

[Service Date June 2, 2009]

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

PAC-WEST TELECOMM, INC.,)	DOCKET UT-053036
)	
Petitioner,)	
)	
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
.....)	
)	
LEVEL 3 COMMUNICATIONS, LLC,)	DOCKET NO. UT-053039
)	
Petitioner,)	
)	LEVEL 3 COMMUNICATIONS,
v.)	LLC's SUBMISSION OF
)	SUPPLEMENTAL AUTHORITY
QWEST CORPORATION,)	
)	
Respondent.)	
)	
.....)	

Level 3 Communications LLC ("Level 3") hereby submits a copy of the following documents in Consolidated Dockets UT-053039 and UT-053036:

- Exhibit A: Level 3 Communications, LLC's Motion to Stay (dated January 23, 2009);
- Exhibit B: Joint Response of Qwest Corporation, The Washington Independent Telecommunications Association and the Washington Utilities and Transportation Commission to Level 3 Communications, LLC's Motion to Stay (dated February 6, 2009);
- Exhibit C: Level 3 Communications, LLC's Reply in Support of Motion to Stay (dated February 13, 2009)

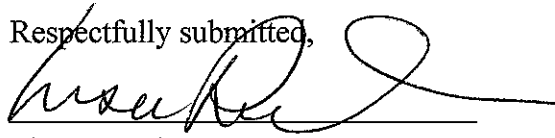
Level 3 Communications, LLC Submission of Supplemental Authority

Exhibit D: Order to Stay (dated March 16, 2009).

Dated this 2nd day of June, 2009.

Respectfully submitted,

By:



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ATTORNEYS FOR LEVEL 3 COMMUNICATIONS, LLC

Exhibit A

Level 3 Communications, LLC'S Motion to Stay

(dated January 23, 2009);

Judge Ronald B. Leighton

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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**

10 LEVEL 3 COMMUNICATIONS, LLC and
11 BROADWING COMMUNICATIONS, LLC

12 Plaintiffs,

13 vs.

14 WASHINGTON UTILITIES AND
15 TRANSPORTATION COMMISSION; and
16 MARK H. SIDRAN, PATRICK J. OSHIE, and
17 PHILIP B. JONES, in their Official Capacities as
18 Commissioners of the Washington Transportation
19 And Utilities Commission and not as Individuals,

20 Defendants

Case No.: C08-5563RBL

LEVEL 3 COMMUNICATIONS,
LLC'S MOTION TO STAY

NOTED ON MOTION
CALENDER: February 13, 2009

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22 Level 3 Communications, LLC ("Level 3") and Broadwing Communications, LLC
23 ("Broadwing"), move for an order staying the above referenced proceeding and suspending
24 any briefing schedule until the conclusion of related litigation pending before the Ninth
25 Circuit Court of Appeals entitled *Qwest Corp. v. Level 3 Communications, LLC et al.*¹
26 ("Ninth Circuit Appeal").

¹ *Qwest Corp. v. Level 3, Communications, LLC et al.*, U.S. Court of Appeals for the Ninth Circuit, Docket No. 08-15887.

1 The Court has inherent power to stay its proceedings to control the disposition of
2 the cases on its docket in an efficient and economic manner for itself and the parties.²
3 Staying the proceeding pending the outcome of the Ninth Circuit Appeal will conserve the
4 judicial resources of this Court and the resources of the parties, because the issues raised by
5 the Ninth Circuit Appeal are fundamentally the same as those raised in this proceeding and
6 the principal parties (*i.e.* Level 3 and Qwest Corporation) are identical. Therefore, it is
7 likely that the Ninth Circuit's decision will clarify and simplify the issues in the current
8 proceeding without prejudicing any of the parties. In support of this Motion, Level 3 and
9 Broadwing set forth the following:

10 BACKGROUND AND FACTS

11 **A. Washington Proceeding.**

12 On September 17, 2008, Level 3 and Broadwing filed their Complaint for
13 Declaratory and Injunctive Relief ("Complaint") with this Court seeking review of the
14 Washington Utilities and Transportation Commission's ("WUTC" or "Commission") Final
15 Order³ and Order No. 11⁴ in WUTC Docket No. UT-063038 ("WUTC Orders").⁵ The
16 Complaint seeks a ruling invalidating the WUTC Orders as contrary to Sections 151,
17 251(b)(5), 252(d), 201, and 202 of the Communications Act of 1934, as amended by the
18 Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S.C. Sections 151 *et*
19 *seq.* (the "Act"), the Federal Communication Commission ("FCC") orders implementing
20 the Act, Washington law, and the terms of the interconnection agreement entered into
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22 ² *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936).

23 ³ *Qwest Corp. v. Level 3 Communications, et al.*, Final Order Upholding Initial Order; Granting in
24 Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order; Approving
25 Settlement Agreement, Docket UT-063038, (WUTC July 16, 2008).

26 ⁴ *Qwest Corp. 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,
(WUTC Aug. 13, 2008).

⁵ Complaint (Sept. 17, 2008).

1 between Broadwing and Qwest Corporation (“Qwest”).⁶ The Washington Independent
2 Telecommunications Association (“WITA”) intervened in the case and is now a party.

3 The WUTC’s Final Order addresses the regulatory classification of and intercarrier
4 compensation for locally-dialed calls that originate on the network of one local exchange
5 carrier and terminate on the network of another. The traffic at issue is referred to as
6 “virtual NXX” or “VNXX”.⁷ As explained in the Complaint, “virtual NXX” or “VNXX”
7 has been described as “when a carrier assigns a telephone number from a rate center in a
8 local calling area different from the one where the customer is physically located.”⁸
9 VNXX traffic almost always consists of locally-dialed calls to internet service providers
10 (“ISPs”) that are not physically located in the caller’s local calling area.⁹

11 Qwest initiated the WUTC proceeding that is the subject of this Complaint in May
12 of 2006 with a complaint (“WUTC Complaint”) filed against several competitive local
13 exchange carriers (“CLECs”), including Level 3 and Broadwing, that exchange traffic with
14 Qwest pursuant to their interconnection agreements. In the WUTC Complaint, Qwest
15 asked the Commission for a ruling that VNXX routing is illegal, and an order requiring the
16 CLECs to either (a) cease such arrangements; or (b) pay access charges to Qwest for the
17 traffic being routed via VNXX.¹⁰

18 The Final Order addresses several issues related to the definition and classification
19 of VNXX traffic. However, one of the central issues in the case—and the primary legal
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22 ⁶ Complaint, ¶ 1.

