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1 BEFORE THE WASHINGTON STATE
 UTILITIES AND TRANSPORTATION COMMISSION
 2 PAC-WEST TELECOMM, INC.,) DOCKET UT-053036
)
 3 Petitioner,) Volume III
) Pages 55 to 87
 4 vs.)
)
 5 QWEST CORPORATION,)
)
 6 Respondent.)
 _____))
 7)
 LEVEL 3 COMMUNICATIONS, LLC,) DOCKET UT-053039
 8)
 Petitioner,) Volume III
 9) Pages 55 to 87
 vs.)
 10)
 QWEST CORPORATION,)
 11)
 Respondent.)
 12 _____))

 A status conference in the above matter
 13
 14 was held on Wednesday, May 27, 2009, from 9:05 a.m to
 15 a.m., at 1300 South Evergreen Park Drive Southwest,
 16 Room 206, Olympia, Washington, before Administrative Law
 17 Judge ANN RENDAHL.

18 The parties were present as follows:
 QWEST CORPORATION, by LISA ANDERL, Attorney
 19 at Law, 1600 Seventh Avenue, Suite 1506, Seattle,
 20 Washington 98191, Telephone (206) 345-1574, Fax (206)
 21 343-4040, E-Mail lisa.anderl@qwest.com; and by THOMAS
 DETHLEFS, Attorney at Law, 1801 California Street, 10th
 Floor, Denver, Colorado 80202, Telephone (303) 383-6646,
 Fax (303) 298-8197, E-mail Thomas.dethlefs@qwest.com.

 PAC-WEST TELECOMM, INC., via bridge line by
 22 GREGORY J. KOPTA, Attorney at Law, Davis Wright
 23 Tremaine, LLP, 1201 Third Avenue, Suite 2200, Seattle,
 24 Washington 98101, Telephone (206) 757-8079, Fax (206)
 757-7079, E-Mail gregkopta@dwt.com

25 Joan E. Kinn, CCR, RPR
 Court Reporter

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1 LEVEL 3 COMMUNICATIONS, LLC, by GREGORY
2 ROGERS, Attorney at Law, Level 3 Communications, LLC,
3 1025 Eldorado Boulevard, Broomfield, Colorado 80021,
4 Telephone (720) 888-2512, Fax (720) 888-5134, E-Mail
5 greg.rogers@level3.com; and via bridge line by LISA F.
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9 E-Mail lisa@mcd-law.com.

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P R O C E E D I N G S

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JUDGE RENDAHL: We're here in Dockets

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UT-053036 and UT-053039 before the Washington Utilities

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and Transportation Commission. My name is Ann Rendahl,

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I'm the presiding Administrative Law Judge, and we're

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here for a status conference on Wednesday, May 27th,

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it's about 9:05. I called the status conference by

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notice on May 14th after having reviewed all of the

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parties' pleadings and realizing that there is a lot

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going on in other fora, including the D.C. Circuit Court

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and the Ninth Circuit Court of Appeals where matters

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relating to the issues in this case are pending on

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appeal, so I wanted to have a status conference to

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determine whether it's appropriate to hold this matter

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in abeyance pending a decision in either of those

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courts.

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So before we have our conversation about

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that, why don't you all make your brief appearances. I

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believe your full appearance is already in the record,

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and while we were off the record we made some

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corrections to various changes in room numbers and

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E-mail addresses.

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MS. ANDERL: Okay, thank you, Your Honor,

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Lisa Anderl representing Qwest Corporation, and my

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updated room number on my mailing address is 1506.

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1 JUDGE RENDAHL: Thank you.

2 And also for Qwest.

3 MR. DETHLEFS: Tom Dethlefs also on behalf of
4 Qwest.

5 JUDGE RENDAHL: Thank you.

6 MR. DETHLEFS: Do I need to give you my
7 address?

8 JUDGE RENDAHL: No, we have all of the full
9 appearances, so it's just a matter of identifying
10 yourselves this morning.

11 For Level 3.

12 MR. ROGERS: Here in the hearing room for
13 Level 3 I'm Greg Rogers.

14 JUDGE RENDAHL: And on the bridge line.

15 MS. RACKNER: Lisa Rackner for Level 3.

16 JUDGE RENDAHL: Thank you.

17 And Mr. Kopta for Pac-West is not here, but
18 while we were off the record we discussed that he
19 appeared to be aware of the conference, so he may be
20 delayed and may chime in at some point.

21 So I've stated my reason for calling this
22 conference to discuss with all of you the pros and cons
23 of holding this matter in abeyance. The reason for
24 issuing the notice and thinking about an abeyance is
25 really a matter of conserving resources. If I were to

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1 go ahead and rule on the pleadings that you all have
2 filed, it seems to me that there could be a change in
3 the law as we know it now in a matter of two to four
4 months requiring additional briefing and maybe
5 addressing the issues again on appeal before the
6 Commissioners. So this is an issue that's been changing
7 as we know it for the last ten years. Whether that
8 actually will ever change we don't know, but it seems to
9 me since there are matters pending that could be decided
10 in the near future, I wanted to get your input before
11 making a decision about whether to hold it in abeyance.

