[Service Date: August 10, 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 REPLY 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 Reply Brief to respond to arguments made by Qwest Corporation ("Qwest") in its Supplemental Initial Brief.[1] In its *Supplemental Initial Brief*, Qwest fails to provide any persuasive arguments challenging Level 3's position that: (i) compensation is owed for all locally-dialed calls terminated by a LEC

[1] Qwest Corporation Supplemental Initial Brief, *Level 3 Communications, LLC v. Qwest Corp.*, Docket No. UT-053039, p. 3 at ¶ 6 (July 20, 2010) ("*Supplemental Initial Brief*").

to Internet Service Providers ("ISPs"); and (ii) the compensation regime for such calls is limited to that established by the Federal Communications Commission ("FCC"). Moreover, Qwest's *Supplemental Initial Brief* fails to address the D.C. Circuit's discussion of how locally-dialed ISP-bound traffic falls into a "special" segment of the statutory framework governing intercarrier compensation "because [such traffic] involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252" in which "[n]either regime is a subset of the other" but rather, "[t]hey intersect and dial-up internet traffic falls within that intersection."[2] Qwest then further ignores the D.C. Circuit's determination that since "ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)."[3] Therefore, the geographic presence of an ISP has "no significance" in determining terminating compensation for such traffic in light of the "end-to-end" analysis adopted by the FCC.

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[2] *See Core Communications v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010) ("*Core*"). On August 6, 2010, the Pennsylvania Public Utility Commission filed in the U.S. Supreme Court a Petition for Writ of Certiorari to the *Core* decision. *See Penn. Pub. Util. Comm'n v. Fed. Communications Comm'n*, Petition for Writ of Certiorari to the United States Court of Appeals to the District of Columbia Circuit (filed Aug. 6, 2010).

[3] *Id.*

II. REPLY TO QWEST'S INITIAL BRIEF

A. The Fundamental Question on Remand is Whether the Commission Should Rely on the Geographic Location of the ISP in Determining the Applicable Compensation for ISP-Bound Traffic under Federal Law.

2. As explained in Level 3's Initial Brief, the *2008 Order*[4] and *Core* establish and uphold a statutory framework for compensation of ISP-bound traffic that turns on the interstate, interexchange nature of ISP-bound traffic and not on the geographic location of an ISP. Qwest's claim that "there have been no developments in the law"[5] ignores these orders and fails to explain how its position can be squared with current federal law that must be applied to interpret the parties' compensation obligations.

3. In the *2008 Order*, the FCC concluded that: (i) Section 251(b)(5) of the Communications Act[6] was broad enough to encompass ***all*** telecommunications, including *non-local* traffic (such as, in the FCC's words, "interstate, interexchange" ISP-bound traffic); (ii) the definition of "telecommunications" in the Act—and thus the scope of Section 251(b)(5)—"is not limited geographically;" and (iii) 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."[7]

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[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*").

[5] *See Supplemental Initial Brief*, p. 2, ¶ 3.

[6] 47 U.S.C. § 251(b)(5).

[7] *2008 Order* 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).").

4. Accordingly, Qwest's argument—that the *2008 Order* addresses only ISP traffic terminating to ISPs physically located in a given calling area—is without merit. Indeed, this argument cannot be squared with the FCC's findings in the *2008 Order*. The class of traffic Qwest seeks to carve out of its compensation obligation, namely "VNXX," is based on a geographic termination distinction the *2008 Order* and *Core* rejected as irrelevant. In short, there was no need for the FCC to address "VNXX" explicitly because the legal reasoning on which the federal compensation regime is grounded renders moot the relevance of the geographic location of termination to the ISP.

5. The *Core* decision similarly refutes Qwest's arguments. *Core* affirmed that: (i) ISP-bound traffic is an interstate communication within the scope of Section 251(b)(5) for which the FCC set compensation pursuant to Section 201; and (ii) the geographic location of the point of termination to the ISP is of "no significance" because of the communication's interstate nature. Accordingly, *Core* demonstrates that: (i) an ISP-bound call is interstate in nature regardless of whether the originating caller and the ISP are located in the same room, the same local calling area, the same state, or across the country from one another; and (ii) 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.

6. While Qwest urges the Commission to look to the *Qwest/WUTC* remand decision[8] and this Commission's VNXX *Generic Order*,[9] those decisions did not have the benefit of the

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

reasoning underlying the *2008 Order* and *Core*. Thus, neither is "controlling" as Qwest argues and neither should be relied upon by the Commission.