23 ⁷ Final Order, ¶¶ 22, 96. While parts of the Order address VNXX calls in general, the Commission
24 acknowledges that the majority of VNXX-routed calls are also ISP-bound, and focuses its analysis
25 on those calls.

26 ⁸ Complaint, ¶ 10 (citations omitted).

⁹ Final Order, ¶¶ 22, 96.

¹⁰ Complaint, ¶ 12.

1 issue in this appeal—is the intercarrier compensation for ISP-bound VNXX traffic required
2 by federal law.

3 At the outset it is important to understand the two forms of intercarrier
4 compensation relevant to the dispute. *Reciprocal compensation* is compensation mandated
5 by Section 251(b)(5) of the Act to be paid by one carrier to another when the second carrier
6 completes a call initiated by the first.¹¹ *Access charges* are charges that are preserved by
7 Section 251(g) of the Act which apply to calls that are not included within the calling
8 party's local calling plan and are paid by the interexchange carrier to the local exchange
9 carrier or carriers that originate and terminate the call.¹²

10 As described in the Complaint, Level 3 and Broadwing alleged that federal law,
11 including Sections 251(b)(5) and 251(g) and the Federal Communications Commission's
12 ("FCC") reciprocal compensation framework for ISP-bound traffic laid out in its *ISP*
13 *Remand Order*¹³ and subsequent FCC orders, applies to *all* locally-dialed ISP-bound
14 traffic, including that ISP-bound traffic that is routed via VNXX arrangements.¹⁴
15 Accordingly, Level 3 and Broadwing argued that they are entitled to receive \$0.0007 per
16 minute of use for all locally-dialed ISP-bound traffic sent to them from Qwest for
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18 ¹¹ Final Order, ¶ 18.

19 ¹² Final Order, ¶ 17 n.15.

20 ¹³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996;*
21 *Inter-carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand*
22 *Order*"); *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from*
23 *Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, (Oct. 18, 2004)
24 ("*Core Forbearance Order*"). After Level 3 filed the Complaint, the FCC issued a decision
25 required under a Writ of Mandamus entered by the United States Court of Appeals for the D.C.
26 Circuit directing the FCC to "explain the basis for its ISP-bound compensation rules" established in
its *ISP Remand Order*. See *In Re Core Communications*, 531 F.3d 849, 850 (D.C. Cir. 2008). The
FCC entered its *Order on Remand* on November 5, 2008. *Order on Remand and Report and Order*
and Further Notice of Proposed Rulemaking, W.C. Docket No. 05-337, FCC 08-262 (Nov. 5,
2008).

¹⁴ Final Order, ¶ 156.

1 termination.¹⁵ Qwest, on the other hand, argued that the reciprocal compensation
2 framework articulated in the *ISP Remand Order* excludes VNXX ISP traffic. Further,
3 Qwest argued that VNXX-routed ISP-bound traffic is truly interexchange in nature and
4 thus subject to access charges. Accordingly, Qwest argued that it owes Level 3 and
5 Broadwing *nothing* in the form of reciprocal compensation for the ISP-bound traffic routed
6 via VNXX arrangements and instead that Qwest is entitled to originating access
7 compensation for the traffic from Level 3 and Broadwing.¹⁶

8 In the Final Order, the WUTC determined that VNXX traffic is *intrastate*
9 *interexchange* traffic, not subject to the reciprocal compensation obligations of Section
10 251(b)(5) of the Act.¹⁷ Central to its analysis was the WUTC's conclusion that the FCC's
11 compensation framework for ISP-bound traffic does not include VNXX traffic.¹⁸ Thus, the
12 Commission ordered the CLECs to pay Qwest originating transport charges where the
13 CLEC utilizes Qwest's facilities and has not established transport or a physical presence in
14 the local calling area in order to pick up traffic from Qwest.¹⁹ In this proceeding, Level 3
15 and Broadwing seek a ruling that the Commission's orders are invalid.²⁰ The Complaint
16 raises twelve separate claims for relief arising under state and federal law. However, the
17 fundamental issue presented by the Complaint is whether federal law, including the FCC's
18 orders implementing ISP-bound compensation rules, requires terminating compensation for
19 all locally-dialed ISP-bound traffic, including VNXX traffic.²¹

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22 ¹⁵ Final Order, ¶ 156.

23 ¹⁶ Final Order, ¶¶ 158-159.

24 ¹⁷ Final Order, ¶¶ 333, 358; Order No. 11, ¶ 27.

25 ¹⁸ Final Order, ¶ 160.

26 ¹⁹ Final Order, ¶ 371.

²⁰ Complaint, ¶ 1.

²¹ See pp. 8-9, *infra*.

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3 **B. Arizona Proceeding**

4 In June of 2005, in a separate proceeding before the Arizona Corporations
5 Commission ("ACC"), Level 3 filed a complaint ("ACC Complaint") against Qwest for
6 enforcement of its interconnection agreement ("ICA").²² Level 3 filed the ACC Complaint
7 after the FCC issued its *Core Forbearance Order* lifting certain rate and growth caps
8 previously set out in the *ISP Remand Order*. In its ACC Complaint, Level 3 alleged that
9 the FCC's action in its *Core Forbearance Order* expanded the minutes of use for which
10 Level 3 was entitled to be compensated.²³ Level 3 further alleged that Qwest refused to
11 amend the ICA to reflect the *Core Forbearance Order* unless and until Level 3 agreed to
12 waive its right to ISP-bound compensation in these circumstances where ISP customers are
13 not physically located within the local calling area.²⁴ While arguments before the ACC
14 were complex, as in the present case, the crux of the dispute was whether the compensation
15 framework articulated in the *ISP Remand Order* applies to locally-dialed ISP-bound traffic
16 routed using VNXX arrangements. The ACC ultimately ruled that it does.²⁵ Therefore, the
17 ACC ordered Qwest to compensate Level 3 consistent with the reciprocal compensation
18 framework of the *ISP Remand Order*.²⁶

19 Qwest appealed the ACC's decision. The U.S. District Court for the District of
20 Arizona enjoined the enforcement of the ACC's order and remanded the matter back to the
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22 ²² *Level 3 Communications, LLC v. Qwest Corp.*, Docket Nos. T-01051B-05-0415, T-03654A-05-
0415 (Az. C.C.).

23 ²³ *Level 3 Communications, LLC v. Qwest Corp.*, Order No. 68855, Docket Nos. T-01051B-05-
0415, T-03654A-05-0415, ¶ 17, 2006 WL 2524546 (Az. C.C. July 28, 2006). ("Order No. 68855")

24 ²⁴ Order No. 68855, ¶¶ 27-28.