12 So I would like to hear first from Level 3 as
13 one of the petitioners in this case, and then from
14 Qwest, and if Mr. Kopta chimes in we'll hear from
15 Mr. Kopta as well.

16 Mr. Rogers or Ms. Rackner, I don't know who
17 chooses to go first.

18 MR. ROGERS: I will go ahead and start, and
19 then perhaps if I've left anything out or there are
20 additional comments, Lisa, you can feel free to jump in.

21 Level 3 is supportive of the idea that the
22 matter should be held in abeyance. We've not filed a
23 motion to stay the matter, but nevertheless we do feel
24 it's appropriate at this point in time to stay the
25 matter. We did file a motion to stay in our appeal of

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1 the Virtual NXX complaint case that is before the
2 Western District Court. We had also sought and I think
3 in the state court matter it was stipulated that a stay
4 would be put in place. But in the District Court, our
5 motion for a stay was opposed but was granted over the
6 opposition of the joint parties, the Attorney General's
7 Office, Qwest, and WITA. And I think the, you know, the
8 rationale that you've identified was certainly the
9 fundamental basis for our motion to stay in that
10 proceeding, which is that with a Ninth Circuit
11 proceeding underway, the briefing has been submitted on
12 both sides, that it doesn't seem to make a lot of sense
13 to expend resources toward, you know, arguing about what
14 the law is and then what the outcome ought to be when
15 the Ninth Circuit decision is likely to control both the
16 Western District's ultimate outcome as well as what the
17 outcome would be here at the Commission in this
18 proceeding.

19 It's also I think relevant to consider that
20 the D.C. Circuit has the mandamus order before them and
21 the question of whether they've established the correct
22 legal basis for their ISP recip comp orders at this
23 point in time. It is important and certainly would play
24 into, you know, how that affects a decision in this
25 matter. You know, it's Level 3's opinion certainly that

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1 the mandamus order ought to put an end to the lengthy
2 litigation that's been going on for a number of years
3 and that we are nearing a final point in all of this.
4 You know, it's hard to know exactly when the Ninth
5 Circuit decision would come out. All we can say really
6 at this point is that the briefs have been submitted and
7 we've submitted our arguments to the Ninth Circuit, and
8 we've agreed to provide periodic reports, status
9 updates, to the District Court. Now that the stay has
10 been granted, we have that obligation there and would
11 certainly be willing to do so here if that was seen as
12 being useful. So that's where Level 3 is.

13 I guess the other matter that I might just
14 mention briefly that's out there that also perhaps
15 factors in to some degree is the FCC's Blue Casa
16 proceeding, a declaratory ruling I believe, where
17 virtual NXX has been brought forward and, you know,
18 comments have been submitted in that proceeding as well.
19 So that's another proceeding still where these issues
20 are being considered and probably would have impact.
21 Certainly, you know, the question in the Blue Casa case
22 is I think not quite -- it's not quite as clear that it
23 would be as impactful as the Ninth Circuit outcome, but
24 I mention it nevertheless.

25 Lisa, I don't know if you had anything else

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1 you wanted to add to any of that at this point.

2 MS. RACKNER: No, I think that covers it.

3 JUDGE RENDAHL: Okay, I have one question.

4 In terms of status of the cases, you all are probably
5 more familiar than I am or have the schedule at your
6 fingertips more than I do, my understanding is that as
7 you say that in the Ninth Circuit case that the briefing
8 has been submitted, has there been any oral argument
9 scheduled yet in that case?

10 MR. ROGERS: (Shaking head.)

11 JUDGE RENDAHL: No, I see shaking of heads.

12 MR. ROGERS: I don't believe so, right, I'm
13 not aware of it.

14 JUDGE RENDAHL: And in the D.C. Circuit
15 mandamus appeal, are all the final briefs, have they all
16 been submitted, do you know if briefing has been
17 concluded in that matter?

18 MR. ROGERS: I can't say for certain. I know
19 that briefing has been submitted, I'm just not sure
20 whether it's final.

21 JUDGE RENDAHL: And do we know whether
22 there's an oral argument date scheduled yet in that
23 proceeding?

24 MR. ROGERS: I do not know. I have not heard
25 of an oral argument date I guess at this point.

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1 JUDGE RENDAHL: For Qwest?

2 MR. DETHLEFS: Your Honor, it's my
3 understanding that the interveners just filed their
4 brief, the interveners in support of the FCC order filed
5 their brief a little over a week ago, week and a half
6 ago. There's at least one more brief that would be
7 filed by the parties who appealed the order, their reply
8 briefs. I don't believe oral argument has been
9 scheduled in that proceeding. And that's the only
10 additional information I have on that.

