-bound traffic." (Level 3 Motion ¶ 59). The FCC rule Level 3 cites does not apply to ISP-bound traffic. Moreover, *Peevey* upheld the California Commission's decision allowing a LEC to impose charges on a CLEC for the origination of VNXX traffic, holding that no federal rule prohibits such a charge for "exchange access" or for "exchange services for such access." *Id.* at 1157-59.

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39 Second, for interstate FX[60] and similar services such as VNXX, the FCC has issued orders directing that access charges be assessed on the open end of the service—that is, the end at which calls to ISPs are placed. When an end user in the foreign exchange calls the local telephone number assigned to the FX subscriber, the call traverses the local switch in the foreign exchange (the "open end") and is transported to the LCA of the FX subscriber (the "closed end"). Under the FCC's rules, the local exchange carrier that provides the switching at the open end is entitled to charge switched access to the IXC that provides the interstate FX service.[61]

40 The FCC has long had a policy of avoiding discrimination in the application of access charges to interexchange services.[62] In 1987, the FCC noted that it had "adopted rules for the computation and assessment of charges for carrier common line and end office access elements (switched access charges) that were designed to alleviate [discriminatory] disparities. [The FCC] required that these charges be assessed for some access services, such as open end access for Foreign Exchange (FX) and off-net access for CCSA, that had previously been billed as local exchange service."[63] The FCC made it clear that, in order to avoid discrimination, "access charge orders subject the open end of *FX lines* and CCSA ONALs *and their equivalents*, along with MTS/WATS and their equivalents, to these switched access charges."[64]

41 In the *VNXX Final Order*, the Commission ruled that VNXX and FX are "functionally

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[60] Interstate FX and intrastate FX are different. Unlike interstate FX, an intrastate FX subscriber is required to purchase local exchange service in the foreign exchange.

[61] *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd 7441 ¶ 12 (1987). ("[O]ur access charge orders subject the open end of FX . . . to the switched access charges paid by MTS/WATS *equivalent services*.) (Emphasis added).

[62] *See* 47 U.S.C. § 202.

[63] Memorandum Opinion and Order, In the Matter of Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems, 2 FCC Rcd. 7458 ¶ 5 (1987).

[64] *Id.* ¶ 13 (emphasis added).

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equivalent," because both allow an end user to dial a local number to reach another party located outside the caller's LCA: "[W]hile VNXX calls are the 'functional' equivalent of FX calls due to their local dialing characteristics, they also bear the "physical" characteristics of long distance or interexchange calls by originating and terminating outside of a local calling area."[65] The Commission found that there are no "material attributes that distinguish VNXX service from FX service . . . [;] they are functional equivalents when the CLEC bears the cost of transporting the traffic between LCAs."[66]

42 Third, under the FCC's pre-Act Enhanced Service Provider Exemption and continuing today, Enhanced Service Providers ("ESPs") (including Internet service providers) are treated as "end users" for purposes of applying access charges.[67] This is an access charge rule and it simply treats ESPs like all other end users. Thus, under the FCC's orders, rules and policy, ESP "*[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers*."[68] Thus, when Level 3 provides an interexchange service to its ISP customers, any access charge exemption the ISP customers may have does not extend to Level 3, the IXC.

43 Fourth, as discussed above, pre-Act FCC orders and policies provided for the circumstance in which two LECs jointly provide access service to an IXC. This is known as jointly provided switched access ("JPSA") and the FCC has long had rules governing its provision. With

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65 *VNXX Final Order* ¶ 97 (footnotes omitted).

66 *Id.* ¶ 103.

67 *ISP Remand Order*, ¶ 11; Memorandum Opinion and Order, *In the Matter of MTS and WATS Market Structure*, 97 FCC 2d 682 ¶¶ 83-84, 91 (1983); Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-elements for Open Network Architecture*, 4 FCC Rcd 3983, ¶¶ 39, 42, fn. 92 (1989); *ACS of Anchorage, Inc. v. Federal Communications Commission*, 290 F.3d 403, 409 (D.C. Cir. 2002) (characterizing ESPs as "end users" – no different from a local pizzeria or barber shop"); *ISP Mandamus Order* ¶ 13 citing *Bell Atlantic*, 206 F.3d at 6 (reaffirming the *Bell Atlantic* decision's conclusion that ISP traffic is "switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'")

68 Memorandum Opinion and Order, *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986 ¶ 21 (1987) (emphasis added), *vacated on other grounds with legal principles reaffirmed*, Memorandum Opinion and Order, *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling and WATS Related and Other Amendments of Part 69 of the Commission's Rules*, 7 FCC Rcd 5644 (1992).