25 ²⁵ Order No. 68855, ¶ 59.

26 ²⁶ *Id.*

1 ACC for further findings.²⁷ In its decision the District Court agreed with Qwest and found
2 that the compensation framework of the *ISP Remand Order* applies only to calls placed by
3 a caller to an ISP located in the same local calling area as the caller, and is thus
4 inapplicable to ISP-bound traffic that is VNXX in nature.²⁸

5 Level 3 appealed the Arizona District Court's decision to the Ninth Circuit, where
6 the case is currently pending.²⁹ In its Docketing Statement filed in the Ninth Circuit, Level
7 3 has identified three principal issues it intends to raise on appeal: (1) whether the district
8 court properly interpreted the *ISP Remand Order* as it relates to the handling of VNXX
9 ISP-bound traffic; (2) whether and how the *ISP Remand Order* has been modified by the
10 *WorldCom* decision; and (3) whether the district court properly applied *Pacific Bell v. Pac-*
11 *West Telecomm*, 325 F.3d 1113 (9th Cir. 2003) and *Verizon California, Inc. v. Peevey*, 462
12 F.3d 1142 (9th Cir. 2006).³⁰ Level 3's opening brief is due on February 9, 2009.

13 ARGUMENT

14 The Court should issue a stay pending a decision in the Ninth Circuit Appeal,
15 because that decision will clarify and simplify the legal issues here, the length of the stay is
16 reasonable, and the stay will not prejudice any party.

17 **A. The Ninth Circuit Appeal Will Clarify the Legal Issues and the Stay is** 18 **Reasonable in Duration.**

19 A court is authorized to issue a stay based upon its inherent power to control the
20 disposition of the cases on its docket "with economy of time and effort for itself, for
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22 ²⁷ *Qwest v. Ariz. Corp. Comm'n*, Case No. CV-06-2130-PHX-SRB, Order at 10 (D. Ariz. March 6,
2008).

23 ²⁸ *Id.* at 22.

24 ²⁹ *Qwest Corp. v. Level 3, Communications, LLC*, U.S. Court of Appeals for the Ninth Circuit,
25 Docket No. 08-15887.

26 ³⁰ Civil Appeals Docketing Statement, Docket No. 08-15887, U.S. Court of Appeals for the Ninth
Circuit (April 4, 2008).

1 counsel, and for litigants.”³¹ In analyzing whether to stay a proceeding, the court must
2 weigh the competing interests affected by the stay.³² These interests include the hardship
3 that a party may suffer if the case is not stayed, the possible damage resulting from a stay,
4 and the “orderly course of justice measured in terms of the simplifying or complicating of
5 issues, proof and questions of law which could be expected to result from a stay.”³³

6 When seeking a stay pending an appeals court’s ruling in a different case, a stay is
7 appropriate if “(1) the decision in the pending case or cases will settle or simplify some, but
8 not necessarily all, issues of law or fact in the case being stayed, and (2) the stay is
9 reasonable in duration.”³⁴ In *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*³⁵ the
10 district court granted a stay pending the outcome of proceedings before the Supreme
11 Court.³⁶ The court expected the Supreme Court’s ruling to simplify and narrow the issues
12 before it and the stay was expected to last for six months.³⁷ In *ASIS Internet Services v.*
13 *Member Source Media, LLC*³⁸ the district court also granted a stay when it expected a
14 pending appeal to the Ninth Circuit to provide clarity regarding the legal issues before it.³⁹

15 ³¹ *Landis*, 299 U.S. at 254-255.

16 ³² *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

17 ³³ *Id.* (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

18 ³⁴ *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007)
19 (citing *Landis*, 299 U.S. at 256-257 (courts can stay proceedings in one case pending the outcome
20 of another even if the parties and issues are not identical)). See also *Lockyer*, 398 F.3d at 1110
21 (stay denied because case pending before the bankruptcy court was unlikely to decide or contribute
22 to the decision of the legal issues before the district court) and *Dependable Highway Exp., Inc. v.*
23 *Navigators Ins. Co.*, 498 F.3d 1059, 1066-1067 (9th Cir. 2007) (overruling stay in part because the
24 district court did nothing to indicate when the stay would be lifted).

21 ³⁵ *Id.*

22 ³⁶ *Id.*

23 ³⁷ *Id.*

24 ³⁸ *ASIS Internet Services v. Member Source Media, LLC*, 2008 WL 4164822 (N.D. Cal. Sept. 8,
25 2008).

26 ³⁹ *Id.* See also *McConnell v. Lassen County*, 2007 WL 4170622 (E.D. Cal. Nov. 26, 2007) (stay
granted pending Ninth Circuit *en banc* ruling when that ruling is material to aspects of the district
court case and the ruling was expected within a year).

1 In that case, the court ruled that an anticipated stay of one year was reasonable in
2 duration.⁴⁰

3 In this case, the disposition of the Ninth Circuit case will not only likely simplify
4 and clarify the issues raised in this case—it may well control the outcome of this
5 proceeding. As discussed above, all of the issues Level 3 intends to raise at the Ninth
6 Circuit relate directly to the question of whether the FCC’s reciprocal compensation
7 framework for ISP-bound traffic applies to all locally-dialed ISP-bound traffic without
8 exception. It is true that the Complaint in this case raises additional issues, including issues
9 of state law. However, if the Ninth Circuit finds that the FCC’s reciprocal compensation
10 framework applies to all locally-dialed ISP-bound traffic—without exception—then all
11 other issues raised in the Complaint will have little to no legal effect.⁴¹ Thus, the Court
12 should stay this case pending the outcome of Ninth Circuit Appeal.

13 A stay is also appropriate because it will lead to an efficient disposition of this case
14 and prevent unnecessary litigation. If the parties are required to litigate this case prior to
15 the Ninth Circuit’s ruling and this Court’s ruling differs from that of the Ninth Circuit,
16 another appeal is likely. This will create needless appeals and further crowd an already full
17 appellate docket. Moreover, if the Ninth Circuit issues its ruling while this case is pending,
18 the Court will likely require an additional round of briefing so the parties can address and
19 fully inform the Court as to the impact of the Ninth Circuit’s decision on their positions.
20 On the other hand, if the Court issues a stay allowing for the Ninth Circuit to issue its
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24 ⁴⁰ *Id.*

25 ⁴¹ For example, Count II alleges that the Commission exceeded its authority under state law by
26 ordering a compensation arrangement for Level 3’s ISP-bound traffic which is interstate in nature.
Complaint, ¶¶ 33-35. Obviously, if the Ninth Circuit confirms that the *ISP Remand Order* does
control the treatment of this traffic, then Count II becomes moot.