11 JUDGE RENDAHL: Do you know what the schedule
12 is for the reply briefs?

13 MR. DETHLEFS: I don't.

14 JUDGE RENDAHL: All right.

15 And not being familiar with D.C. Circuit
16 practice, how quickly do you know if they normally
17 schedule oral arguments?

18 MR. DETHLEFS: On the D.C. Circuit appeal, it
19 was my understanding that there were two separate sets
20 of appeals filed. Right after the order came out, Core
21 filed its appeal. There might have been one or two
22 parties with them. Then in January or February time
23 period NARUC and one or two state commissions also filed
24 an appeal.

25 JUDGE RENDAHL: Okay.

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1 MR. DETHLEFS: It had been set on an
2 expedited schedule after Core filed its appeal. That
3 whole schedule got restructured when the next appeal got
4 filed, and so there's a more complicated briefing
5 scheduled. So I think we were anticipating that there
6 might be an oral argument later in the summer or in the
7 fall, but we don't know right now whether the D.C.
8 Circuit is still on track to do it on an expedited
9 basis.

10 JUDGE RENDAHL: Okay, well, thank you.

11 Since Mr. Kopta is not here and Level 3 has
12 given their thoughts on this issue, why don't you,
13 Ms. Anderl or Mr. Dethlefs, whoever chooses to go first,
14 let me know what your thoughts are on this issue.

15 MR. DETHLEFS: Your Honor, on the -- there
16 are three different moving pieces, as Mr. Rogers said.
17 There's the Blue Casa declaratory ruling. Now that's
18 just been filed with the FCC. The FCC has been very
19 slow on these issues. For example the issue of VNXX was
20 first raised in the intercarrier compensation in 2001.
21 They haven't done anything to my knowledge, there's no
22 schedule for a decision on Blue Casa. So the Blue Casa
23 matter, although it might address some of the issues
24 here, we don't believe there's any way to predict
25 whether that will be ten years from now or a year from

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1 now or when anything will be decided there.

2 The Core appeal of the ISP mandamus order and
3 the ISP remand order might be decided this fall. The
4 issue there is whether the ISP remand order rate caps
5 are lawful, whether they should stay in effect or
6 whether that order, that mandamus order, should be
7 vacated for the reasons that the appellants have given.
8 We would view that as an event that would be a change in
9 law that wouldn't operate retroactively. The ISP remand
10 order remains in effect except to the extent that it was
11 changed by the mandamus order, and so because this
12 dispute has a large component that's historical,
13 predominantly historical as a matter of fact, we don't
14 believe a decision in that matter would eliminate the
15 need to decide the issues that have been raised in the
16 motions to date. Now there may be some impact on a
17 going forward basis when that appeal is decided. If,
18 for example, the ISP remand order rate caps were
19 vacated, we think there may be some issues the
20 Commission would have to deal with on a prospective
21 basis, but we don't think that that would affect the
22 historical issues that are raised in the motions.

23 The Ninth Circuit appeal, it's true that the
24 briefing has been completed. After the briefing in this
25 matter and after the briefing in the Ninth Circuit,

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1 after the reply brief in the Ninth Circuit, Qwest was
2 made aware of some statements that the FCC had made in a
3 brief that it had filed in the Core mandamus appeal that
4 led to the order by the D.C. Circuit directing the FCC
5 to justify the ISP remand rules by November 5th, and we
6 would like to submit that to you before you decide
7 whether to stay this matter. There's some statements in
8 the FCC's briefs which we believe basically say they
9 didn't address VNXX traffic in the ISP remand order, and
10 we can submit that this week I'm sure.

11 The Ninth Circuit is a notoriously slow
12 circuit. The average time from filing of an appeal to a
13 decision in the Ninth Circuit is two years. This appeal
14 was filed a year ago, so we believe that it's unlikely
15 that you're going to get a decision from the Ninth
16 Circuit until maybe May of next year. That's an awful
17 long time to hold things in abeyance. Qwest paid the
18 amounts that were in dispute pursuant to the
19 Commission's orders, and so we're trying to, you know,
20 get a refund of those amounts. Not to prejudge the
21 issues there, that's obviously, you know, the
22 Commission's task, but we would like to get our money
23 back as soon as we can, and there's a large -- it's a
24 large sum now as I'm sure you're aware from the papers.