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JPSA, the two originating LECs provide a service to an IXC and the FCC's rules provide that the two LECs will charge the IXC access charges.

44 Level 3 argues that, as a LEC that obtains local telephone numbers to assign to its customers, it cannot also be an IXC. (Level 3 Motion ¶ 50). The FCC rejected this very argument in its *IP in the Middle* decision.[69] In this case, whether Level 3 is also classified as a LEC, Level 3 must be classified as an IXC because it offers an interexchange service by using VNXX arrangements to provide a toll free service to its ISP customers.

D. Calls Placed to ISPs Located Outside the Caller's LCA Would Not Be Subject to Reciprocal Compensation Even If The Traffic is Classified as Intrastate Traffic

45 The VNXX traffic at issue in this remand proceeding is jurisdictionally interstate for the same reasons that calls placed to an ISP located in the caller's LCA are jurisdictionally interstate. The *ISP Declaratory Order*, *ISP Remand Order* and the *ISP Mandamus Order* all hold that calls delivered to an ISP located in the caller's LCA are jurisdictionally interstate on an end-to-end basis because ISP traffic is delivered to websites throughout the United States and the rest of the world. When this end-to-end analysis is applied to VNXX ISP traffic, the same conclusion follows. A call to an ISP located outside the caller's LCA is routed to websites throughout the world in the same way that a call to an ISP located within the caller's LCA would be. [70]

46 Nonetheless, Level 3's argument that the Section 251(g) carve-out does not encompass VNXX ISP traffic would also be wrong even if the VNXX ISP traffic is classified as intrastate interexchange traffic as the Washington Commission has done. The reason for this is simple. Under the ESP exemption, an ESP is treated as an end user for purposes of applying access

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[69] *IP-in-the-Middle Decision* ¶ 19, fn. 80.

[70] *ISP Declaratory Order* ¶¶ 1, 6, 11, 13, 18-20; *ISP Remand Order* ¶ 1 ("we reaffirm our previous conclusion that traffic delivered to an ISP is *predominantly interstate access* traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic."); *ISP Mandamus Order* ¶¶ 2, 4 and 17.

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charges.[71] Thus, if the caller and the ESP/ISP POP are both located in the same state but in different LCAs, the FCC's ESP Exemption requires the application of the intrastate access charge rules. This application of the FCC's rule is the reason the Washington Commission could properly conclude that the ISP-bound VNXX traffic it was addressing "is appropriately classified as intrastate interexchange traffic" for which it had authority to determine compensation.[72] Thus, in this peculiar circumstance, VNXX ISP traffic will be encompassed by Section 251(g) (and carved out of Section 251(b)(5)) both because it is subject to an FCC access charge rule (the ESP Exemption) and because it is subject to intrastate access charge rules/ exemptions.

47 Moreover, in the *ISP Remand Order*, the FCC held that traffic subject to intrastate access charge rules was carved out of Section 251(b)(5) as part of its analysis of Section 251(g).[73] Since the *ISP Remand Order* remains in effect, the Commission correctly recognized this principle in the *Final Order* when it stated that "[t]he Act preserved in section 251(g) the existing compensation scheme for *interstate and intrastate* interexchange and information access traffic . . . ." [74]

48 The pre-Act rule and policy in Washington was that access charges were to be applied uniformly to all carriers offering interexchange services unless their services had been

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[71] *ISP Remand Order* ¶ 11.