1 ruling prior to further process in this case, the parties' initial briefing will include a full
2 analysis of the application of that decision to the issues in this appeal.⁴²

3 Finally, the duration of the stay requested is reasonable. The opening brief in the
4 Ninth Circuit Appeal is scheduled to be filed on February 9, 2009, and Level 3 expects that
5 the Ninth Circuit will issue a decision within 12 to 24⁴³ months, which is within the range
6 of stays considered reasonable by the courts.⁴⁴ Level 3 will provide the Court with periodic
7 updates as to the status of the appeal.

8 **B. A Stay Will Not Prejudice Qwest or WITA.**

9
10 ⁴² A current WUTC remand proceeding provides an additional reason for this Court to grant a stay. Docket UT -053036 arises from a Level 3 complaint, identical to the one filed with the ACC, that is now the subject of the Ninth Circuit Appeal. The WUTC consolidated the case with a similar complaint by Pac-West Telecom, docketed as UT 053039. In these cases the WUTC found that the *ISP Remand Order's* compensation framework encompassed all ISP-bound traffic including VNXX. *Qwest v. WUTC*, 484 F.Supp.2d 1160, 1167 (W.D. Wash. 2007). On appeal the District Court disagreed and remanded the case to the WUTC.

13 At the prehearing conference in the remand proceedings the WUTC Administrative Law Judge deferred establishing a procedural schedule in the consolidated matters, pending the FCC's response to the Writ of Mandamus. The FCC entered its *Order on Remand* on November 5, 2008. Briefs by the parties are now due to be filed on February 9, 2009 and March 11, 2009. Among the issues to be briefed is the impact of the *Order on Remand*.

16 The federal Telecommunications Act grants state commissions authority to interpret and enforce §§251-252. For this reason it would be instructive to the Court to allow the WUTC to interpret the impact of the *Order on Remand* before it considers the legal issues in the case. See *Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186, 1200-1201 (9th Cir. 2008) ("federal statutory scheme specifically grants authority to state agency to interpret and enforce the provisions of §§ 251 and 252" and thus the state PUC was appropriate agency to determine a good faith claim under § 252(b)(5)); *Ill. Bell Tele. Co., Inc. v. Global NAPS Ill., Inc.*, ___ F.3d ___, 2008 WL 5273539 (7th Cir. 2008) ("Primary jurisdiction usually involves referral to a federal agency, but in a case... in which a state commission is exercising in effect its delegated federal power, the logic of the doctrine permits a federal court's reference to a state agency.").

22 ⁴³ See U.S. Court of Appeals for the Ninth Circuit Clerk's Office, *Frequently Asked Questions* <http://www.ca9.uscourts.gov/datastore/general/2008/11/14/FAQ_MAR_2007update.pdf> (last updated March 5, 2007) (oral argument generally takes place 9-12 months after the completion of briefing and the decision is generally issued 3-12 months after oral argument).

25 ⁴⁴ Compare *ASIS Internet Services*, 2008 WL 4164822 (delay of one year reasonable), and *McConnell*, 2007 WL 4170622 (appellate ruling expected within a year so stay was reasonable in duration), with *Dependable Highway Exp.*, 498 F.3d at 1066 (reversing a stay where it was issued pending the outcome of foreign arbitration that had yet to commence two years after the stay commenced and it was unclear if the arbitration would ever take place).

1 The court should issue a stay only if the benefits of waiting for a decision on appeal
2 outweigh the potential damages resulting from the stay. A stay would impose no material
3 hardship or inequity on any non-moving party.⁴⁵ Further, any favorable resolution for
4 Qwest in this proceeding would nevertheless be subject to the outcome of the Ninth Circuit
5 Court's order. Thus, the Court may safely conclude that no party will be materially
6 prejudiced by a stay.

7 **CONCLUSION**

8 The Court should grant Level 3's Motion to Stay this proceeding until the pending
9 Ninth Circuit appeal is resolved. The requested stay is reasonable in duration and offers
10 substantial benefits, including the clarification and simplification of the legal issues before
11 the Court and the efficient and economic disposition of the case. Moreover, the stay will
12 not prejudice the parties in any material respect.

13
14 WHEREFORE, for all of the foregoing reasons, Level 3 Communications, LLC and
15 Broadwing Communications, LLC respectfully requests this Court to issue an order that:

16 (1) Stays the proceeding and suspends the briefing schedule in this matter until
17 a date following a final order on the merits not subject to further review by a federal court
18 of the issues identified in the case captioned *Qwest Corp. v. Level 3, Communications, LLC*
19 *et al.*, Docket No. 08-15887, filed in the U.S. Court of Appeals for the Ninth Circuit;

20 (2) Directs Level 3 to file periodic reports with the Court identifying the status
21 of this matter in the Ninth Circuit and/or any other federal court; and

22 ////

23 ////

24 _____
25 ⁴⁵ *Dependable Highway Exp.*, 498 F.3d at 1066 (non-moving party prejudiced by stay because the
26 stay was granted to force the parties to arbitrate the case in a foreign country despite the objections
to the arbitration by the non-moving party).

1 (3) Grants any additional relief that is just and reasonable under the
2 circumstances.

3 DATED: this 23rd day of January, 2009.



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Judge Ronald B Leighton

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

LEVEL 3 COMMUNICATIONS, LLC and
BROADWING COMMUNICATIONS, LLC

Plaintiffs,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION; and
MARK H. SIDRAN, PATRICK J. OSHIE, and
PHILIP B. JONES, in their Official Capacities as
Commissioners of the Washington Transportation
And Utilities Commission and not as Individuals,

Defendants

Case No.: C08-5563RBL

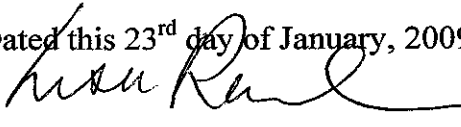
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of Level 3
Communications, LLC's Motion to Stay and [Proposed] Order to Stay upon the persons and
entities listed on the Service List below by the manner shown:

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18 For Qwest Corporation
19 **VIA CM/ECF**

20 Dated this 23rd day of January, 2009.

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Exhibit B

**Joint Response of Qwest Corporation, The Washington
Independent Telecommunications Association and the
Washington Utilities and Transportation Commission to
Level 3 Communications, LLC'S Motion to Stay**

(dated February 6, 2009);

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LEVEL 3 COMMUNICATIONS LLC and
BROADWING COMMUNICATIONS
LLC.,

Plaintiffs,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
MARK SIDRAN, PATRICK OSHIE,
PHILIP B. JONES,

Defendants.