25 And while it's possible that the Ninth

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1 Circuit will decide the issues or an issue that's at
2 issue here, specifically whether the ISP remand order
3 required reciprocal compensation for ISP bound traffic,
4 it's also possible that they will send the matter back
5 to the District Court to decide certain issues that the
6 District Court had remanded back to the Commission. And
7 in particular one of the issues that the District Court
8 did not decide because the Arizona Commission had not
9 decided it was whether Section 251(g) of the Act
10 preserved an intercarrier compensation regime for VNXX
11 traffic. And the District Court in its decision, and I
12 noticed in going through the papers that were filed with
13 the Commission here that I don't believe that anyone
14 cited to the Arizona District Court decision that's on
15 appeal in the Ninth Circuit, but what that court did is
16 it said the Commission itself hasn't decided whether
17 251(g) preserves an intercarrier compensation regime for
18 VNXX traffic, and so it remanded the matter back to the
19 Commission to make a determination. And the idea is
20 that then that determination would be appealable again
21 to the federal court. And so we think it's very
22 possible that what the Ninth Circuit will do is just
23 simply say there was no decision by either the
24 Commission or the District Court on whether 251(g)
25 carves out VNXX traffic from Section 251(b)(5) of the

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1 Act, and if the Court did that, it really wouldn't give
2 any guidance on the issues to be decided here. I guess
3 in shorthand what I'm saying is it's entirely possible,
4 we think likely, that the Ninth Circuit decision will
5 not resolve the matter in a way that provides guidance
6 to the Washington Commission.

7 JUDGE RENDAHL: Okay, anything further,
8 Ms. Anderl?

9 MS. ANDERL: Your Honor, I just wanted to add
10 that we believe that because this matter has been
11 pending on remand for two years that -- and that there
12 will, because of the state of the law on these issues,
13 there will always be upcoming or pending decisions by
14 courts which may or may not be binding on this
15 Commission or may or may not provide guidance on the
16 ultimate issues that there is no compelling reason to
17 hold the matter in abeyance.

18 I think building on what Mr. Dethlefs said
19 with regard to the Arizona Commission's decision and the
20 appeals of that, this Commission has already taken steps
21 way beyond where Arizona was. This Commission has
22 already decided about whether VNXX is local or long
23 distance, about whether it is compensable or not. And I
24 think, you know, really in the historic VNXX docket,
25 Docket 063038, you can characterize the Commission's

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1 ruling in that case in a lot of different ways, but I
2 think it was a ruling under state law that this
3 Commission has authority to determine the natures and
4 characteristics of VNXX. I think it's unlikely that any
5 of the pending other actions will disturb the
6 Commission's authority on that.

7 And, you know, you could say that the
8 Commission held that VNXX is permissible. I prefer to
9 look at it as the Commission held that VNXX would really
10 be unlawful absent compliance with certain standards,
11 and that is the agreement by the carriers to exchange
12 traffic on a bill and keep basis. In other words, Level
13 3 and Pac-West don't have to engage in VNXX, and they
14 are only permitted to engage in it if they agree to
15 exchange that traffic on a bill and keep basis. And I
16 think that that ruling in that complaint docket provides
17 a solid foundation coupled with the parties' papers in
18 this matter for the Commission to move forward and make
19 a decision on the remand issues and on the other issues
20 that are presented.

21 JUDGE RENDAHL: Mr. Rogers and Ms. Rackner,
22 I'm going to let you respond to anything you have heard
23 from Qwest, but I am just letting you both know, both
24 parties know, that I do have some questions. So go
25 ahead, Mr. Rogers, and then I'll --

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1 MR. ROGERS: Okay, Your Honor, I think there
2 are a few things that I would like to respond to or
3 comment on, and perhaps just because I've heard it most
4 recently I will start with some of the comments that
5 Ms. Anderl made. You know, the comment about there not
6 being a compelling reason to hold the matter in
7 abeyance, I think you've accurately identified the
8 reason that it makes sense potentially is that it would
9 require the expenditure of resources and going through
10 the process of reaching a final decision that then
11 likely is to be appealed to a place where there is a
12 matter that is, you know, obviously very similar being
13 stayed right now. So, you know, what we likely would go
14 through is a lot of work to get to a point where we then
15 would wait for the Ninth Circuit decision anyway, and so
16 it doesn't seem to Level 3 that that would be a wise
17 expenditure of resources.

18 You know, the other comment I think, you
19 know, as I listen to Qwest's comments, they seem to
20 think that, well, you know, they want to hold on to the
21 money that's in dispute during that period. Level 3 and
22 Qwest have multiple disputes on these issues throughout
23 Qwest's entire region, and, you know, in any given
24 instance the parties -- one party may be holding the
25 money while the other thinks that money belongs to them,

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1 and we're, you know, we've identified all those disputes
2 between us throughout their region, and I don't know why
3 Washington really would be unique among all of those
4 disputes. And as we've said, you know, we've sought a
5 stay in the Washington appeal that we've had, there is a
6 New Mexico proceeding that's currently going on that has
7 been stayed as well, same issues, and it really depends
8 upon the outcome of the Ninth Circuit. And we realize
9 that that can take time, but the question is does it
10 make sense to expend a great deal of resources in the
11 interim period of time when whatever happens at the
12 Ninth Circuit is going to be controlling of the ultimate
13 outcome anyway. And so I would just make those brief
14 comments.