[72] The Commission generally addressed all intrastate VNXX traffic in its *VNXX Final Order* in Docket UT-063038. *See e.g., VNXX Final Order* ¶¶ 43, 63, 71, 124, 130-31. The Commission's statements categorizing VNXX traffic as intrastate interexchange traffic are statements about the Commission's jurisdiction to rule on the issues in the complaint. Qwest believes that the Commission did not purport to exercise jurisdiction over interstate traffic, except to the extent that the FCC's rules call for the application of the intrastate access regime. Nor did the Commission purport to classify all VNXX traffic as intrastate, interexchange traffic. With respect to VNXX ISP traffic, the Commission's analysis assumed that the caller and the ISP are in the same state.

[73] *ISP Remand Order*, ¶ 37.

[74] *VNXX Final Order* ¶ 18 (emphasis added). In reaching that conclusion, the Commission relied on the statement in the FCC's *Local Competition Order* that"[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and *interstate and intrastate charges for terminating long-distance traffic.*" *Local Competition Order* ¶ 1033 (emphasis added). *Accord*¸ *id.* ¶ 1035 ("Traffic originating or terminating outside the applicable local area *would be subject to interstate and intrastate access charges.*") (Emphasis added). The continually viability of these paragraphs of the *Local Competition Order* are demonstrated by *Global NAPs I*, which also relied upon both paragraphs. 454 F.3d at 63. Furthermore, Sections 261(b) and 251(d)(3) of the Act authorize the Commission to continue to enforce its rules and policy with respect to the intrastate access charge regime.

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exempted.[75] The pre-Act rule and policy in Washington was that FX service was exempt from access charges.[76] Thus, Level 3's interexchange service using VNXX arrangements was either subject to access charges or fell within an exemption by analogy to FX. But, in either case, VNXX traffic was subject to pre-Act intercarrier compensation rules and policy preserved by the *ISP Remand Order* and Section 251(g) and, thus, carved out of Section 251(b)(5).

E. Level 3's Argument That There Were No Pre-Act Rules Applicable to VNXX Traffic Is Based On An Erroneous Reading of *WorldCom* and the *ISP Mandamus Order*

49 Throughout its brief, Level 3 erroneously asserts that the FCC use the term "ISP-bound" in its orders to mean all calls to ISPs regardless of where the ISPs are located. Level 3 then takes statements from the FCC orders and Court cases and attempts to extend those statements to interexchange calls to remote ISP POPs. For example, Level 3 cites the *ISP Mandamus Order's* reference to *WorldCom* for the proposition that there were no pre-Act obligations relating to intercarrier compensation for ISP-bound traffic. (Level 3 Motion ¶ 48). However, this statement in *WorldCom* was necessarily confined to calls placed to an ISP located in the caller's LCA because that was the traffic addressed by the *ISP Remand Order*, the decision under review. Furthermore, *WorldCom* relied solely upon the *ISP Declaratory Order* as the basis for the statement that there were no pre-Act rules.[77] As discussed above, the *ISP Declaratory Order* was only addressing calls placed to an ISP located within the caller's LCA. *WorldCom* does not hold that there were no pre-Act intercarrier compensation rules applicable to calls placed to an ISP located outside of the caller's LCA. Since the *ISP Mandamus Order* cites *WorldCom*, the *ISP Mandamus Order* itself is necessarily referring only to calls placed to

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[75] *See e.g.*, Eighteenth Supplemental Order, *Washington Util. & Transp. Comm'n v. Pacific Northwest Bell*, Cause No. U-85-23, 1986 WL 215085 *95 (Findings 11 & 17) (1986) (access charges to be applied uniformly to all IXCs; LECs shall file intrastate traffic sensitive access charges); Second Supplemental Order, *In the Matter of Determining the Proper Classification of US METROLINK CORP*., Docket No. U-88-2370-1, 1989 UTC LEXIS 40 *7 (May 1, 1989) (holding that when toll bridger comes "into compliance with Commission laws and rules, it will be obliged to pay its fair share of network costs through an appropriate access charge.")

[76] *VNXX Final Order* ¶ 134.

[77] *WorldCom*, 288 F.3d at 433.

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ISPs located in the caller's LCA.

50 Level 3 also relies upon *WorldCom* for the proposition that compensation for services provided by one LEC to another do not fall within the scope of Section 251(g) of the Act. (Level 3 Motion ¶ 49). *WorldCom* predates the District Court's decision in *Qwest* and was taken into account by the District Court. Thus, Level 3's reliance upon *WorldCom* is misplaced.