No. 08-CV-05563-RBL

**JOINT RESPONSE OF QWEST
CORPORATION, THE WASHINGTON
INDEPENDENT
TELECOMMUNICATIONS
ASSOCIATION, AND THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION TO
LEVEL 3 COMMUNICATIONS, LLC'S
MOTION TO STAY**

Qwest Corporation ("Qwest"), the Washington Independent Telecommunications Association ("WITA"), and the Washington Utilities and Transportation Commission ("Commission") (referred to collectively as the "Joint Parties") hereby respond to the Motion to Stay filed by Level 3 Communications, LLC ("Level 3") on January 23, 2009. The Joint Parties oppose the motion to stay for the reasons set forth hereafter and respectfully request that the motion be denied.

1 **ARGUMENT**

2 Level 3 claims that a stay is warranted because its Ninth Circuit appeal and this appeal
3 address some similar issues related to the regulatory treatment of traffic referred to as “Virtual
4 NXX” or “VNXX” traffic, and that this proceeding should await the outcome of the Ninth
5 Circuit appeal. However, this is not a sufficient reason to grant a stay, and there are also
6 dramatic differences in the issues in this case and the Ninth Circuit appeal that strongly militate
7 against granting the motion to stay. A stay will cause a significant delay in the resolution of this
8 docket, to the detriment of the Joint Parties and to other parties to this case who are not
9 participating in this appeal.

10 The Court should deny Level 3’s Motion for the following reasons:

11 **A. The Key Common Issue—the Scope of the *ISP Remand Order*—is Settled Law in**
12 **the Ninth Circuit and Several Other Federal Circuits.**

13 The Joint Parties agree with Level 3 that one of the issues in the Arizona case now on
14 appeal to the Ninth Circuit deals with the proper scope of the Federal Communications
15 Commission’s (“FCC’s”) 2001 *ISP Remand Order*: whether the *ISP Remand Order* governs *all*
16 traffic sent to Internet Service Providers (“ISPs”) or whether the *ISP Remand Order* governs
17 only calls to an ISP located within the caller’s local calling area. The same issue was also
18 addressed by the Washington Commission in the order that is on appeal in this case. Level 3’s
19 motion suggests that this issue has not been decided by the Ninth Circuit and that the Arizona
20 appeal is a matter of first impression in the Ninth Circuit. Thus, Level 3 argues that this case
21 should be stayed until the Ninth Circuit answers that question.

22 Level 3’s motion is misleading. The scope of the *ISP Remand Order* is not a matter of
23 first impression in the Ninth Circuit (or in three other federal circuits where it has already been
24 decided, or in the Western District of Washington). In fact, the Ninth Circuit definitively
25 decided this issue more than two years ago in *Verizon California v. Peevey*, 462 F.3d 1142, 1159
26 (9th Cir. 2006) (“*Peevey*”). In *Peevey*, the Ninth Circuit stated that the rate caps in the *ISP*

1 *Remand Order* “are intended to substitute for the reciprocal compensation that would otherwise
2 be due to CLECs for terminating local ISP-bound traffic. They do not affect the collection of
3 charges by ILECs for originating interexchange ISP-bound traffic.”

4 The Ninth Circuit was the fourth circuit court to weigh in on that issue; all four circuits
5 are unanimous in holding that the *ISP Remand Order* applies only to calls to an ISP located
6 within the caller’s local calling area. In the original appeal of the *ISP Remand Order*, the D. C.
7 Circuit, in *WorldCom, Inc. v. FCC*, 288 F3d 429, 430 (D.C. Cir. 2002) (“*WorldCom*”),
8 confirmed this reading in its description of the issue before the FCC: “[i]n the [*ISP Remand*
9 *Order*] the [FCC] held that under § 251(g) of the Act it was authorized to ‘carve out’ from §
10 251(b)(5) calls made to internet service providers (“ISPs”) located within the caller’s local
11 calling area.” Litigation on the scope of the *ISP Remand Order* worked its way through the
12 courts for the next several years. In 2006, three additional federal circuit courts (including the
13 Ninth Circuit) ruled that the only traffic subject to the *ISP Remand Order* are calls to an ISP
14 located within the caller’s local calling area. In the first of these three decisions, *Global NAPs v.*
15 *Verizon New England*, 444 F.3d 59, 62 (1st Cir. 2006) (“*Global NAPs I*”), the First Circuit held
16 that “the FCC did not expressly preempt state regulation of intercarrier compensation for non-
17 local ISP-bound calls.” Three months later, in *Global NAPs v. Verizon New England*, 454 F.3d
18 91, 99 (2d Cir. 2006) (“*Global NAPs II*”), the Second Circuit concluded that “[t]he ultimate
19 conclusion of the [*ISP Remand Order*] was that ISP-bound traffic within a single calling area is
20 not subject to reciprocal compensation.” *Peevey* then followed less than five months after
21 *Global NAPs I*. There is no contrary circuit court authority on this issue.

22 In 2007, the issue was decided by the Western District of Washington in *Qwest Corp. v.*
23 *Washington Utilities & Transp. Comm’n*, 484 F. Supp. 2d 1160, 1173 (W.D. Wa. 2007)
24 (“*Qwest*”). Relying on the authorities above, the court noted: “It comes as no surprise, then, that
25 every federal court of appeals that has recently analyzed the scope of *ISP Remand Order* in this
26 regard has concluded similarly, i.e., that the changes ushered by that order apply only to ISP-

1 bound traffic within a single local calling area.” The Court engaged in a detailed analysis of the
2 issues and relevant authorities, and ruled that the scope of the *ISP Remand Order* is limited to
3 calls to an ISP located within the caller’s local calling area. *Id.* at 1173-76.¹

4 Thus, there is no merit to Level 3’s argument that this case should be stayed pending a
5 Ninth Circuit decision on the scope of the *ISP Remand Order*. The scope issue is a settled issue
6 in the Ninth Circuit and in the three other circuits that have considered the issue. Level 3’s
7 attempt to revisit this settled issue again in its Ninth Circuit appeal of the Arizona decision is not
8 grounds for a stay of this case.

9 **B. The Only Significant Common Issue is the Scope Issue. Two Other Critical**
10 **Issues In This Appeal Are Not Present in the Arizona Appeal; Those Issues Need**
11 **to be Decided and a Delay Will Prevent Resolution**

12 There are several issues between this case and the Arizona case that are different. The
13 Joint Parties will mention only the two most critical issues.