B. The *Qwest* Decision is not *Res Judicata* and Permits the Commission to Define Calls to ISPs as "Within a Local Calling Area" Based on Comparing Telephone Numbers.

7. Qwest concludes, without any legal support, that because neither Level 3 nor PacWest appealed the *Qwest/WUTC* decision, such decision *is res judicata* and thus, controlling in this proceeding.[10] Qwest is wrong.

8. Any party relying upon the doctrine of *res judicata* has the burden of proving that the matter that would be precluded was adjudicated in the former action.[11] Qwest has failed to carry its burden.

9. *Res judicata* occurs when a prior judgment has a concurrence of identity with a subsequent action with respect to four distinct characteristics: (i) subject matter; (ii) cause of action; (iii) persons and parties; and (iv) the quality of the persons for or against whom the claim is made.[12] This four prong test is conjunctive and thus, requires satisfaction of all four elements.[13]

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[9] *Qwest Corp v. Level 3 Communications, LLC, et al.* Docket No. UT-063038, Order 10, Final Order Upholding Initial Order (July 16, 2008) ("*Generic Order*").

[10] *See Qwest Supplemental Initial Brief*, p. 3 at ¶ 6.

[11] *See Bradley v. State*, 73 Wn.2d 914 (1968) ("It is the general rule that a person relying upon the doctrine of *res judicata* as to a particular issue involved in the pending case bears the burden of proving, by competent evidence consistent with the record in the former cause, that such issue was involved and actually determined, where it does not appear from the record that the matter as to which the rule of *res judicata* is invoked as a bar was necessarily adjudicated in the former action." (citing *Rufener v. Scott*, 46 Wash.2d 240, 280 P.2d 253 (1955)).

[12] *See Rains v. State*, 100 Wash.2d 660; 674 P.2d 165 (1983).

[13] *Hisle v. Todd Pac. Shipyards*, 151 Wash.2d 853, 865, 93 P.3d 108 (2004).

10. Qwest's conclusory assertion that the *Qwest/WUTC* decision is *res judicata* fails to address any of these four prongs. Moreover, even if Qwest presented a *res judicata* argument, as opposed to a bald conclusion that *res judicata* applies, there is no concurrence of identity between the subject matter and cause of action between the *Qwest/WUTC* decision and this proceeding. First, in *Qwest/WUTC*, the Court only interpreted the *2001 Order*[14] and on remand, instructed the Commission to ensure that its conclusion did "not contravene federal law and policy."[15] In this proceeding, the Commission must determine what is owed for "VNXX" ISP-bound calls ***based on the current law***—including the *2008 Order* and *Core* decisions that were not addressed in *Qwest/WUTC*. Thus, neither the subject matter (interpretation of the *2001 Order*) nor cause of action (compensation owed under the parties' interconnection agreement pursuant to the *2001 Order*) that were adjudicated in *Qwest/WUTC* are at issue. Moreover, it is of no import that the facts in the *Qwest/WUTC* case and this proceeding are identical because the law that must be applied is different.[16] And finally, in Washington, "[w]hen the appellate process results in remand to an agency, the agency must begin again. Whether the remand is the result of a settlement or a Supreme Court decision is immaterial."[17] Accordingly, unless the matter is resolved on purely legal bases, the Commission must provide an opportunity to present evidence, a hearing, and additional briefing on the remanded issue of VNXX call classification

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[14] *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*").

[15] *Qwest/WUTC*, 484 F.Supp.2d at 1177.

[16] *Hisle*, 151 Wash.2d at 865 (finding a case in which the claim presumes the validity of an agreement and seeks to apply the Minimum Wage Act to it involves a different subject matter from a previous case concerning the procedures used to adopt the same agreement and seeking to invalidate it).

[17] *St. Joseph Hosp. & Health Care Ctr. v. Dept. of Health*, 125 Wash.2d 733, 887 P.2d 891 (1995); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 121 (2000).

and methodology for compensation purposes based upon the current law from the *2008 Order* and *Core*. As such, the *Qwest/WUTC* decision cannot be *res judicata* in this proceeding.

11. Moreover, the *Qwest/WUTC* decision permits the Commission to define calls to ISPs as "within a local calling area" based on "calling" and "called" telephone numbers. Indeed, despite its reliance upon Section 251(g) for its interpretation of the *2001 Order*, the *Qwest/WUTC* remand does 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 noted that the Commission may 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."[18] Further, in previous orders, such as the *Level 3/CenturyTel Arbitration*, the Commission correctly concluded that the "substance of the [FCC] decisions make no distinction based on the location of the ISP modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic."[19]

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[18] *Qwest/WUTC*, 484 F.Supp.2d at 1177 (emphasis in original).