15 I think, you know, to the comments about the
16 Arizona, specifics about the Arizona proceeding and the
17 likelihood that it would be remanded back to the Arizona
18 Commission, you know, those questions again in Level 3's
19 perspective are addressed by the mandamus order. The
20 mandamus order says this traffic is 251(b)(5) traffic,
21 and there is no longer a distinction between local and
22 long distance traffic, and that question is tied up with
23 the Ninth Circuit, the question of has the FCC put ISP
24 bound traffic into the category of 251(b)(5). We
25 believe the answer is clearly yes, therefore there would

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1 really not be any need to move any further. Once you
2 address that point, then these issues really fall away.
3 I mean what you are left with is that there really is no
4 such thing as Virtual NXX when you're talking about ISP
5 bound traffic. And I think that's where Level 3
6 believes this will ultimately wind up and at that point
7 that question is teed up with the Ninth Circuit right
8 now.

9 JUDGE RENDAHL: Okay. Mr. Rogers, you
10 mentioned that the -- and I believe this is -- you said
11 the District Court, you are providing status reports to
12 the District Court on the Ninth Circuit litigation as
13 well as the D.C. Circuit appeal or just the Ninth
14 Circuit appeal?

15 MR. ROGERS: What we I think have is to
16 provide periodic status reports broadly, and I think
17 it's the Ninth Circuit principally, but Level 3 would
18 provide, you know, status updates to the extent that
19 there were any other developments that may be relevant
20 for consideration.

21 JUDGE RENDAHL: And the Ninth Circuit is
22 aware of the pending D.C. Circuit appeal?

23 MR. ROGERS: I'm certain of that, yes.

24 JUDGE RENDAHL: All right.

25 Mr. Dethlefs, you said you would like to

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1 provide further briefing on --

2 (Bridge line.)

3 JUDGE RENDAHL: Hello, is this Mr. Kopta?

4 Nope, somebody else has dropped off.

5 You said you would like to provide further
6 briefing to submit briefing the FCC made before the D.C.
7 Circuit; is that correct?

8 MR. DETHLEFS: We weren't asking for
9 briefing.

10 JUDGE RENDAHL: Okay.

11 MR. DETHLEFS: The FCC filed a brief in
12 connection with the Core appeal that led to the decision
13 directing the FCC to justify the ISP remand order rules
14 by November 5th, 2008, and the FCC order that was issued
15 then was what we refer to as the ISP mandamus order
16 or --

17 JUDGE RENDAHL: Is your microphone on? Is
18 the red light on?

19 MR. DETHLEFS: Yes.

20 JUDGE RENDAHL: Okay.

21 MS. RACKNER: This is Lisa, I'm having a hard
22 time hearing Tom.

23 JUDGE RENDAHL: Okay, if you can speak more
24 directly into the mike, that would be great, thank you.

25 MR. DETHLEFS: The FCC filed a brief in that

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1 Core appeal with the D.C. Circuit, we just wanted to
2 provide that brief to you. It's got a quote on a
3 particular page about what was and what was not
4 addressed in the ISP remand order, and it says that VNXX
5 traffic was not addressed in the ISP remand order.
6 There's a second brief that they filed in this pending
7 appeal that is for the most part briefed, there may be
8 one or more briefs that are left, and in that brief it's
9 also made a statement to about what traffic was covered
10 in the ISP mandamus order, and we just wanted to bring
11 that to your attention. We weren't asking for, you
12 know, briefing on it, we would just submit it as a
13 supplemental authority. And the reason that we wanted
14 to bring that to your attention is Level 3 has argued in
15 the Ninth Circuit that ISP bound traffic in the ISP
16 remand order means all ISP traffic including VNXX calls,
17 and we believe that the brief the FCC has filed dispels
18 that. We provided the supplemental authority to the
19 Ninth Circuit about a week and -- about last week, and
20 we wanted you to be aware of that and to consider that
21 in deciding whether to stay this matter. And that's --
22 I wasn't asking for additional briefing.

23 JUDGE RENDAHL: Okay.

24 MR. DETHLEFS: Just to bring that to your
25 attention.

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1 JUDGE RENDAHL: Okay, well, I'm happy to set
2 a date for any party to submit supplemental authority if
3 they think that would be helpful in my making a decision
4 on holding this matter in abeyance.

5 I have a question for both parties about the
6 interplay between all of these cases. Hypothetically if
7 the D.C. Circuit were to reject the FCC's mandamus
8 order, my understanding was that the D.C. Circuit had
9 told the FCC they needed to justify their ISP remand
10 order by that date or they would reverse the order. If
11 they reject the mandamus order and they therefore as a
12 result reverse or vacate the ISP order, I assume, I
13 would hope that they would address whether it is vacated
14 retroactively or not. It raises a whole host of issues
15 for this Commission, and that's part of my concern about
16 going ahead and resolving this not knowing what the D.C.
17 Circuit thinks of the mandamus order. Obviously the
18 three parties in this case have specific opinions about
19 what that order means, and if it's upheld or vacated, it
20 clearly affects the outcome in this case. So I would
21 like you to address your understanding of the law and
22 retroactivity, what's likely to happen here, and that
23 will affect my decision on whether to hold in abeyance
24 or not. So starting with Mr. Rogers and Ms. Rackner,
25 specifically if the FCC were to reverse the mandamus

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1 order and vacate the ISP remand order, what effect does
2 that have?

3 MR. ROGERS: I think briefly our opinion that
4 the effect would be that you really -- you go back to
5 the set of circumstances that existed prior to the ISP
6 remand order. I mean recall that the ISP remand order
7 was the FCC's attempt to address the concerns that were
8 being brought forth by the ILECs with regard to ISP
9 bound traffic and allegations that it was being
10 arbitrated by CLECs, and what they did is to try to put
11 in place a terminating rate structure to address those
12 concerns that were brought forth that was different from
13 the traditional set of terminating rates either -- and
14 really the predominant regime was reciprocal
15 compensation.

16 So what you had prior to the ISP remand order
17 was the assessment of reciprocal compensation for
18 termination of local traffic, and what the FCC did with
19 the ISP remand order is to establish a new regime for
20 terminating ISP bound traffic that was different,
21 perhaps had some unique characteristics from traditional
22 local traffic. So they asserted their jurisdiction,
23 they put in place a lower rate as well as caps, new
24 market restrictions, and, you know, the entire structure
25 of their regime.

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1 And then of course once you tick those things
2 off about what it did initially, we would of course
3 mention that in Core, in the Core forbearance order, it
4 got rid of the new market restrictions and the rate caps
5 because it found that those arbitrage concerns that they
6 identified in the ISP remand order did not exist in the
7 marketplace any longer.

8 JUDGE RENDAHL: But if the ISP remand order
9 is vacated, then it doesn't matter what the Core
10 forbearance order said.

11 MR. ROGERS: Agreed.

12 JUDGE RENDAHL: And if the ISP remand order
13 is gone, do you then go back to the Declaratory Order,
14 or because that was vacated do we go back to prior to
15 even the Declaratory Order?

16 MR. ROGERS: Well, I think you're back with
17 the whole set of issues I guess is what I would say in
18 short is that likely the CLECs would say you're left
19 with reciprocal compensation and the ILECs are not going
20 to pay those bills and they'll dispute them on some
21 basis.

22 JUDGE RENDAHL: So you would say that it
23 would have retroactive effect if the ISP remand order
24 were vacated, you would have to in interpreting the
25 interconnection agreements that are at issue in this

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1 case that -- what state of the law would we interpret
2 your interconnection agreements? See that's what I'm
3 left with.

4 MR. ROGERS: Well, I think we would struggle
5 with a bit the term retroactive effect we think is not
6 necessarily applicable, because what we're talking about
7 is what was the law all along. If you vacate the ISP
8 remand order of 2001, then you're saying that that
9 wasn't the law, so you can't -- so it's not a
10 retroactive application of anything, you're wiping out
11 everything that followed from that point forward, and
12 you're going back to what the law was at that point in
13 time. And Level 3 believes that that's very much what
14 is currently being considered with the mandamus order as
15 well where the FCC has said that, you know, they're
16 really left with no choice but to put this into
17 251(b)(5). You either have 251(b)(5) traffic or you
18 have 251(g) traffic, and they've been told by the D.C.
19 Circuit that's it's not 251(g). So that is the law,
20 it's not really a retroactive application of the law.
21 Now you have a clear statement of the law, and you would
22 then be required to apply that law to the parties'
23 contracts.

24 JUDGE RENDAHL: But if the court -- the only
25 reason why the court would throw out the ISP remand

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1 order is because they would also reject the mandamus
2 order, so if they reject the analysis in the mandamus
3 order that you just stated, then where are we? That's
4 my question, and maybe, you know --

5 MR. ROGERS: I agree, and that's why I think
6 it's an unlikely outcome frankly. But I think the only
7 thing that we can speculate is that you would be back in
8 a set of circumstances like you had where you're arguing
9 about whether state reciprocal compensation rates apply
10 or do not apply.

11 JUDGE RENDAHL: Okay, so, Qwest, you've heard
12 my quandary. Before I go to Qwest, Ms. Rackner, is
13 there anything you want to add to what Mr. Rogers has
14 said?

15 MS. RACKNER: No, thank you.

16 JUDGE RENDAHL: Okay.

17 MR. KOPTA: Your Honor, this is Greg Kopta
18 for Pac-West, I just joined the conference, my sincere
19 apologies for being so late.

20 JUDGE RENDAHL: Well, good morning, I gather
21 you jumped in during my conversation with Mr. Rogers.

22 MR. KOPTA: I did.

23 JUDGE RENDAHL: So just to recap, I explained
24 my reasons for wanting to discuss with all parties
25 whether to hold this in abeyance. Mr. Rogers argued,

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1 and Ms. Rackner supported his argument, to hold this,
2 and he's supportive of holding the matter in abeyance
3 given the Ninth Circuit and the D.C. Circuit matter and
4 also mentioned Blue Casa. Qwest has responded arguing
5 against holding in abeyance given the fact that this
6 litigation is probably going to go on for some time and
7 given the financial issues in question and the fact that
8 this has been -- the remand has been pending for two
9 years, that we should go forward. And then I raised
10 some questions about hypothetically what happens if the
11 D.C. Circuit rejects the mandamus order and the result
12 is that the ISP remand order is vacated, and then where
13 are we. And this is part of my frustration in thinking
14 why holding in abeyance may be appropriate, so I was
15 just turning to Qwest to respond to Mr. Rogers'
16 comments, and then I will go to you.

17 MR. KOPTA: Thank you, Your Honor.

18 JUDGE RENDAHL: Okay.

19 MR. DETHLEFS: Your Honor, first let me just
20 point out that Level 3 is in the D.C. Circuit advocating
21 that the ISP mandamus order was lawful, and they are
22 actually supporting that order, so.

23 JUDGE RENDAHL: I understand that.

24 MR. DETHLEFS: And we supported the order
25 too, but we have a disagreement as to what the order

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1 means. And I don't mean to go, you know, into that
2 except to say that, you know, we believe that when the
3 ISP remand order and the ISP mandamus order use the term
4 ISP bound, they are referring to a specific type of
5 traffic, that is calls placed to an ISP located in the
6 caller's local calling area. That said --

7 JUDGE RENDAHL: I'm sorry to interrupt you, I
8 just want to clarify. So you hope to get in this
9 decision before the D.C. Circuit some clarification
10 about the definition of ISP bound traffic within the
11 order?

12 MR. DETHLEFS: We believe that the FCC has
13 said that the traffic at issue, and this will be in the
14 brief that we will submit to you this week, we believe
15 that they have said that the traffic that they addressed
16 in both the ISP remand order and the ISP mandamus order
17 concerns calls to an ISP in the local calling area.

18 JUDGE RENDAHL: Okay, sorry to interrupt.

19 MR. DETHLEFS: Now if the ISP remand order is
20 vacated and the ISP mandamus order is rejected, we
21 believe that that will only operate prospectively and
22 that -- because every court that has had a dispute,
23 every court of appeals, Global Maps 1, Global Maps 2,
24 every court that has addressed the issue has said that
25 the ISP remand order was in effect at the time that they

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1 decided their appeal. That's because when the initial
2 appeal in WorldCom of the ISP remand order took place,
3 the D.C. Circuit had a choice, they could have either
4 remanded the ISP remand order, or they could have
5 vacated it, and they chose to remand without vacating,
6 which meant that the ISP remand order remained in
7 effect. So it's our position that whatever the D.C.
8 Circuit does when it reaches its decision to vacate an
9 order, that will operate prospectively from that time
10 forward, and that will leave the fight between or the
11 dispute between the parties as to what the law was prior
12 to the time at issue of this order just as it is today.
13 We don't think that that would change, because the ISP
14 remand order was in effect until and will be in effect
15 until such time as it's vacated. Same with the ISP
16 mandamus order.

17 JUDGE RENDAHL: Okay.

18 Anything further from Qwest?

19 MS. ANDERL: Your Honor, Lisa Anderl, I would
20 just add that I think that the ICAs incorporate the
21 terms of the ISP remand order, and so I think we would
22 need to grapple with the question of whether even if it
23 is vacated and doesn't exist according to Mr. Rogers'
24 view, the question would be then whether the ICAs are
25 somehow altered without amendment to remove the terms of

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1 the ISP remand order from the parties' interconnection
2 agreements, and I think that they probably would not.
3 And so I think that the ISP remand order will remain
4 relevant in terms of a framework for deciding the
5 compensation issues between the parties, and I think
6 that based on the history that we have in the state here
7 and the District Court for the Western District of
8 Washington's remand, the direction is pretty clear, that
9 decision is dependent on the characterization of the
10 VNXX traffic as either local or non-local. This
11 Commission has already decided that it's non-local, and
12 courts with authority to bind this Commission have
13 decided that the ISP remand order is limited in scope
14 and applies only to local, using that word in quotes,
15 ISP bound traffic. And so we think that the decision is
16 going to be pretty clear regardless.

17 And I guess even if you were to say that the
18 ISP remand order if it were vacated and just returned us
19 to some pre 2001 existence, I guess then you would look
20 at -- I don't think the result for Qwest would change,
21 because we would look at what was the state of the law
22 then, and we go back to our briefing on the VNXX is
23 nothing but a total avoidance scheme, and we briefed
24 that based on Commission precedent either with toll
25 bridgers and other carriers who have tried to engage in

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1 dialing and traffic patterns that simply avoid access to
2 purchase. And so we would still be in a situation where
3 regardless of what the state of the law was with regard
4 to ISP bound traffic, VNXX traffic would be something
5 that is not subject to local compensation either as ISP
6 bound traffic or under Section 251.

7 JUDGE RENDAHL: Okay, Mr. Kopta.

8 MR. KOPTA: Thank you, Your Honor. We
9 certainly share your concern that matters are in a bit
10 of a state of flux given the status of the FCC's second
11 ISP remand order, and obviously there are a number of
12 questions that we could ask and discuss in terms of what
13 might the courts do, what might the Ninth Circuit do,
14 what might the D.C. Circuit do, and there are a variety
15 of outcomes that are possible, so we certainly can
16 understand that taking some time at least for the D.C.
17 Circuit decision to come out, particularly given that
18 Qwest is seeking some clarification on the scope of the
19 order, might make some sense, and we would certainly be
20 supportive of that decision by the Commission to at
21 least wait until the D.C. Circuit has issued its
22 decision. At this point we are, you know, amenable to
23 either waiting until that happens, or if the Commission
24 decides that it has the information that it needs to
25 make a determination now, then we are basically okay

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1 with that as well. So we're sort of taking a neutral
2 position, although we are supportive of the concerns
3 that would lead to at least a partial stay of this until
4 at least the D.C. Circuit has ruled on the legality of
5 the ISP remand order the second ISP remand order.

6 JUDGE RENDAHL: Okay, is there anything
7 further Level 3 or Qwest or Pac-West wishes to let me
8 know before I make a decision on this? And I likely
9 will not make a decision this morning on the record, I
10 would like to see Qwest's supplemental authority, and if
11 Level 3 or Pac-West have any additional supplemental
12 authority I'm happy to receive that as well, we can set
13 a date. So before I cut you off though, Mr. Rogers, you
14 have something else to say?

15 MR. ROGERS: Well, I have just perhaps a
16 suggestion along the lines of submitting supplemental
17 authority. I don't know that we have supplemental
18 authority per se, but it strikes me that perhaps
19 submitting the motions and opposition and reply of our
20 motion to stay the District Court appeal may be useful,
21 because there are legal arguments in the form of the
22 motion and a response all set out. And so I just make
23 that suggestion that perhaps that might be something
24 that you would be interested in considering.

25 JUDGE RENDAHL: I'm happy to receive those as

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1 supplemental information, much as Qwest has offered the
2 FCC briefs in the mandamus matter.

3 So what date, since you're not writing
4 anything, it's not as if you need an extensive period of
5 time to do so, should we set a date of no later than a
6 week from today?

7 MR. ROGERS: That would be fine with Level 3.

8 MR. DETHLEFS: That would be fine with Qwest
9 too.

10 JUDGE RENDAHL: Okay, so if we set Wednesday,
11 June 3rd, by the end of the day as the date for
12 submitting any supplemental authority relating to the
13 question of holding this matter in abeyance pending the
14 Ninth Circuit and the D.C. Circuit appeals.

15 MS. ANDERL: And, Your Honor, may I ask would
16 it just be the normal number of copies that are as
17 previously designated, which I don't remember how many
18 that is?

19 JUDGE RENDAHL: Yes, it would be whatever has
20 been previously designated, and I can probably tell you
21 that since I have my prehearing conference orders. I
22 think it's an original and 4, and under our rules you
23 can submit them electronically and then file the
24 original and 4 the following business day.

25 All right, well, thank you very much for

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1 coming here today. You can understand my frustration
2 and confusion in this in not wanting to expend
3 unnecessary resources when things may change, as they
4 have routinely over the years in this case or this
5 issue, so thank you very much. Is there anything else
6 to add this morning, Mr. Kopta, Ms. Rackner, or those
7 here in the room?

8 MR. KOPTA: No, Your Honor.

9 MS. RACKNER: No.

10 JUDGE RENDAHL: Okay, so we'll make sure that
11 your appearance is stated in the record, Mr. Kopta.

12 MR. KOPTA: Thank you.

13 JUDGE RENDAHL: And thank you for joining us,
14 and thank you very much, and I will send out a notice
15 about the filing date later today. Okay, thank you.

16 (Hearing adjourned at 9:55 a.m.)

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