14 First, while the scope issue is a matter of federal law, the question of how to classify calls
15 as local or interexchange is left to the state commissions. *Global NAPs II*, 454 F.3d at 99 (ruling
16 that state commissions “have authority to define local calling areas with respect to intercarrier
17 compensation.”); *see also Qwest*, 484 F. Supp. 2d at 1177 (remanding the case to the
18 Washington Commission to “classify the instant VNXX calls, for compensation purposes, as
19 within or outside a local calling area”). In the Arizona case, issues of call classification were
20 decided under Arizona law; likewise, call classification issues in the present case were decided
21 by the Commission under Washington law. A Ninth Circuit decision dealing with Arizona call
22 classification will provide no guidance to this Court on questions of call classification under

23 ¹ It is also worth noting that the FCC was asked to file an *amicus* brief in *Global NAPs I*
24 on the scope issue. In that brief, among other things, the FCC stated that: “[T]he [*ISP Remand*
25 *Order*] indicates that, in establishing the new compensation scheme for ISP-bound calls, the
26 Commission was considering only calls placed to ISPs located in the same local calling area as
the caller. The Commission itself has not addressed application of the *ISP Remand Order* to
ISP-bound calls outside a local calling area. Nor has the Commission decided the implications
of using VNXX numbers for intercarrier compensation more generally.” Quoted in *Qwest*, 484
F. Supp. 2d at 1174.

1 Washington law. Thus, irrespective of what may happen on the scope issue, this issue is unique
2 to this case and will need to be decided.

3 Second, in this case, the Commission established a policy with regard to the manner in
4 which VNXX traffic would be treated for intercarrier compensation purposes. The Commission
5 adopted a compensation mechanism known as "bill-and-keep," whereby each party bears its own
6 costs for the exchange of a particular type of traffic (in this case VNXX traffic) and neither party
7 compensates the other party for terminating traffic. That issue is a central issue in this case, but
8 is completely absent from the Arizona case. Waiting for a Ninth Circuit decision will not in
9 provide any guidance on that critical issue.

10 **C. Delay Will Harm Qwest, WITA, and the Other Parties to This Docket Who are**
11 **Not Participating in This Appeal**

12 Level 3 states that a delay will not prejudice Qwest or WITA. That is not true (see
13 below), but it also ignores the fact that this case involves far more than just Level 3, Qwest, and
14 WITA. In this docket, excluding Commission Staff, there are ten parties (including seven other
15 respondents). Only two of the respondents—Level 3 and Broadwing (which is owned by Level
16 3)—chose to appeal the Commission's decision. Qwest, state regulators, WITA, and all the
17 other parties to the case deserve finality and a clear sense of direction on intercarrier
18 compensation, which will be denied to these parties in Washington if this matter is indefinitely
19 deferred. In addition, only Level 3 has appealed the Arizona decision. Thus, Level 3 is in
20 essence asking this Court to hold up the implementation of a critical order that affects numerous
21 other parties, solely for the benefit of Level 3.

22 Qwest filed the complaint in this docket in May 2006, nearly three years ago. Even if
23 this case proceeds, it is likely to take a year until it is resolved (and then the decision is subject to
24 further appeal). On the other hand, the Ninth Circuit case is just beginning the briefing process
25 (the first brief will be filed in February 2009) and the case has not been argued. Thus, it could
26 be months (and perhaps considerably more than a year before a decision is rendered in the Ninth

1 Circuit). To that time must be added the time necessary to brief the appeal to this Court, argue it,
2 and have it decided; that process would take at the very least several months. Thus, Level 3's
3 claim that delay will cause no harm to Qwest and WITA (not to mention the other parties) is
4 simply untrue. Considering the time necessary to complete the Ninth Circuit proceeding, then
5 complete the appeal in this matter, it could easily delay a decision in this case for more than two
6 years. Such a delay creates such prolonged uncertainty about the resolution of the disputed
7 issues that it will prevent Qwest, WITA, and the other parties from moving on with their
8 business in a timely and predictable manner.

9 DATED this 6th day of February, 2009.

10 STOEL RIVES LLP

11 /s/ John H. Ridge

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Attorneys for Qwest Corporation

1 Dated: February 6, 2009.

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/s/ Richard Finnigan per email authorization

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Dated: February 6, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am an employee of Stoel Rives LLP. I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 years, and not a party to this action.

On February 6, 2009, I certify that I served a true and correct copy of *Joint Response Of Qwest Corporation, The Washington Independent Telecommunications Association, And The Washington Utilities And Transportation Commission To Level 3 Communications, LLC's Motion To Stay* and this *Certificate of Service* upon the following parties in the manner shown below:

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Attorney for Intervenor-Defendant WITA

DATED this 6th day of February, 2009, at Seattle, Washington.

/s/ John H. Ridge
John H. Ridge, WSBA #31885

Exhibit C

**Level 3 Communications, LLC's Reply in Support of Motion to
Stay**

(dated February 13, 2009)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LEVEL 3 COMMUNICATIONS, LLC and
BROADWING COMMUNICATIONS, LLC

Plaintiffs,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION; and
MARK H. SIDRAN, PATRICK J. OSHIE, and
PHILIP B. JONES, in their Official Capacities as
Commissioners of the Washington Transportation
And Utilities Commission and not as Individuals,

Defendants

Case No.: C08-5563RBL

LEVEL 3 COMMUNICATIONS,
LLC'S REPLY IN SUPPORT OF
MOTION TO STAY

NOTED ON MOTION
CALENDER: February 13, 2009

I. INTRODUCTION

Level 3 Communications, LLC and Broadwing Communications, LLC (together, "Level 3") have moved this Court for an order staying the litigation pending a decision by the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Qwest v. Level 3*

1 *Communications, LLC et al* (“Ninth Circuit Appeal”).¹ In support of its Motion, Level 3
2 demonstrated that the central issue presented by the Ninth Circuit Appeal—whether the
3 reciprocal compensation framework of the Federal Communications Commission’s (“FCC”)
4 *ISP Remand Order*² applies to VNXX-routed ISP-bound traffic—is identical to the central
5 issue presented in this case. Therefore, it is highly likely that the Ninth Circuit’s decision will
6 clarify and simplify, if not control, the Court’s decision in this case. For this reason, the Court
7 should delay its consideration until the Ninth Circuit has a chance to rule.