[19] *See In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC, and CenturyTel of Washington, Inc, Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, at ¶¶ 1, 7-10, 35 (February 28, 2003) ("*Level 3/CenturyTel Arbitration*"). *See, e.g., Pac-West Telecomm, Inc. v. Qwest*, Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition, at 13 n. 37, 14 (Aug. 23, 2005) ("ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements"); *Level 3 Communications LLC v. Qwest Corp.* Docket No. UT-053039, Order No. 05, ¶¶ 4, 25-29, n.7, 39-40, 58, 70, and 80 (Feb. 10, 2006) (the WUTC "interpret[ed] the *ISP Remand Order* to apply to all [locally-dialed] ISP-bound traffic, regardless of the point of origination and termination of the traffic"); *Pac-West v. Qwest Corp.*, Docket No. UT-053036, Order 05, ¶¶ 30, n.1, 42-43 (Feb. 10, 2006).

12. Because this Commission must not contravene federal law and policy, it must apply the findings of the *2008 Order* and *Core* to the parties' dispute and thus define calls "within a local calling area" based on a comparison of telephone numbers.

C. The *Generic Order* is Not Controlling.

13. Qwest presents the *Generic Order* as the "definitive decision" on call classification in which the Commission, relying on its statutory authority to prescribe exchange boundaries and rules defining local calling areas on a geographic basis, adopted a "geographic" test to find that locally-dialed calls to ISPs are interexchange in nature and do not originate and terminate within the same geographic local calling area.[20]

14. In this argument, Qwest ignores the impact of both the *2008 Order* and *Core*. Qwest incorrectly concludes that "VNXX traffic is not local and never has been under either state or federal law."[21] Qwest's argument cannot be justified in light of the FCC's finding that the application of a physical location for the calling and called party is no longer relevant in the analysis for compensation for ISP bound traffic. At footnote 49 of the *2008 Order*, the FCC said:

> Because our conclusion in this order concerning the scope of section 251(b)(5) is no longer tied to whether the traffic is local or long distance, we need not address arguments made by the parties as to whether ISP-bound traffic constitutes "telephone exchange service" under the Act. (cites omitted).[22]

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[20] *See Supplemental Initial Brief*, p. 2, ¶ 3, n.2.

[21] Qwest also ignores Washington's definition of a local calling area, which makes no reference to a customer's physical location or the location of its servers or modems. *See* WAC 40-120-021 which provides "'[l]ocal calling area' means one or more rate centers within which a customer can *place calls* without incurring long-distance (toll) charges." (emphasis added) Thus, Washington law defines a "local calling area" based on the area in which "a customer can place [i.e., originate] calls" without incurring toll charges, and there is no requirement based on the location of the terminating facilities.

[22] *2008 Order* at n. 49.

By moving its legal basis for ISP bound traffic away from the physical location requirements of "telephone exchange access", the FCC obliterated any distinction between "local" and "virtual NXX" ISP-bound traffic and instead affirmed that it had established a unified rate mechanism for all ISP-bound traffic.

15. Obviously, Qwest would prefer that the FCC never further interpreted the *2001 Order* as it did in the *2008 Order* or that in *Core*, the D.C. Circuit had not approved the FCC's analysis, but that is, in fact, what happened. These decisions, especially the review of the *2008 Order* by the D.C. Court—the court that was explicitly assigned to resolve challenges to the FCC ISP orders[23]—render all of Qwest's claims about so-called "VNXX" or the local or non-local nature of ISP-bound traffic moot.

16. Furthermore, to the extent that Qwest is arguing that the *Generic Order* is *res judicata*, again, Qwest is wrong. While an administrative agency decision is final and binding and subject to *res judicata* to the same extent as the judgment of a court,[24] the *Generic Order* is not *res judicata* in this proceeding for similar reasons that the *Qwest/WUTC* decision is not *res judicata*. Specifically, when it released the *Generic Order* on July 16, 2008, the Commission, like the *Qwest/WUTC* District Court, did not have the benefit of the *2008 Order* and/or *Core* in finding that VNXX ISP traffic was not subject to the FCC's interim rate of $.0007 per MOU. Because this Commission must ensure that its determination does not contravene current federal

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[23] The Hobbs Act, 28 U.S.C. § 2342, vests exclusive jurisdiction to review FCC orders in the federal courts of appeals, and the D.C. Circuit was charged specifically with resolving challenges to the *2008 Order*. By contrast, the District Court's *Qwest/WUTC* 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 in its *2008 Order*.

[24] *Civil Serv. Comm'n. v. Kelso*, 87 Wash. App. 907, 910, 943 P.2d 397 (1997) (citing *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wash.2d 22, 30-31, 891 P.2d 29 (1995)).

law, its conclusion concerning the compensation for VNXX ISP traffic in the *Generic Order* is no longer relevant and may not be relied upon in this proceeding.

D. The Commission Must Determine Compensation Consistent with Federal Law.

17. Since 1999 and through the *2001 Order* and the *2008 Order*, the FCC has consistently asserted interstate jurisdiction over ISP-bound calls based upon an end-to-end analysis. This jurisdictional analysis has never been rejected by the D.C. Circuit. In fact, in *Core*, the D.C. Circuit explicitly affirmed the FCC's end-to-end jurisdictional analysis for ISP-bound calls because no party had challenged its application and because it was reasonable.[25] Accordingly, the FCC's exercise of jurisdiction over ISP-bound traffic as interstate is the current law.

18. Further, the D.C. Circuit has affirmed the FCC's established compensation regime for all locally-dialed ISP-bound traffic. In so doing, the D.C. Circuit rejected an argument that the FCC lacked jurisdiction to determine compensation for ISP-bound traffic because LECs terminate calls to ISPs "locally." The Court found that this argument, with its focus on how to parse the intrastate segment of an ISP-bound call, implicitly challenged the approved end-to-end analysis used to determine that the calls are interstate.

To the extent this Commission has jurisdiction over any interstate communications, and assuming, *arguendo*, that there is such a thing as "VNXX" ISP-bound traffic, the Commission's jurisdiction is both granted and limited by Sections 251 and 252 of the Communications Act.

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

The *Qwest/WUTC* decision recognized this by requiring the Commission to define what constitutes "within a local calling area" consistent with federal law.[26]

19. Qwest wrongly equates every use of "local call" and "within a local calling area" with a geographic limitation in orders and briefs. If Qwest were correct that the *2008 Order* did not change the scope of *2001 Remand Order*, there would be a lingering question of what qualifies as "within a local calling area." However, because the *Qwest/WUTC* remand requires this Commission to define "local call" and "within a local calling area" consistent with federal law,[27] the Commission can only resolve the outstanding issues pursuant to the *2008 Order* and *Core*—the applicable binding federal law. Current federal law makes clear that it is proper to define calls "within a local calling area" by comparing calling and called party telephone numbers.

20. Furthermore, the FCC's brief opposing mandamus is not as unequivocal as Qwest portrays.[28] For example, that brief includes the statement that mandamus would not "necessarily" resolve any controversy concerning VNXX, leaving open the possibility that it could.[29] Indeed, *Qwest/WUTC* and *Peevey* recognized that defining calls "within a local calling area" based on a comparison of telephone numbers is consistent with federal law.[30] This

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26 *Qwest/WUTC*, 484 F.Supp.2d at 1177.

27 *Id.*

28 *See* Opposition of Federal Communications Commission to Petition for a Writ of Mandamus (Dec. 27, 2007) *In Re Core Communications, Inc.*, No. 07-1446 (DC Cir) ("*FCC Mandamus Brief*").

29 *FCC Mandamus Brief* at 26.

30 *Id.* and *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1157-58 (9th Cir. 2006).

definition is consistent with the FCC's rejection of geographic relevance in its *Core* brief[31] and the similar finding in *Core* that termination of calls is functional, not geographic.[32]

21. Moreover, as the D.C. Circuit noted in *Core*, all parties agreed that the case was about locally dialed calls exchanged by LECs, not long distance calls exchanged between a LEC and an IXC. Thus, toll traffic was not at issue.[33]

22. Finally, the Commission would contravene federal law—going against *WorldCom*[34] and the resulting *2008 Order*, as well as *Core*—if it were to: (1) subject calls between two LECs to a compensation structure under 251(g) rather than 251(b)(5); and (2) define ISP-bound calls as subject to a compensation regime that existed prior to the 1996 Act pursuant to 251(g) when no such traffic was exchanged prior to 1996. Indeed, in *WorldCom*, the D.C. Circuit concluded 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.[35] Then, in the *2008 Order*, the FCC 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).[36] And finally, in *Core*, the D.C. Circuit did not even include Section 251(g) in its legal analysis. Given that the FCC discarded Section 251(g) as a basis for "removing" ISP-

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31 Brief for Fed. Communications Comm'n, D.C. Circuit Case Nos. 08-1365, *et al.*, May 1, 2009 ("*FCC Brief*"), at 31.

32 *Core*, 592 F.3d at 144 (the fact that ISP bound calls to a LEC might terminate to a LEC has no significance to the FCC's interstate jurisdiction over these calls or the FCC's right to set compensation for such calls).

33 *Id.* at 143.

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

35 *WorldCom*, 288 F.3d at 433.

36 *2008 Order*, at ¶ 16.

bound traffic from Section 251(b)(5), the absence of a discussion of Section 251(g) is logical.[37] Therefore, the Commission may not rely upon section 251(g).

E. If this Commission Rejects *Core* and Instead Adopts Qwest's "Geographic" View of ISP-Bound Traffic, It Will Need to Initiate Additional Fact-Finding Proceedings to Determine What Portion of the Traffic is "Intrastate."

23. For the reasons discussed above and in Level 3's Initial Brief, the *2008 Order* and the *Core* decision end the long-running disputes over what compensation mechanism applies to locally-dialed ISP-bound traffic. If, however, the Commission were to adopt Qwest's arguments that Section 251(g) and the *2001 Order* sustain a distinction between "local," "intrastate interexchange," and "interstate interexchange" locally-dialed calls to ISPs, it would need to take several additional steps to (i) attempt to identify the subset of calls to ISPs over which it would assert authority; (ii) set compensation for that intrastate subset of such interstate traffic; and (iii) determine the extent to which that compensation regime applies to the historical exchange of traffic between the parties.

24. Of course, any such analysis highlights the inherent contradiction with the FCC's regime given that FCC rules do not define "termination" by reference to any geographic location[38] and the *Core* court's finding that the point of termination is of "no significance" in determining whether the FCC's compensation regime applies.[39] Moreover, as a practical matter, this examination is unlikely to be as simple as locating a single "modem" or other physical piece

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[37] *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).

[38] *See* 47 C.F.R. § 51.701(d).

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

of equipment that would dictate interconnection and intercarrier compensation obligations for any given LEC, ISP, telephone number or individual call.[40] Instead, because of the dynamic routing of Internet traffic based upon addresses, calls could be routed any number of different ways at any given time and any number of servers could be involved in the transmission of individual browsing sessions.[41]

25. Therefore, if Qwest's arguments were adopted the Commission would need to tackle two thorny legal and economic issues: (i) establishing the appropriate compensation structure for such "intrastate" ISP-bound traffic; and then, (ii) attempting to apply this newly established compensation regime retroactively to the parties. Among other things, the Commission would need to consider the impact of federal and state law on the compensation applicable to the exchange of such traffic, as well as addressing how such charges could apply under an interconnection agreement that calls on its face for ISP-bound traffic to be compensated only pursuant to a compensation mechanism established by the FCC.[42] Notwithstanding these legal infirmities, the practical hurdles to an approach like this would be enormous.

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[40] *See* Level 3 Opposition to Qwest's Motion for Summary Determination, March 25, 2009, at Exh. 3 (Affidavit of Jamie Moyer) ("*Moyer Affidavit*"), at ¶¶ 12-13 and 15.

[41] *See also 2001 Order*, at ¶ 58 ("In real time, the web host may request that different pieces of that webpage, which can be stored on different servers across the Internet, be sent, also in real time, to the user. . .. A single web address frequently results in the return of information from multiple computers in various locations globally. These different pieces of the webpage will be sent to the user over different network paths and assembled on the user's display.").

[42] *See, e.g.*, Level 3-Qwest ICA, at § 7.3.6.1 ("The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order"), and Amendment No. 1, § 2.1 ("The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC *Core Order*").

III. CONCLUSION

In its *Supplemental Initial Brief*, Qwest fails to provide any legally supportable or otherwise persuasive arguments why the Commission may ignore the current and applicable law provided in the *2008 Order* and *Core* to develop a response to the *Qwest/WUTC* remand. Rather, Qwest continues to rely on a discredited statutory analysis that draws false distinctions between "types" of locally-dialed ISP-bound traffic that have no relevance under existing law. Further, Qwest's reliance on the *Qwest/WUTC* decision and the *Generic Order* as *res judicata* in this proceeding is neither supported by Qwest's conclusory assertions that *res judicata* applies nor through any meaningful analysis of the required *res judicata* elements.

The *2008 Order* and the *Core* opinion provide the requisite roadmap that this Commission must follow 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 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 determination of compensation applicable to an ISP-bound call that is at once interstate and locally-dialed in nature. The *2008 Order* and *Core* must guide this Commission to find that 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 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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