51 Level 3 contends erroneously that the VNXX traffic at issue is exchanged between two LECs, not a LEC and an IXC. This argument is incorrect for two reasons. First, the issue is not whether the traffic is exchanged between two LECs. The issue is whether Qwest is providing service to an IXC. Qwest clearly does provide service to Level 3, the IXC, because Level 3 is the carrier offering an interexchange service and Qwest provides originating access to Level 3. Thus, it does not matter whether Level 3 is just an IXC or both an IXC and a LEC for the traffic in question. In either case, the traffic at issue is carved out of Section 251(b)(5) by the *ISP Remand Order* and Section 251(g).

52 Second, Level 3 again attempts to take a statement made in *WorldCom* about calls placed to an ISP located in the caller's LCA and erroneously extend it to calls placed to an ISP located outside of the caller's LCA. Nothing in *WorldCom* supports such an extension.

53 Level 3's argument that there were no pre-Act rules for VNXX traffic is also erroneous. (Level 3 Motion ¶¶ 47-49). VNXX is just a new name given to a subcategory of interexchange traffic that was subject to access charges prior to the Act. As discussed above, all interexchange traffic was subject to access charges prior to the Act unless exempted by the FCC. Moreover, the pre-Act analog to VNXX was interstate FX service and the FCC's orders, rules, and policy required that access charges be applied at the open end of interstate FX services or "their equivalents." Further, the logical extension of Level 3's argument is the

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absurd conclusion that whenever a new name is given to a subcategory of interexchange traffic, the subcategory no longer falls within Section 251(g) and then becomes subject to reciprocal compensation under Section 251(b)(5). That is not the law.

54 Much of Level 3's argument in its motion is based on generic statements that the FCC made in the *ISP Mandamus Order* concerning the scope of Section 251(b)(5). In particular, Level 3 relies upon statements that Section 251(b)(5) standing alone is not limited either geographically or to particular services. (Level 3 Motion ¶ 44). However, Level 3 has taken those statements out of context. Whether there are geographic or service limits applicable to Section 251(b)(5) ultimately depends upon the scope of Section 251(b)(5) after the Section 251(g) and *ISP Remand Order* carve out for traffic governed by interstate and intrastate access charge rules are taken into account.[78] When these carve outs are taken into account, it is very apparent that there are geographic limits on the scope of reciprocal compensation under Section 251(b)(5).

IV. LEVEL 3 IS NOT ENTITLED TO COLLECT INTERCARRIER COMPENSATION FROM QWEST FOR VNXX TRAFFIC UNDER THE AMENDED QWEST/LEVEL 3 ICA

A. The Qwest/Level 3 ICA Incorporates Only the *ISP Remand Order*, Not the *ISP Mandamus Order*

55 The Amended Qwest/Level 3 ICA incorporates the *ISP Remand Order* as both the Commission and the District Court recognized.[79] However, the ICA does not incorporate the *ISP Mandamus Order* into its terms. Indeed, the *ISP Mandamus Order* postdates the entire period for which intercarrier compensation is in dispute in this remand proceeding.

56 Level 3 erroneously argues in its motion that the Commission must review the Qwest/Level 3 ICA based on existing law. (Level 3 Motion ¶¶ 54-55). Level 3 is wrong for two reasons.

[78] *ISP Mandamus Order* ¶¶ 16, 18.

[79] Order No. 6, *Level 3 Communications, LLC v. Qwest Corporation*, Docket No. UT-053039, 2006 Wash UTC LEXIS 269, *12 (June 9, 2006)(the parties interconnection agreement "incorporates the ISP Remand Order as the standard for determining compensation for ISP-bound traffic."); *Qwest*, 484 F.Supp.2d at 1168.

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First, the general rule is that a contract is to be interpreted with reference to the law at the time the contract was entered into.[80]

57 Second, the authorities that Level 3 relies upon to argue that the ICA must be reviewed with reference to existing law do not apply here. Level 3's authorities address the circumstance in which a federal court reviews a state commission's decision for compliance with federal law after an interconnection arbitration to create a new agreement.[81] The review in those cases addresses the formation of the ICA, not a subsequent dispute regarding the interpretation of a previously approved ICA.