8 Qwest Corporation, the Washington Independent Telecommunications Association
9 and the Washington Utilities and Transportation Commission (referred to collectively as the
10 “Joint Parties”) oppose Level 3’s Motion. In their response, the Joint Parties argue that the
11 Court should deny the stay because (1) “there are dramatic differences” between the issues in
12 this case and the Ninth Circuit Appeal; and (2) a stay will delay this case to the detriment of
13 Joint Parties and others as well.³ There is no merit to either argument, and the Court should
14 grant Level 3’s Motion to Stay.

15 II. DISCUSSION

16 1. The Decision Issued in the Ninth Circuit Appeal Will be Relevant and Will Likely 17 Control the Outcome of this Case.

18 The Joint Parties agree with Level 3 that the Ninth Circuit Appeal will address
19 whether or not the FCC’s compensation framework in the *ISP Remand Order* applies to all
20 ISP-bound traffic, regardless as to whether it originates from and terminates to physical
21

22
23 ¹ Docket No. 08-15887.

24 ² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

25 ³ Joint Response of Qwest Corp, the Washington Independent Telecommunications Association
26 and the Washington Utilities and Transportation Commission to Level 3 Communications, LLC’s Motion to Stay (February 6, 2009) (“Joint Parties’ Response”), p. 2.

1 locations in the same local calling area.⁴ They argue, however, that the Ninth Circuit has
2 already “definitively” decided this issue two years ago in *Verizon California v. Peevey*,⁵
3 suggesting that a decision in their favor is a foregone conclusion, and not worth waiting for.
4 This mischaracterizes controlling law, *Peevey*, and its relevance to the Ninth Circuit Appeal.

5 *First*, the Ninth Circuit applies federal law as it exists at the time a case is decided.⁶
6 On July 8, 2008, the United States Court of Appeals for the District of Columbia granted a
7 writ of mandamus directing the FCC to respond to its 2002 remand of the *ISP Remand Order*
8 by November 5, 2008, in the form of a final, appealable order that explains the legal authority
9 for the FCC’s interim intercarrier compensation rules.⁷ On November 5, 2008, the FCC
10 issued an order in response.⁸ Because the FCC’s *2008 Order* provides the legal foundation
11 for the federal ISP-bound compensation regime,⁹ and clarifies the governing rules in light of
12 this new legal basis, the Ninth Circuit must analyze the *ISP Remand Order* **as clarified and**
13 **justified by the 2008 Order**. In view of this fact, the Joint Parties’ suggestion that the core
14 issue in the Ninth Circuit Appeal is settled by *Peevey* is false and must be rejected.

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17 ⁴ Joint Parties’ Response, p. 2.

18 ⁵ 462 F.3d 1142, 1159 (9th Cir. 2006) (“*Peevey*”).

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

26 ⁷ *In re: Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008).

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

⁹ The court in *WorldCom* rejected the FCC’s prior foundation which erroneously presumed that
section 251(g) removed ISP bound traffic from the ambit of 251(b)(5). *WorldCom v. FCC*, 288 F.3d
429, 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (“*Worldcom*”); *2008 Order*, FCC 08-262,
at ¶ 4 (“The court held that section 251(g) did not provide a basis for the [FCC’s] decision.”).

1 Second, contrary to the Joint Parties' implication, in *Peevey* the Ninth Circuit *did not*
2 decide the scope of the *ISP Remand Order*. *Peevey* addressed two VNXX issues: (1)
3 Verizon's challenge to call termination charges for VNXX traffic¹⁰ and (2) Pac-West's
4 challenge to call origination charges for VNXX traffic.¹¹ *Peevey* found that the California
5 Public Utilities Commission ("CPUC") reached its determination on issue under state law,
6 without regard to the federal Telecommunications Act or FCC rules.¹² Noticeably absent is
7 any discussion of whether the *ISP Remand Order* required the CPUC to reach a certain result
8 on the issue of call termination charges. On the second issue, after discussing the fact that
9 ISP-bound traffic is *not* subject to Section 251(b)(5) (and the FCC rules adopted thereunder
10 that prohibit call origination charges), *Peevey* held that the issue of call origination charges for
11 VNXX ISP-bound traffic—which were classified as interexchange by the CPUC—was not
12 before the FCC in the *ISP Remand Order*.¹³ Therefore, *Peevey* upheld the CPUC's imposition
13 of such origination charges under state law. This second *Peevey* holding needs to be
14 reevaluated in light of the *2008 Order*'s determination that ISP-bound traffic *is* subject to
15 Section 251(b)(5).

16 Third, contrary to the Joint Parties' claim, there is circuit authority—in fact, Ninth
17 Circuit authority—that supports Level 3's position on the merits. In *Pacific Bell v. Pac-West*
18 *Telecomm, Inc.*,¹⁴ the Ninth Circuit described the *ISP Remand Order* instead as "[a]bandoning
19 the local versus interstate distinction" and concluding "that §251(b)(5) applie[s] to all
20 telecommunications traffic except for categories specifically enumerated in §251(g)." The
21 *PacBell* court explicitly rejected arguments that Section 251(g) can be used to justify
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23 ¹⁰ *Peevey*, 462 F.3d at 1155-56.

24 ¹¹ *Id.* at 1157-58.

25 ¹² *Id.* at 1158.

26 ¹³ *Id.* at 1158-59.

¹⁴ 325 F.3d 1131 (9th Cir. 2003) ("PacBell").

1 excluding ISP calls from compensation.¹⁵ Thus, the Ninth Circuit is likely to conclude that
2 the *ISP Remand Order's* reciprocal compensation framework extends to encompass all
3 locally-dialed ISP-bound traffic, regardless of local versus interexchange distinctions.¹⁶ Such
4 a ruling would determine the outcome in this case.¹⁷

5 In sum, *Peevey* did not determine the scope of the *ISP Remand Order* and the Ninth
6 Circuit's observation—quoted by the Joint Parties—that the *ISP Remand Order's* rate caps
7 apply to “local ISP-bound traffic” and not “interexchange ISP-bound traffic” is neither on
8 point nor controlling.

9 The Joint Parties also incorrectly imply that the Ninth Circuit, as well as other
10 circuits,¹⁸ determined that the *ISP Remand Order* is limited to “local” calls to ISPs *located*
11 within the local calling area of the calling party.¹⁹ To the contrary, *Peevey upheld* the
12 CPUC's determination that VNXX traffic should be subject to terminating compensation
13 regardless of the physical location of the ISP modem.²⁰ As the Ninth Circuit noted, rating
14 calls based on dialed numbers rather than based on location—treating VNXX ISP-bound calls
15 the same as “local” ISP-bound calls—is “consistent with ... industry-wide practice” and
16 reasonably “recognizes essential differences between the ... network architectures of ILECs
17 and CLECs.”²¹ Therefore, the substantive result of *Peevey* supports Level 3's position on

18 ¹⁵ *Id.* at 1131.

