[Service Date: July 20, 2010]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent. PAC-WEST TELECOMM, INC., Petitioner v. QWEST CORPORATION, Respondent	)	Docket No. UT-053039 **LEVEL 3 COMMUNICATIONS, LLC'S INITIAL BRIEF TO REFRESH THE RECORD AND TO PROVIDE SUPPLEMENTAL AUTHORITY** Docket No. UT-053036

I. INTRODUCTION

1. Level 3 Communications, LLC ("Level 3") submits its Initial Brief to Refresh the Record and to Provide Supplemental Authority.[1] As shown herein, the decision of the United States Court of Appeals for the District of Columbia Circuit in *Core Communications, Inc. v. FCC*[2] settles the debate, confirming—consistent with this Commission's earlier rulings[3]—that

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[1] This filing is made pursuant to Order No. 11 of the Washington Utilities and Transportation Commission (the "Commission") in the above-captioned consolidated proceedings.

[2] 592 F.3d 139 (D.C. Cir. 2010).

compensation is owed for all locally-dialed calls terminated by a LEC to Internet Service Providers ("ISPs") and that the compensation regime is limited to that established by the Federal Communications Commission ("FCC"). Specifically, the D.C. Circuit's approval of the FCC's "end-to-end" analysis for locally-dialed ISP-bound traffic, that court's discussion of how these calls fall into a "special" segment of the statutory framework governing intercarrier compensation, and its determination that the geographic presence of an ISP has "no significance" in determining terminating compensation confirm that the FCC's compensation mechanism applies to *all* locally-dialed ISP-bound traffic.

II. DISCUSSION OF SUPPLEMENTAL AUTHORITY

A. Resolution of this Dispute Must be Consistent with the *2008 Order* and *Core*.

2. The fundamental question presented in these proceedings is what compensation mechanism applies to locally-dialed calls under the FCC's *ISP Remand Orders*.[4] Even if the *ISP Remand Orders* were deemed not to have preemptive effect, this Commission found several years ago that the parties rendered federal law "controlling" by incorporating the federal compensation mechanism into their interconnection agreement.[5] Furthermore, as the United States

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[3] *See, e.g., In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC, and CenturyTel of Washington, Inc, Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, at ¶¶ 1, 7-10, 35 (February 28, 2003); *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order No. 05, ¶¶ 4, 25-29, n.7, 39-40, 58, 70, and 80 (Feb. 10, 2006) (the WUTC "interpret[ed] the *ISP Remand Order* to apply to all [locally-dialed] ISP-bound traffic, regardless of the point of origination and termination of the traffic").

[4] *See 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, 24 FCC Rcd 6475 (2008) ("*2008 Order*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*2001 Order*") (collectively, "*ISP Remand Orders*").

[5] *Level 3 Communications, LLC v. Qwest Corp.*, Docket No. UT-053039, Order Denying Petition for Reconsideration, Order No. 6 (June 9, 2006), at ¶19-20; *see also* Arbitrated Interconnection

Court of Appeals for the Ninth Circuit has ruled, arbitrated interconnection agreements must "comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreement."[6]

3. Level 3 appreciates that these proceedings continue as the result of a remand in 2007 by the U.S. District Court for the Western District of Washington ("District Court").[7] Critically, however, the District Court's decision was made without the benefit of the FCC's statutory analysis in the *2008 Order* or the D.C. Circuit's findings in *Core*. Looking to the then-current statutory interpretation contained within the *2001 Order*, the District Court relied upon Section 251(g) of the Communications Act of 1934, as amended (the "Act"),[8] to find that "ISP-bound traffic . . . is unequivocally *excluded* from the dictates of § 251(b)(5)."[9] That is no longer the case. The *2008 Remand Order* and *Core* reached precisely the opposite conclusion, finding that ISP-bound traffic *does* fall within Section 251(b)(5) even though it is also "interstate" *and* "interexchange" in nature. Moreover, despite its reliance upon Section 251(g), the District Court's remand does not preclude the Commission from reaching the same outcome, and does

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Agreement Between Qwest Corporation and Level 3 Communications, LLC, Docket No. UT-023042 ("*Level 3-Qwest ICA*"), at §§ 7.3.6.1 and 7.3.4.3 and Amendment No. 1.

[6] *US WEST v. Jennings*, 304 F.3d 950 (9th Cir. 2002).

[7] *Qwest Corp. v. Washington Utils. and Transp. Comm'n*, 484 F.Supp.2d 1160 (W.D. Wash. 2007).

[8] 47 U.S.C. § 251(b)(5).

[9] *Qwest*, 484 F.Supp.2d at 1170 (emphasis in original). It is also worth noting that the Commission's order in its generic proceeding on "Virtual NXX" traffic likewise relied upon the statutory analysis set forth in the *2001 Order* and did not have the benefit of the FCC's complete reversal in statutory interpretation as set forth in the *2008 Order* and upheld in *Core*. *See, e.g., Qwest Corp v. Level 3 Communications, LLC, et al.* Docket No. UT-063038, Order 10, Final Order Upholding Initial Order, *In the Matter of Request of MCI Metro Access Transmission Services LLC d/b/a Verizon Business Access Transmission Service and Qwest Corporation for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Docket No. UT-063055, Order 3, Final Order Upholding Initial Order (Wash. U.T.C. 2008), at ¶ 30 (stating that the FCC was "[a]bandoning its end-to-end model for determining the jurisdiction of ISP-bound traffic" in relying on Section 251(g)").

not dictate that the Commission view the FCC's ISP-bound compensation mechanism as necessarily tied to an ISP's physical location. To the contrary, the District Court stated that its holding was "limited."[10] The court directed the Commission to ensure that its conclusion does "not contravene federal law and policy," noted that the Commission might very well find that the calls at issue might be deemed "within *or* outside a local calling area, to be determined by the assigned telephone numbers," and acknowledged that it was "plausible that the ultimate conclusion reached by the [Commission] will not change."[11] As explained further herein, the Commission can only avoid "contraven[ing] federal law and policy" by applying the findings of the *2008 Order* and *Core* to the parties' dispute.

4. By contrast, in an attempt to preserve the District Court's reliance on Section 251(g) and to minimize subsequent legal and regulatory developments, Qwest argues without citation or legal support that, because it was entered through a remand, the scope of the *2008 Order* "is defined by" the scope of the *2001 Order*.[12] Qwest defines the scope of the *2001 Order* based on an example of a typical ISP serving arrangement and ignores both the legal reasoning in the *2008 Order* (as reinforced by *Core*) and the fact that application of the *compensation mechanism* adopted in 2001 must be consistent with the *legal justification* that the D.C. Circuit required the FCC to provide in order to maintain it.[13] Likewise, the interconnection agreement between Qwest and Level 3 refers not to the scope of the *2001 Order* but rather to exchanging

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[10] *Qwest*, 484 F.Supp.2d at 1177.

[11] *Id.* (emphasis in original).

[12] Qwest Memorandum in Support of Motion for Summary Determination ("*Qwest Motion*"), at ¶ 66.

[13] *2008 Order*, at ¶ 21 & n.72 ("[W]e find, *for the reasons set forth here* that the Commission had the authority to adopt the pricing regime pursuant to our broad authority under section 201(b) to issue rules governing interstate traffic.") (emphasis added).

traffic pursuant to "the compensation mechanism" set forth in the [*2001 Order*]."[14] The compensation mechanism applied to locally-dialed ISP-bound traffic exchanged between the parties under their interconnection agreement must be consistent with the *2008 Order*—and the D.C. Circuit's findings on appeal.

B. The *Core* Decision Ends the Long-Running Debate Over the Scope of the FCC's Jurisdiction to Establish Compensation for Locally-Dialed Calls to ISPs.

5. Although this pleading focuses upon the legal import of the *Core* decision and its view of the statutory framework underpinning the *2008 Order*, in the face of the District Court's remand of this Commission's order, it is necessary to retrace the winding path that led to the D.C. Circuit's decision. A careful review of the history reveals several long-standing common threads that turned out to be critical to the court's reasoning in *Core* and should inform the Commission's analysis.

1. Common Threads in the FCC and Court Decisions Leading Up to Core.

6. The FCC first tackled the question of what compensation was due for ISP-bound calls in 1999, employing an "end-to-end" analysis and concluding that the intermediate point of local exchange carrier ("LEC") termination was immaterial to a call that should be viewed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site."[15] Although the *1999 Declaratory Ruling* was vacated and remanded, the D.C. Circuit did not dispute the FCC's end-to-end analysis; rather, it questioned the FCC's reliance on that analysis to exclude ISP-bound traffic from the scope of traffic subject to Section 251(b)(5)

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[14] Level 3-Qwest ICA, at §§ 7.3.4.3 and 7.3.6.1, and Amendment No. 1, § 2.1.

[15] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*1999 Declaratory Ruling*"), at ¶13.

reciprocal compensation.[16]

7. The FCC issued the *2001 Order* on remand, finding once again that ISP-bound traffic was "indisputably interstate in nature" because the communication was "between the dial-up customer and the global computer network of web content"—and notably *not* "*with ISP modems.*"[17] The FCC rejected its prior conclusion that Section 251(b)(5) was limited to "local" traffic and deleted the reference to "local" traffic in its rules implementing Section 251(b)(5).[18] However, it also found that Section 251(g) of the Act excluded interstate ISP-bound traffic from the reciprocal compensation obligations that would have otherwise applied.[19] Policy concerns about "regulatory arbitrage" drove the FCC to implement "rate caps" and other aspects of the ISP-bound compensation regime.[20]

8. The FCC's statutory framework for its new ISP-bound compensation regime failed yet again upon appeal, with the D.C. Circuit concluding that Section 251(g) did not allow the FCC to exclude ISP-bound traffic from Section 251(b)(5) inasmuch as locally-dialed ISP-bound traffic exchanged between a CLEC and ILEC did not exist prior to 1996.[21] The court once again did not question the FCC's "end-to-end" analysis of the interstate nature of the traffic, and

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16 *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

17 *2001 Order*, at ¶ 59 (emphasis added). Qwest's argument to the contrary that the scope of the compensation mechanism developed in the *2001 Order* is limited only to calls placed to ISPs who have modems physically located within the originating caller's local calling area (*see, e.g.,* Qwest Motion at ¶ 66) fails for several reasons as discussed further in paragraphs 16-18, *infra.*

18 *2001 Order*, at ¶¶ 45-46 (finding that the question of whether traffic fell within the scope of Section 251(b)(5) did not turn on whether it was "local" in nature).

19 *Id.* at ¶¶ 31-32, 44, 46; *see also* 47 U.S.C. § 251(g).

20 *See 2001 Order*, at ¶ 2.

21 *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *see also* Opposition to Qwest's Motion for Summary Determination ("*Level 3 Opposition*"), at ¶ 26 (highlighting Qwest's failure to identify any cases or support for the proposition that obligations to exchange locally-dialed ISP-bound traffic existed prior to 1996).

left the compensation regime intact because there was a "non-trivial likelihood" that the FCC had jurisdiction to adopt its pricing rules for ISP-bound traffic on other grounds.[22]

9. In the *2008 Order*, with effectively no other alternative available to it, the FCC finally and explicitly discarded its prior reliance on Section 251(g) and concluded instead that ISP-bound traffic fell *within* the scope of Section 251(b)(5).[23] But because it determined yet again that ISP-bound traffic was interstate in nature, the FCC concluded that it retained authority under Section 201 of the Act to establish and maintain the pricing rules applicable to such traffic in lieu of the state-set reciprocal compensation rates that would otherwise apply.[24] Of particular importance to the issues under consideration in this proceeding, the FCC determined in the *2008 Order* that: (a) Section 251(b)(5) was broad enough to encompass *all* telecommunications, including *non-local* traffic (such as, in the FCC's words, "interstate, interexchange" ISP-bound traffic); (b) the definition of "telecommunications" in the Act—and thus the scope of Section 251(b)(5)—"is not limited geographically;" and (c) its reliance upon Section 251(b)(5) to maintain the ISP-bound traffic compensation regime was not "tied to whether this traffic is local or long-distance."[25]

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22 *WorldCom*, 288 F.3d at 434.

23 *2008 Order*, at ¶ 16.

24 *Id.* at ¶¶ 17-22.

25 *Id.* at ¶¶ 6-8 and n.49; *see also id.* at ¶ 11 ("Verizon and others argue that [Section 252(d)(2) of the Act] necessarily excludes interexchange traffic from the scope of section 251(b)(5), because at the time the 1996 Act was passed calls neither originated nor terminated on an interexchange carrier's network. We reject this reasoning because it erroneously assumes that Congress intended the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5).").

2. *The Critical Clarifications and Confirmation Provided by the Core Decision.*

10. The *Core* decision confirms Level 3's position in this proceeding and also the holdings made in prior cases by this Commission.[26] *First*, the D.C. Circuit affirmed the FCC's continuing use of an end-to-end jurisdictional analysis for ISP-bound calls because no party had challenged its application.[27] *Second*, the *Core* court found locally-dialed ISP-bound traffic is unique "because it involves interstate communications that are *delivered through local calls*," meaning that such traffic "simultaneously implicates the regimes of both § 201 and of §§ 251-252."[28] Although neither statutory regime is a subset of the other, the court stated that the two "intersect" and that "dial-up internet traffic falls within that intersection."[29] Because of this intersection, the court found that Section 251(i)'s "savings" clause gave the FCC a sufficient basis to set compensation for this unique subset of Section 251(b)(5) traffic—locally-dialed calls to ISPs exchanged between a CLEC and an ILEC—pursuant to its Section 201 authority.[30]

11. *Third*, and of greatest import, the D.C. Circuit rejected an argument that the FCC lacked jurisdiction to determine compensation because LECs terminate calls to ISPs "locally." The court found that this argument implicitly challenged the end-to-end analysis used to determine that the calls are interstate. Instead, when such calls are viewed in light of the fact that "dial-up traffic extends from the ISP subscriber to the internet," the court believed it clear that "it

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26 *See* footnote 3, *supra*.

27 *Core*, 592 F.3d at 143.

28 *Id.* at 144 (emphasis added).

29 *Id.*

30 *Id.*

has no significance for the FCC's § 201 jurisdiction . . . that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)."[31]

12. *Fourth*, it is noteworthy that the *Core* decision did not include Section 251(g) in its legal analysis. This intentional omission is logical given that the FCC discarded Section 251(g) as a basis for "removing" ISP-bound traffic from Section 251(b)(5) and highlights that the key distinction is no longer whether ISP-bound traffic is "local" or "interexchange" in nature.[32] The *2008 Order* and *Core* confirm that such pre-1996 geographic distinctions are no longer relevant in determining what compensation applies to locally-dialed calls to ISPs under either Section 201 and/or Section 251(b)(5). Instead, to the *Core* court, the key question was whether locally-dialed calls to ISPs were interstate such that the FCC could set the compensation for such traffic pursuant to Section 201, regardless of whether that traffic "terminated" to an ISP in a particular location.[33]

13. The *Core* decision thus reflects the logical culmination of several common threads established in the preceding FCC and D.C. Circuit decisions with respect to ISP-bound traffic compensation.

- *Core* affirms that ISP-bound traffic, dialed as a local call, is an interstate communication within the scope of Section 251(b)(5) for which the FCC set compensation pursuant to Section 201.

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[31] *Id.*

[32] *See 2008 Order*, at n. 49 (declining to consider whether ISP-bound traffic constitutes "telephone exchange service" because the scope of Section 251(b)(5) is not limited by whether traffic is "local" or "long distance" in nature).

[33] *Id.*; *see also id.* at ¶¶ 6-8 (describing ISP-bound traffic as "interstate, interexchange traffic" that falls within Section 251(b)(5) because that statute is "not limited to local traffic" and the definition of "telecommunications" in the Act is "not limited geographically").

- *Core* confirms that the geographic location of the point of termination to the ISP customer is of "no significance" precisely because of the interstate nature of that communication.

Core thus makes clear that: (a) a locally-dialed call is interstate in nature regardless of whether the ISP is located in the same room, the same local calling area, the same state, or across the country; and (b) the FCC has jurisdiction to set the compensation for such interstate calls pursuant to Section 201 even if they might otherwise fall within Section 251(b)(5) and regardless of where they "terminate" to the ISP.

14. These key takeaways from the *Core* decision must guide this Commission's response to the remand from the District Court. Pursuant to the Hobbs Act, the D.C. Circuit's evaluation of the *2008 Order* controls. The Hobbs Act vests exclusive jurisdiction to review FCC orders in the federal courts of appeals,[34] and the D.C. Circuit was charged specifically with resolving challenges to the *2008 Order*. By contrast, the District Court's *Qwest* decision only conducted a limited review of this Commission's order for consistency with the *2001 Order*, and was premised upon legal reasoning that was discarded by the FCC after yet another remand. One cannot reconcile the District Court's holding that the FCC "did not eliminate the distinction between 'local' and 'interexchange' traffic and the compensation regimes applicable to each—namely, reciprocal compensation and access charges"[35]—with the FCC's subsequent conclusions in the *2008 Order* that ISP-bound traffic is both "interstate" and "interexchange" in nature[36] and that the ISP-bound compensation regime is "no longer tied to whether this traffic is local or long

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34 28 U.S.C. § 2342.

35 *Qwest*, 484 F.Supp.2d at 1170.

36 *2008 Order*, at ¶ 6.

distance."[37] By affirming that ISP-bound traffic is *subject to* Section 251(b)(5), the *2008 Order* and *Core* addressed the District Court's finding that "it was error for the WUTC to extend the FCC's disapproval of the 'local' descriptor beyond the FCC's intended target—the reciprocal compensation universe of § 251(b)(5)."[38] The FCC's disapproval of the "local" descriptor applies squarely to ISP-bound traffic. Similarly, the Commission on remand can no longer conclude that geography is dispositive (or even relevant) in the context of determining whether a locally-dialed call to an ISP is subject to the FCC's compensation mechanism. The D.C. Circuit in *Core* expressly rejected the argument that the location where the LEC terminates the locally-dialed call to the ISP gives state commissions authority to set compensation.[39]

15. Treating certain kinds of locally-dialed calls to ISPs differently based on the location of LEC termination to the ISP is at odds with the end-to-end jurisdictional analysis employed by the FCC and approved in *Core*. It would also create an absurd jurisdictional "donut hole" structure for compensation of locally-dialed ISP-bound traffic. Locally-dialed calls terminated to an ISP physically located in the same calling area or in another state would be subject to an interstate compensation regime. But locally-dialed calls terminated to an ISP at a location *in between* would be subject to an intrastate compensation mechanism. The FCC could not possibly have intended for locally-dialed calls to an ISP physically located "next door" to be deemed interstate in nature on an end-to-end basis, while calls routed to modem banks just slightly

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[37] *Id.* at n. 49.

[38] *Qwest*, 484 F.Supp.2d at 1171.

[39] This is consistent with the FCC's early determination in 2001 that other obligations under Part 51 of its rules (such as the obligations to interconnect and transport such traffic to points of interconnection) apply to ISP-bound traffic. *See 2001 Order*, at n. 149. The *2008 Order*'s clarification that locally-dialed ISP-bound traffic falls within the scope of Section 251(b)(5) reinforces that all rules otherwise applicable to Section 251(b)(5) traffic also apply to ISP-bound traffic.

further away remain subject to intrastate jurisdiction. In fact, the FCC argued to the contrary in the *Core* appeal, noting that "it is not the law that the intrastate segment of end-to-end interstate traffic falls *outside* the [FCC's] section 201(b) ratemaking authority."[40] Although it should have been clear from the interstate analysis employed by the FCC since 1999 that where the ISP falls within the end-to-end continuum of a locally-dialed call is irrelevant to application of an inter-state compensation regime, the FCC's stark comment in the *2008 Order* that its interpretation of the statutory framework "is no longer tied to whether this traffic is local or long distance" and the D.C. Circuit's ensuing clarification in *Core* that the geographic location of LEC termination is of "no significance" dispels any remaining doubt.

C. Qwest's Arguments in this Proceeding are Misplaced and Turn on the Very Factors Rendered Irrelevant and/or Rejected Altogether by the *2008 Order* and *Core*.

16. The *Core* decision drives a stake through Qwest's case and brings the long-running inter-LEC disputes over such compensation to a final conclusion. Thus far in these proceedings, Qwest hangs its hat on the now-discarded *2001 Order* statutory framework to the near exclusion of the *2008 Order*. Specifically, Qwest perpetuates a distinction between "local" and "interexchange" ISP-bound traffic premised on the application of Section 251(g) to such traffic.[41] Yet, as discussed above, the D.C. Circuit rejected this statutory interpretation in 2002,

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[40] Brief for Federal Communications Commission, D.C. Circuit Case Nos. 08-1365, *et al.*, May 1, 2009 ("*FCC Brief*"), at 31 (emphasis added).

[41] *See, e.g.*, Qwest Response to Level 3's Motion for Summary Determination, at ¶¶ 33-54; *see id.* at ¶ 54 ("Whether there are geographic or service limits applicable to Section 251(b)(5) ultimately depends upon the scope of Section 251(b)(5) after the Section 251(g) and *[2001 Order*] carve out for traffic governed by interstate and intrastate access charge rules are taken into account."). Of course, as noted elsewhere herein, the FCC decided in the *2008 Order*, as upheld in *Core*, that while ISP-bound traffic is "special" and both "interstate" and "interexchange" in nature, this traffic also falls within Section 251(b)(5), subject to the FCC's authority to set rates for it pursuant to Section 201. In other words, the *2008 Order* establishes that Section 251(b)(5) *does* apply to this traffic and that Section 251(g) does *not* carve out such traffic.

the FCC departed altogether from reliance on Section 251(g) in the *2008 Order*, and the D.C. Circuit has now confirmed in *Core* that the compensation regime turns not on Section 251(g) but instead on the FCC's authority to set rates for an "end-to-end" interstate communication under Section 201.

17. Qwest's continued reliance on Section 251(g) dooms its arguments in light of the *2008 Order* and *Core*. Qwest attempts to sustain its "Virtual NXX" theories by pointing to a comment in the *2008 Order* that "Section 251(g) preserved the pre-1996 . . . regulatory regime that applies to access traffic, including rules governing 'receipt of compensation.'"[42] But this was no more than a passing observation on the way to the FCC's conclusion in the next sentence that "the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as 'there had been *no* pre-[1996] obligation relating to intercarrier compensation for ISP-bound traffic.'"[43] Although Qwest has argued that this conclusion (and thus the FCC's compensation mechanism) applies *only* to traffic terminating to a "local" ISP,[44] this assertion fails in several respects. First, the reference in the *2001 Order* to calls terminating to ISPs within a local calling area was drawn from an earlier decision describing *just* "*one* typical arrangement" that might be used to serve ISPs.[45] Moreover, it would be contrary to the jurisdic-

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[42] Qwest Motion, at ¶ 67 (quoting *2008 Order*, at ¶ 16).

[43] *2008 Order*, at ¶ 16 (underlined emphasis added).

[44] *See* Qwest Motion at ¶ 66.

[45] *See 1999 Declaratory Ruling*, at ¶ 4 (emphasis added); *see also 2001 Order*, at ¶ 10 ("As we noted in the *Declaratory Ruling*, an ISP's end-user customers *typically* access the Internet through an ISP server located in the same local calling area.") (emphasis added). Perhaps the clearest and most comprehensive "definition" of ISP-bound traffic comes in the first sentence of the *2001 Order*, where the FCC indicated – without distinction between "local," "interexchange," or other *type* of telecommunications traffic – that the purpose of that order was to "reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers." *2001 Order*, at ¶ 1.

tional analysis employed by the FCC in the *2008 Order* and the reasoning of the D.C. Circuit in *Core* – as well as the arbitrage concerns that drove the FCC to adopt a special ISP-bound compensation mechanism in the first place[46] – to turn this single illustrative example into an absolute limitation on the application of that interstate traffic compensation mechanism. Since 2001, the FCC's rules implementing Section 251(b)(5) have defined "termination" by a LEC not by reference to any specific geographic location (*e.g.*, within a given local calling area), but rather by reference to the delivery of traffic to a "called party's premises."[47] The *2008 Order* and *Core* applied those termination rules to ISP-bound traffic and established that the FCC did not and could not assert interstate jurisdiction and establish a limited compensation structure for locally-dialed calls only to those ISPs who are located "very close" or "very far" from the customer placing such a call, leaving those in the middle of the continuum as "intrastate" in nature and subject to a patchwork of state-by-state administration and litigation.[48]

18. As the FCC's brief in *Core* argued, compensation established pursuant to the FCC's Section 201(b) ratemaking authority applies to *any* "intrastate segment" of traffic that is

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[46] The arbitrage concerns cited by the FCC had nothing whatsoever to do with where an ISP happened to put down its modem banks or servers. Instead, the "market distortions" of concern to the FCC arose out of "excessively high reciprocal compensation rates" and the "one-way nature of [ISP-bound] traffic." *See 2001 Order*, at ¶¶ 69-75. Had the FCC intended for its passing reference to "one typical" location of an ISP earlier in the order to be determinative of how the new special compensation structure would apply, one would certainly expect the "location" issue to come up somewhere within the FCC's detailed discussion of the concerns that prompted its adoption of such a compensation mechanism. Of course, the FCC has since found that many of the early arbitrage concerns that prompted the adoption of special rules for ISP-bound traffic compensation have passed. *See Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, 19 FCC Rcd 20179 (2004), at ¶¶ 20-21, 24.

[47] 47 C.F.R. § 51.701(d).

[48] In fact, when it first established the ISP-bound traffic compensation mechanism in 2001, the FCC lampooned the notion that an ISP's modem would play any role in determining the proper treatment of an ISP-bound call: "Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists." *2001 Order*, at ¶ 59.

interstate on an end-to-end basis.[49] Thus, as the *Core* court found in dismissing arguments that Section 251(b)(5) reciprocal compensation should apply to calls to ISPs physically located in close proximity to the originating caller, the question of how "short" or "long" that intrastate segment may be is irrelevant in applying the FCC's compensation mechanism to this unique category of interstate traffic. Qwest's reliance on Section 251(g) is therefore misplaced as matter of statutory analysis, premised upon a mistaken reading of the *2001 Order*, and inconsistent with the *2008 Order* and *Core*.

19. Level 3 expects that Qwest will make one final attempt to fend off the *Core* decision by pointing to a recent decision by the United States Court of Appeals for the First Circuit upholding a federal district court's imposition of intrastate access charges on "virtual NXX" ISP-bound traffic.[50] The First Circuit's decision cannot be squared with the D.C. Circuit's decision in *Core*—which, under the Hobbs Act, is the authoritative opinion on the FCC's compensation structure for locally-dialed calls to ISPs. In fact, the First Circuit paid little heed to *Core*, citing only in passing to the D.C. Circuit's opinion and looking instead to what the First Circuit perceived independently as the scope of the *2008 Order*.[51] Specifically, the First Circuit found in *Global NAPs* that the FCC did *not* "exercise[] jurisdiction over interexchange traffic" in the *2008 Order*, thus leaving it to the state commission to determine whether intrastate access charges applied to such traffic.[52] Moreover, the First Circuit relied at least in part upon its own prior

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[49] FCC Brief, at 31. As a matter of both logic and plain reading, the FCC's comment regarding its Section 201(b) authority over an end-to-end interstate communication applies with equal force to the "intrastate segment" within a single local calling area or the "intrastate segment" elsewhere within a state boundary.

[50] *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010).

[51] *See id.* at 83 and n.8.

[52] *Id.* at 83.

interpretation of the *2001 Order*—in particular that the FCC had, in the First Circuit's view, not intended to regulate "all ISP-bound traffic" in the *2001 Order*, and that the *2008 Order* "simply clarified the legal basis for the authority the FCC had asserted in earlier orders . . . ."[53]

20. By contrast, the *Core* decision was not so limited in its view of the *2008 Order*. The D.C. Circuit faced the very question of whether ISP location matters in determining what compensation applies to locally-dialed calls to ISPs. As discussed above, in rejecting arguments that state-set Section 251(b)(5) reciprocal compensation should apply to ISP-bound traffic where the ISP is physically located in the local calling area, the D.C. Circuit in *Core* omitted any substantive consideration of Section 251(g) and thus effectively treated any distinction between "local" and "interexchange" ISP-bound traffic as irrelevant. Indeed, the question of where a given LEC might terminate individual ISP-bound calls was deemed of "no significance" in deciding whether the FCC's compensation regime applies to locally-dialed calls to ISPs.[54] Nor is it clear that the First Circuit's opinion can be squared with the *2008 Order* itself. The *2008 Order* described ISP-bound traffic as "interstate" and "interexchange" in nature[55] and found that the scope of Section 251(b)(5) is "no longer tied to whether this traffic is local or long distance."[56] Moreover, the FCC relied on this characterization of ISP-bound traffic, the scope of Section 251(b)(5), and its Section 201 authority over interstate communications as legal justification for the intercarrier compensation mechanism it established for locally-dialed calls to ISPs.[57] In

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[53] *Id.* at 81 (citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71-75 (1st Cir. 2005)).

[54] *Core*, 592 F.3d at 144.

[55] *2008 Order*, at ¶ 6.

[56] *Id.* at n. 49.

[57] *Id.* at ¶¶ 17, 22 & n.72.

having done so—on the theory that the "end-to-end" nature of the communication is determinative and in light of the finding that all ISP-bound traffic is interstate and interexchange in nature—the FCC left no room to parse the "intrastate segments" of such communications.

21. In the end, Qwest's attempts to sustain its arguments based mostly upon the *2001 Order* and the discredited Section 251(g) analysis employed therein, along with its failure to address fully the legal reasoning and impact of the *2008 Order*, must be seen for what they are—a concession that the *2008 Order* undermines its arguments. It would be serious legal error for this Commission to adopt Qwest's outdated reasoning and maintain a "local" and "interexchange" distinction between locally-dialed calls to ISPs based upon the very factors—the "local" nature of certain traffic and the preservation of pre-1996 compensation regimes under Section 251(g)—that were rejected by the D.C. Circuit in *WorldCom* in 2002, discarded by the FCC in the *2008 Order*, and rendered irrelevant by the legal analysis in *Core* in 2010. In fact, given the D.C. Circuit's finding in *Core* that it is of "no significance" where the LEC terminates the locally-dialed call to the ISP[58] and in light of the FCC's assertion to the D.C. Circuit in *Core* that any "intrastate segment" of ISP-bound traffic falls within its Section 201 ratemaking authority,[59] it is clear that Qwest's reliance on Section 251(g) represents a misplaced attempt to defend the District Court reasoning that has since been surpassed by events at the FCC and in the United States Court of Appeals charged with primary review of the relevant FCC orders.

III. CONCLUSION

22. In developing a response to the District Court's remand, the Commission should look to the *2008 Order* and the *Core* opinion from the D.C. Circuit rather than continuing to

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[58] *Core*, 592 F.3d at 144.

[59] FCC Brief, at 31.

rely—as Qwest has urged in these proceedings—on a discredited statutory analysis that draws false distinctions between "types" of locally-dialed ISP-bound traffic that have no relevance under existing law. In questioning the Commission's basis for its earlier orders in these proceedings and remanding the matter, the District Court did not direct the Commission to adopt a specific outcome; rather, it charged this Commission with ensuring that its conclusion does "not contravene federal law and policy," and acknowledged that it was "plausible that the ultimate conclusion reached by the [Commission] will not change."

23. The subsequent *2008 Order* and the *Core* opinion provide the roadmap to reach a decision that comports with federal law and policy. Together they make clear that: (1) ISP-bound traffic is subject to the FCC's jurisdiction because it is classified on an end-to-end basis from calling party to the Internet; (2) locally-dialed ISP-bound traffic falls within a unique statutory niche "because it involves interstate communications that are delivered through local calls;" (3) the physical location of termination is of "no significance" in light of (and contrary to) the end-to-end analysis employed by the FCC and ratified by the D.C. Circuit; and (4) Section 251(g)—with its focus on whether traffic is "local" or "interexchange"—has no role in the compensation applicable to an ISP-bound call that is at once interstate and locally-dialed in nature. The Commission should heed these lessons from the *2008 Order and Core*, and find that the physical location of termination to the ISP is irrelevant to application of the FCC's interstate compensation mechanism for locally-dialed ISP-bound traffic. Accordingly, the Commission should rule

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that under the terms of the parties' interconnection agreement, Level 3 is entitled to collect terminating compensation for Qwest-originated, locally-dialed ISP-bound traffic.

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Dated: July 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of July, 2010, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

David Danner Executive Secretary Washington Utilities and Transportation Commission 1300 S Evergreen Park Drive SW Olympia, WA 98504-7250	___ Hand Delivered ___ U.S. Mail (first-class, postage prepaid) _X_ Overnight Mail (UPS) ___ Facsimile _____ _X_ Email (records@wutc.wa.gov)

I hereby certify that I have this 20th day of July, 2010, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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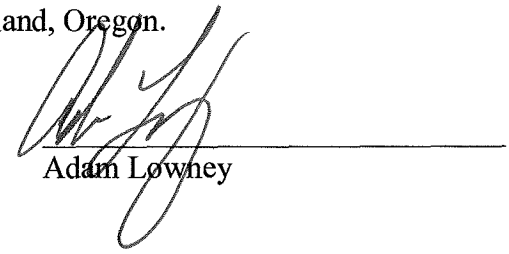
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of July, 2010, at Portland, Oregon.



Adam Lowney