58 In any event, as discussed below, the *ISP Mandamus Order* does not in any way undermine the District Court's conclusion that the *ISP Remand Order* does not require Qwest to pay inter-carrier compensation to Level 3 for calls placed to ISPs located outside of the caller's LCA. However, even if the *ISP Mandamus Order* did make calls placed to ISPs outside of the caller's LCA compensable under Section 251(b)(5) (which it did not), that would be a change in law and it would not apply retroactively to the traffic at issue in this dispute.

B. The Qwest/Level 3 ICA Does Not Require Qwest to Pay Intercarrier Compensation on Calls Placed to an ISP Located Outside of the Caller's Local Calling Area

59 Level 3 argues in its motion that the plain language of the ICA requires Qwest to pay reciprocal compensation on all "locally dialed" ISP traffic, including calls placed to ISPs located outside of the caller's LCA. (Level 3 Motion ¶¶ 56-60). Level 3's argument is wrong for four reasons. First, the Commission has already determined that Qwest's obligation to pay intercarrier compensation is tied to the requirements of the *ISP Remand Order*.[82] And the

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[80] *General Telephone Co. of the Northwest, Inc. v. City of Bothell*, 716 P.2d 879, 884 (Wash. 1986)("[T]he laws which exist at the time and place of making a contract are to form part of it."); *McDonald V. Farm Bureau Ins. Co*, 747 N.W.2d 811, 818 (Mich. 2008)("[T]he general rule is that contracts are interpreted in accordance with the law in effect at the time of their formation.").

[81] Level 3 Motion ¶ 54, fn. 103; *See Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1129-1131 (9th Cir. 2003); *U.S. West v. Jennings*, 304 F.3d 950, 956-57 (9th Cir. 2002).

[82] *VNXX Final Order* 141-42.

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Washington District Court has determined that the *ISP Remand Order* does not require Qwest to pay intercarrier compensation on calls placed to an ISP located outside of the caller's LCA.[83]

60 Second, the plain language of the ICA requires Qwest to pay intercarrier compensation only on calls placed to an ISP located within the caller's ICA. The ICA, in Section 7.3.4.3,[84] provides that the "[p]arties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order." "ISP-bound traffic (as that term is used in the FCC ISP Order)" includes only calls placed to an ISP located within the caller's LCA as the District Court has already determined. "EAS Local" traffic is defined in Section 4.24 of the ICA to mean only "traffic that is originated and terminated within the local calling area determined by the Commission."[85] Thus, it does not include interexchange calls to ISP POPs.

61 Third, the language of the ICA confirms that the Parties understood that the only traffic subject to reciprocal compensation under the *ISP Remand Order* was "EAS/Local" traffic. Thus, the traffic exchanged at the FCC ordered rate pursuant to the mirroring rule is described in Section 7.3.4.3 as "EAS/Local (§251(b)(5)) traffic." EAS/Local traffic and Section 251(b)(5) traffic are treated synonymously.

62 Finally, the Commission has already determined that VNXX calls are interexchange calls that are not delivered to an ISP located within the caller's LCA. Consistent with the rulings of federal courts[86] and the FCC,[87] the Commission determined in the VNXX complaint proceed-

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83 *Qwest*, 484 F.Supp.2d at 1176-77.

84 Brotherson Response Declaration, Attachment A.

85 *Id.*

86 *Global NAPs* , 444 F.3d at 64 (VNXX "allows a party to call what appears to be a "local" number, although behind the scenes that call is actually routed to a different local calling area.); *Global NAPs II*, 454 F.3d at 93, n. 3 ("Virtual NXX, or VNXX, refers to telephone numbers assigned to a customer in a local calling area different from the one where the customer is physically located . . . ."); *Peevey*, 462 F.3d at 1148 ("VNXX, or "Virtual Local" codes are NPA-NXX codes that correspond to a particular rate center, but which are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different

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ing that a VNXX arrangement involves a situation where a carrier uses "local numbers" to create traffic that is "interexchange" in nature:

> "VNXX traffic arrangements occur when the carrier assigns a telephone number from a rate center (NXX) in a local calling area different from the one where the customer is physically located."[88]
>
> "The Initial Order found that while VNXX calls . . . bear the "physical" characteristics of long distance or interexchange calls by originating and terminating outside of a local calling area. The Order concluded that VNXX calls are properly classified as non-local or *interexchange calls*.
>
> We uphold the Initial Order's *description* of VNXX services, which for the most part, no party disputes."[89]

Furthermore, the Commission, in the *Final Order*, ruled that the test in Washington is a geographic test (*i.e.*, based on the physical locations of the parties to the call):

> Washington tariffs, supported by state law and rules, apply call rating based on the physical location of the calling and called parties, not on the respective NPA-NXX codes. . . . We reject Level 3 and Broadwing's claims that the distinction between local and long distance traffic no longer exists, that geography is not an appropriate basis for classifying traffic, and that local calls should not be defined based on ILEC local calling areas."[90]

63 Yet in the face of this clear ruling, Level 3 asserts that the definition of LCA "under Washington rules is devoid of any geographical references." (Level 3 Motion ¶ 33, fn. 63). Level 3 is simply wrong. Read in their entirety, the Commission rules unambiguously establish a geographic test for determining whether a call is local or not. WAC 480-120-021 includes the following definitions of "exchange" and "interexchange":

> "Exchange" as a *geographic* area established by a company for tele-communications service within that area.

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calling area.").

87 "Virtual NXX codes are central office codes that correspond with a particular geographic area that are assigned to *a customer located in a different geographic area*." Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610 ¶ 115, n. 188 (2001).

88 *VNXX Final Order* ¶ 21.

89 *Id*. ¶¶ 97-98 (footnotes omitted; italics in original).

90 *Id*. ¶150 (emphasis added); *see also id.* ¶ 173.

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> "Interexchange" means telephone calls, traffic, facilities or other items that *originate in one exchange and terminate in another*." (Emphasis added).

Furthermore, the Commission rules defines a LCA as "one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges." (Emphasis added). "Within" implies a physical area in which something is located (*e.g.*, within a city; within a state; within a county). The phrase "within which" would be meaningless if it did not refer to a physical, geographic area.

64 Level 3 erroneously relies on the *2001 U S WEST Order*, a Section 271 workshop order, to argue that ISP-bound traffic is treated as local traffic in Washington. (Level 3 Motion ¶ 37). However, the issue in the *2001 U S WEST Order* was how local ISP traffic should be treated for purposes of applying the "significant local use" restriction relating to Enhanced Extended Loops ("EELs"). The argument made to the Commission by the Joint CLECs was that "service to ISPs *for calls delivered within a local calling area* is local exchange service, not special access."[91] In other words, the only ISP traffic at issue in that docket was ISP traffic delivered to the ISP within the same LCA as the caller. Thus, this decision does not address the issue of the proper treatment of interexchange ISP traffic.

65 Throughout its motion, Level 3 refers to VNXX traffic as "locally dialed" calls. (*See e.g.*, Level 3 Motion ¶ 2). The term "locally dialed" is an invention by Level 3 that has no regulatory or legal significance. It is a euphemism for the interexchange service that Level 3 offers when it employs VNXX arrangements.

V. CONCLUSION

66 It is clear that the petition for enforcement seeks to enforce the ICA, which incorporates the *ISP Remand Order*. It is equally clear that the *ISP Remand Order* requires reciprocal

[91] Thirteenth Supplemental Order Initial Order (Workshop Three), *In the matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 et seq*, Docket Nos. UT-003022 & UT-003040, 2001 Wash UTC LEXIS 230, ¶ 118 (WUTC, July 24, 2001) (emphasis added).

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ICA. Thus, the conclusion is inescapable that under the ICA and the *ISP Remand Order*, VNXX traffic is not compensable under any provision of the ICA, unless the Commission determines that VNXX is subject to access charges, which charges would be payable by Level 3 as the IXC to Qwest as the originating LEC. For the foregoing reasons, Level 3's motion for summary determination should be denied and Qwest's motion for summary disposition should be granted.

DATED this 25th day of March, 2009.

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