19 ¹⁶ The Joint Parties argue that VNXX ISP-bound traffic is “interexchange” and therefore is
20 “excluded” by 251(g). The issue of whether VNXX is excluded from the FCC compensation regime
21 by Section 251(g) is pending before the Ninth Circuit.

22 ¹⁷ See Level 3 Communications, LLC's Motion To Stay, p. 9 (Jan. 23, 2009) (“Motion to Stay”).

23 ¹⁸ For example, in *Global NAPs, Inc. v. Verizon New England, Inc.*, Global NAPs did not
24 challenge the state commission determination that whether a call is rated as local or interexchange
25 should be based on the geographic endpoints of the call. 444 F.3d 59, 72 (1st Cir. 2006).

26 ¹⁹ Joint Parties' Response, p. 3.

²⁰ *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”).

²¹ *Id.* at 1155-56.

1 terminating compensation in this case and the Ninth Circuit appeal of the Arizona district
2 court's decision.

3 Finally, even assuming for the sake of argument that the *Peevey* court *had* ruled that
4 the reciprocal compensation framework of the *ISP Remand Order* did not extend to VNXX
5 traffic—that ruling needs to be revisited in light of the FCC's *2008 Order*, which makes clear
6 that the FCC intended the opposite result.²²

7 **2. The State Law Issues in this Case are Subsidiary and May Well be Mooted by the**
8 **Ninth Circuit's Decision.**

9 Second, the Joint Parties argue that, regardless of the Ninth Circuit's interpretation of
10 federal law, the instant case presents issues of state law that will eventually need to be
11 decided.²³ Specifically, the Joint Parties point out that the question of the proper classification
12 of calls is left to state commissions, and claims that this is an issue that “will need to be
13 decided.”²⁴ The Joint Parties, however, provide no support for this statement. The fact is that,
14 as discussed in Level 3's Motion, the Ninth Circuit decision may well render all state law
15 issues moot.²⁵ If the *ISP Remand Order* requires compensation for all locally-dialed ISP-
16 bound traffic, including VNXX, then the issues of how a call is classified as “local” under
17 state law and whether the state may adopt a different compensation regime (e.g. “bill and
18 keep”) are moot.

19
20
21 ²² *2008 Order* ¶¶ 6-9, 15-16 (ISP-bound traffic is subject to section 251(b) and section 251(b)(5)'s
22 “scope is not limited geographically (“local,” “intrastate,” or “interstate”) or to particular services
23 (“telephone exchange service,” telephone toll service,” or “exchange access”)); ¶¶ 8-10 (rejecting
24 claims that Section 251(b)(5) applies only to intraexchange (or “local”) voice calls that originate on the
network of one local exchange carrier (“LEC”) and terminate in the same exchange on the network of
another LEC).

25 ²³ Joint Parties' Response, pp. 4-5.

26 ²⁴ *Id.*

²⁵ Motion to Stay, p. 9.

1 **3. The Joint Parties' Claim of Harm is Insufficient**

2 Finally, the Joint Parties argue that this Court should deny a stay because the resulting
3 delay would harm the other parties.²⁶ However, the Joint Parties do not identify any particular
4 harm that would result from a delay, other than "uncertainty" with respect to the outcome.
5 The Joint Parties' position is insufficient. First, as discussed in Level 3's Motion, in
6 analyzing whether to stay a proceeding the Court must weigh the competing interests.²⁷
7 "Uncertainty" of outcome is too vague a "harm" for the Court to weigh.²⁸ Moreover, there is
8 no reason to believe that a denial of a stay would produce a shorter period of uncertainty. To
9 the contrary, if the parties are required to litigate this case prior to the Ninth Circuit's ruling,
10 and if this Court's decision differs from that of the Ninth Circuit, another appeal is likely.
11 There is no way around it—the outcome of this case will remain uncertain until the Ninth
12 Circuit rules. The only question is whether this Court and the parties are required to expend
13 their resources litigating the very same issues in this proceeding before receiving the Ninth
14 Circuit's guidance.

15
16 **III. CONCLUSION**

17 In the Ninth Circuit Appeal that court will, for the first time, interpret the scope of the
18 *ISP Remand Order*, and do so in light of the FCC's most recent precedent articulated in the
19 *2008 Order*. The decision rendered will likely substantially impact, if not control altogether,
20 the result in this case. Granting a stay will allow this Court to be guided by the Ninth
21 Circuit's analysis, and will not harm any party. Therefore, in order to avoid inconsistent
22 decisions and in order to allow the parties and this Court to conserve resources, this Court
23 should grant Level 3's Motion to Stay.

24 ²⁶ Joint Parties' Response, pp. 5-6.

25 ²⁷ Motion to Stay, p. 8, ll. 1-5.

26 ²⁸ The Joint Parties have produced no support for their suggestion that such a vague harm can defeat a motion for a stay.

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2 DATED: this 13th day of February, 2009.
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CERTIFICATE OF SERVICE


I hereby certify that I have this day served a true and correct copy of Level 3 Communications, LLC's Reply in Support of Motion to Stay upon the persons and entities listed on the Service List below by the manner shown:

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VIA CM/ECF

Dated this 13th day of February, 2009.



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Exhibit D

Order to Stay

(dated March 16, 2009).

Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LEVEL 3 COMMUNICATIONS, LLC and
BROADWING COMMUNICATIONS, LLC

Plaintiffs,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION; and
MARK H. SIDRAN, PATRICK J. OSHIE, and
PHILIP B. JONES, in their Official Capacities as
Commissioners of the Washington Transportation
And Utilities Commission and not as Individuals,

Defendants

Case No.: C08-5563RBL

ORDER TO STAY

NOTED ON MOTION
CALENDER: February 13, 2009

Having reviewed Level 3 Communications, LLC's Motion to Stay, and being fully advised, the Court hereby ORDERS that the motion is GRANTED. The Court hereby:

(1) Stays the proceeding and suspends the briefing schedule in this matter until a date following a final order on the merits not subject to further review by a federal court of the issues identified in the case captioned *Qwest Corp. v. Level 3, Communications, LLC et al.*, Docket No. 08-15887, filed in the U.S. Court of Appeals for the Ninth Circuit; and

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(2) Directs Level 3 to file periodic reports with the Court identifying the status of this matter in the Ninth Circuit and/or any other federal court.

DATED: this 16th day of March, 2009.


RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE