

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In The Matter Of	Docket No. UT-063006
Level 3 Communications, LLC'S Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by The Telecommunications Act Of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation	LEVEL 3's RESPONSE TO QWEST CORPORATION'S REPLY TO LEVEL 3'S RESPONSE TO QWEST'S PETITION FOR REVIEW

On May 25, Qwest filed with the Commission a motion for leave to file a reply and a reply to Level 3's response. By Order No. 11, dated May 30, 2007, the Commission directed that in order to ensure that parties have a full opportunity to address the contested issues in this proceeding and to develop a complete record prior to entering a final order it provided an opportunity for Level 3 to respond to Qwest's reply.

1 In paragraph 2 of its filing, Qwest claims Level 3 is incorrect in pointing out that Qwest agreed to compensate VNXX ISP-bound traffic. While Qwest foregoes citing to the extensive cross-examination that followed its introduction of the sworn testimony regarding the nature of its deal with Verizon, the true nature of that document is revealed by the terms of the document itself.¹ Accordingly, although Qwest asserts that the Amendment excludes compensation for VNXX traffic, it expressly includes VNXX traffic in its defined terms as "local traffic" "regardless of the actual geographic end points of the call."² Qwest attempts to avoid this glaring admission by asserting that its compensation formula somehow excludes such traffic

¹ While Level 3 offers no suggestion as to the genesis of Verizon's and Qwest's testimony in this regard, it does suggest that Staff's testimony was based upon an incomplete understanding of all the facts and circumstances inherent in the settlement. The Commission's recent action to refer the settlement to the VNXX proceeding substantiates this view.

² Amendment Regarding Certain Reciprocal Compensation and Network Interconnection Rates, Terms and Conditions to the Interconnection Agreement between Qwest Corporation and MCImetro Access Transmission Services LLC for the State of Washington, March 5, 2007 at Section 1.0 definitions of Local Dialing Pattern and Local ISP-bound Traffic.

from compensation.³ But this simple fact – that VNXX traffic is not compensable – is never stated in the agreement. This omission stands in stark contrast to the length that Qwest’s vehement objections to compensating for VNXX traffic. And it is not as if Qwest could arguably be found to be unaware what it was agreeing to. By Qwest’s witnesses own admission, there were teams of lawyers involved in this deal.⁴ Given that most lawyers seek to avoid ambiguity in contract drafting for obvious reasons, it is surprising to find Qwest claiming that on a topic as vitally important as compensation for VNXX ISP-bound traffic that this issue was not expressly dealt with. Rather, according to Qwest’s latest explanation, the “non-compensable” aspect of VNXX is somehow made clear in a convoluted formula that is not only hidden from public view but also somehow applies across 14 states, that what the contract says – that all “local” traffic is compensable, is not what it means because money is moved around in other parts of the contract. Yet, as confusing as Qwest’s formula might be, one of the few things that the numbers show is that Qwest agreed to pay Verizon **more** than the ISP Remand Order’s intercarrier compensation rate.⁵ So somehow Qwest is paying **more** than it is otherwise required to pay for such traffic, but at the same time paying less for some subset of that same traffic. Regardless of how Qwest might explain these inconsistencies, the fact of the matter is, as Level 3 stated in footnote 19 of its Reply, is that Qwest and Verizon cut a deal to pay compensation for VNXX traffic.⁶

³ *Id.* at 6, 7.

⁴ *Level 3 Communications, LLC's Petition For Arbitration Pursuant To Section 252(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996, And The Applicable State Laws For Rates, Terms, And Conditions Of Interconnection With Qwest Corporation*, Case No. 05-00484-UT, Transcript Of Proceedings, 110:13-14 to 111: 10-18 (May 3, 2007) (Level 3 Attorney Porter: “Q. Why not just expressly say VNXX and ISP-bound traffic is not compensable?” Qwest Witness Brotherson: “A. You know, I will give you my honest answer here. I know of at least **four Qwest attorneys** that were involved in the negotiations and the drafting, and I think there were **three MCI attorneys** that I am aware of, and how a group of lawyers arrive at the language they arrive at through the process of negotiating a settlement is something I won't speculate on, but this is the document, and the wording after the give and take, that they settled upon.”) (emphasis added).

⁵ *Id.* at 2

⁶ *Confidential Settlement Agreement between Qwest Corporation and Verizon Business Network Services* dated

2 In paragraph 3 of its filing, Qwest raises a straw man against one of Level 3's points. Level 3 had earlier stated (footnotes omitted) that:

This Commission has consistently held, without exception, that ISP-bound traffic is a cost-causer and that it should be subject to a uniform compensation regime regardless of whether it is local, toll, long distance, or via VNXX. The Commission knew this to be the proper approach in 2001, 2003, and 2006. It remains the only correct approach in 2007.

Level 3 Response at 2. What Level 3 meant is obvious: whenever the issue of compensation for ISP-bound traffic has come up, this Commission has rejected the ILEC argument *du jour* against subjecting it to "local" compensation.

3 Of course, the ILEC argument *du jour* has changed over time, so the Commission's analysis has changed as well. Starting in 1997, ILECs argued that ISP-bound calls were not "local" because they did not terminate at the ISP's equipment - even if it was within the caller's local calling area. Instead, they argued, the traffic continued to the Internet and so was interstate, not local. In 1999 the FCC agreed that ISP-bound traffic was not "local," but held that states could treat it as local for compensation purposes, either in general or under the terms of specific agreements.⁷ Later - after the *ISP Remand Order*⁸ - the ILECs reversed course, and argued that the FCC's new regime applied only to "local" calls - that is, where the ISP's equipment was in the local calling area.⁹

February 23, 2007, Section 1.1

⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("ISP Declaratory Ruling"). Note that at this time (1997-2001) the FCC's rule for reciprocal compensation required such compensation for "local" traffic, so the key issue during that period was the scope of the term "local."

⁸ *Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) ("ISP Remand Order").

⁹ In the *ISP Remand Order* the FCC rejected the use of the term "local" and purged it from its rules. *See* 47 C.F.R. §

- 4 Addressing Qwest's straw man directly, Level 3 did not say that, prior to the ISP Remand Order, this Commission had ruled against Qwest's most recent argument *du jour* - that is, its claim that the FCC's compensation regime should not apply to VNXX calls to ISPs. (Even so, Level 3 suspects the Commission would not have been impressed, five or six years ago, with ILEC efforts to exclude VNXX calls to ISPs from normal intercarrier compensation.) Qwest and the other ILECs had not yet fully crafted their anti-VNXX arguments, so the Commission had not yet had occasion to reject them.¹⁰ Again, Level 3's point was that whatever the ILEC argument *du jour*, the Commission has rejected it.
- 5 There is good reason that today's anti-VNXX argument had not been invented. That argument depends on the idea that the location of the ISP's equipment totally determines intercarrier compensation for ISP-bound traffic. But the old argument depended on the idea that the location of the ISP's equipment was totally irrelevant to compensation for that traffic. Even Qwest would have been overwhelmed by the cognitive dissonance caused by arguing simultaneously, years ago, that ISP-bound calls were not subject to compensation because the location of the ISP's gear is totally controlling and totally irrelevant, all at the same time.
- 6 Qwest supports its straw man with a Commission decision from 1999. In that case, involving the interpretation of an interconnection agreement from 1998, the Commission characterized WorldCom as stating that ISP-bound calls were local if they were made "within" a local calling

51.701. So, when the rules limited compensation to "local" traffic, ILECs argued that no ISP-bound call could be "local." When the rules changed and removed that limitation, ILECs argued that only "local" ISP-bound calls are subject to compensation. Heads the ILECs win, tails the CLECs lose.

¹⁰ As we pointed out previously, even before the *ISP Remand Order* ILECs were well aware of VNXX arrangements - where the ISP's equipment is efficiently centrally located, rather than distributed to numerous local calling areas. The ILECs' argument at the time, however, was not that the existence of VNXX arrangements should result in no compensation for this traffic; it was that the CLECs' avoidance of inefficient transport should result in lower compensation for this traffic.

area. Given when it occurred, that case understandably revolved around the old argument du jour - that ISP-bound calls could never be "local" because the location of the ISP's gear is irrelevant. The agreement in question simply called for compensation for "local" calls, and WorldCom only sued to get paid for "local" calls to ISPs. So that case has little to do with the matter at hand.

7 Moreover, as noted above, Level 3 said that "in 2001, 2003, and 2006" the Commission had ruled against ILEC objections to compensation for ISP-bound traffic - no matter what those ILEC objections might have been. This is, of course, true, as the cases cited by Level 3 demonstrate. In attacking Level 3, however, Qwest completely ignores the decisions that Level 3 cited from "2001, 2003, and 2006." Given that Qwest's own case is an even earlier example of the Commission rejecting ILEC efforts to undermine compensation for ISP-bound traffic, it appears that Level 3 could well have said that the Commission has consistently extended normal compensation to ISP-bound traffic "in 1999, 2001, 2003, and 2006." Qwest's case, in short, does not undermine Level 3's argument - it strengthens it.

8 Qwest also takes issue with Level 3's citation of four 9th Circuit cases for the proposition that they are "in accord" with this Commission's various rulings requiring compensation for ISP-bound calls. See *Qwest Reply* at ¶ 4, discussing *Level 3 Response* at 6. This was simply an effort to restate, very briefly, a point we had made in our reply brief below. In that brief, at footnote 15 on page 14 (emphasis in original), we stated:

In fact, *Peevey* is just the latest in a series of 9th Circuit cases that without exception **approve** mandatory intercarrier compensation for ISP-bound calling. In *US West v.*

Level 3 Response at 10-12. The FCC, of course, rejected these arguments. See *ISP Remand Order* at ¶ 92 & n.189.

MFS Intelenet, 193 F.3d 1112, 1122-23 (9th Cir. 1999), the court upheld this Commission's ruling requiring compensation for ISP-bound traffic against Qwest's claim that, because ISP-bound traffic was interstate, it could not be "local" for compensation purposes. In *Pacific Bell, supra*, the court upheld the CPUC's arbitration ruling requiring compensation for such traffic against Verizon's claim that "ISP-bound traffic is not local traffic under federal law." 325 F.3d at 1130. (The 9th Circuit applied this same logic to uphold decisions requiring compensation for ISP-bound calls from this Commission and the Oregon commission in two similar cases at that time: *Verizon Northwest v. Electric Lightwave*, 2003 U.S. App. LEXIS 6720 (9th Cir. 2003) (affirming Oregon PUC decision to require compensation); *Verizon Northwest v. WorldCom*, 2003 U.S. App. LEXIS 6724 (9th Cir. 2003) (affirming this Commission's decision to require compensation).) And now in *Peevey* the court addressed another "wrinkle" on this issue, upholding the CPUC's decision requiring compensation for VNXX ISP-bound traffic, specifically ruling that "industry-wide practices" and "essential differences between [ILEC and CLEC] network architectures" support the conclusion that VNXX ISP-bound traffic should be viewed as "local" for these purposes.

9. In its *Reply*, Qwest creates another straw man, taking issue with the notion that these "cases are in accord with the view that the *ISP Remand Order* applies to all ISP-bound traffic." But our point in citing these cases – both below and in our *Reply* to Qwest – was not to suggest that the specific Qwest *argument du jour* had previously been raised at the 9th Circuit. Rather, it was to point out that – like this Commission – every time the 9th Circuit has been presented with some ILEC claim that ISP-bound traffic is not subject to compensation, the court has found to the contrary. As with Qwest's previous point, here Qwest distorts Level 3's argument in order to find something in it with which to disagree. If Level 3 had said that these cases "are consistent with and support the view that the *ISP Remand Order* applies to all ISP-bound traffic exchanged between Qwest and Level 3 in Washington," Qwest would have nothing to complain about – they are. The fact that Level 3 expressed that thought with the notion that those cases are "in accord with" our view hardly supports Qwest's claim that the Commission should set aside Judge Rendahl's ruling below regarding compensation for VNXX traffic.

10. In paragraph 5 of its filing Qwest claims that Level 3 “erroneously states that 33 states had ruled that ISP-bound traffic was indeed local.” Level 3 notes at the outset that it was the California PUC who said that as of July 2000, 33 states “including California, have treated ISP-bound traffic as local, and subject to the payment of reciprocal compensation by the local exchange carrier (“LEC”) to a competitive local carrier (“CLEC”) whose *lines* the ISP has purchased.”¹¹ Qwest concludes that Level 3 is erroneous because the California PUC apparently states that ISP-bound traffic is local when “the service is local because the distance from the end user originating the call to the ISP modem occurs within the same local calling area.” This statement, in and of itself, is not inconsistent with Level 3’s advocacy, as Level 3, as noted above, has shown that California requires compensation for dialup ISP-bound traffic at the FCC’s mandated \$0.0007 rate where the modems or transport connecting to CLEC networks are local to the calling party.
11. Level 3’s statements are also not erroneous when it comes to what the California PUC itself stated to the FCC in comments in FCC dockets related to ISP compensation between 1999 and the middle of 2001. In its first set of comments, dated April 12, 1999, for example, the California PUC notes that federal law prohibits both CLECs and ILECs from assessing access charges on ISPs. “Thus, the CLEC cannot collect compensation from ISPs for delivering traffic to them, and, according to the FCC’s declaratory ruling, the CLEC cannot collect

¹¹ *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comments of the People of the State of California and the California Public Service Commission, pp.1-2 (July 21, 2000) *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=611359905. (In their comments the California Commission noted that ISP dialup was treated as local because modems were located in local calling areas, but in the two California decisions attached the Commission determined that ISP-bound traffic was local because it was directed to CLEC lines that connected to modems. In other words, the California Commission knew in 2000, just as it did in 2005, that ISP-dialup traffic was local based upon the transport used.)

reciprocal compensation for terminating local traffic under Section 251(b)(5) of the Act.”¹² As of 1999, therefore, California was concerned that the ESP exemption left a void in the compensation rules that deprived CLECs of fair compensation for terminating ISP dialup traffic. At the same time, the California PUC noted, “**Over twenty states, including California, have treated such [ISP-bound] traffic as local**, and subject to the payment of reciprocal compensation by the local exchange carrier (“LEC”) to a competitive local carrier (“CLEC”) whose *lines* the ISP has purchased.”¹³ In other words, during a period of time when the FCC had left to the states to determine the scope of “local” traffic under FCC Rule 51.701, twenty states had found that traffic to be compensable.

12. The accuracy of Level 3’s advocacy is further amplified by the fact that the California PUC not only noted in its Reply Comments dated April 27, 1999, that “Indeed, the record in a related case indicates that most traffic to ISPs is intrastate or local[.]”¹⁴, but regardless of whether this traffic is deemed local or not, “nothing prevents the FCC from using its authority under Section 201 to adopt rules allowing states to determine reasonable compensation for the carriage of such traffic.”¹⁵ In other words, the California PUC agreed that the FCC should exercise jurisdiction over all ISP-bound traffic, whether geographically local or not. This view did not change following the March 2000 decision of the Federal Circuit Court of Appeals for the District of Columbia Circuit in *Bell Atlantic v. FCC*, as the California PUC reiterated its

¹² *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comments of the People of the State of California and the California Public Utilities Commission, p.2 (April 12, 1999) available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006744069.

¹³ *Id.* at pages 1-2. (emphasis added).

¹⁴ *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Reply Comments of the People of the State of California and the California Public Utilities Commission, p.3, n. 3 (April 27, 1999) available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006943737.

concerns that regardless of whether ISP-bound traffic fit under Section 251(b)(5) or Section 201 of the Act, “the FCC *should find that ISP-bound traffic carried by a CLEC* terminates at the ISP’s modem, is a severable, local telecommunications service, and is *subject to reciprocal compensation* under Section 251(b)(5) of the 1996 Act.”¹⁶ As noted earlier, California has since required compensation for dialup ISP-bound traffic where the modem or transport connecting calls to such modems are within the local calling area of the dialing party.

13. Qwest also seems to claim in its filing that this or similar statements by the California PUC supports their point that only ISP-bound traffic that terminates that a modem is compensable. This is done not only by direct suggestion in their filing, but also by their repeated assertions that Level 3 has misstated the record. But Level 3’s assertion that the ISP Remand Order is not limited to geographically local traffic where the modem location determines geography is true for two very basic reasons: **First**, it is clear from even Qwest’s advocacy that the FCC was very aware of the fact that there was such a thing as non-local ISP dialup traffic *before* issuing the April 2001 ISP Remand Order.¹⁷ **Second**, this is demonstrated by repeated filings between 1999 and 2001 made by other ILECs and by USTA – that ISP-bound traffic was not local.¹⁸

¹⁵ *Id.* at page 4.

¹⁶ *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comments of the People of the State of California and the California Public Utilities Commission, p.3, n. 3 (May 18, 2000) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511359905.


¹⁷ In an ex parte presentation repeatedly filed as a result of meetings between Qwest and Wireline Competition Bureau and FCC Commissioner staff, Qwest re-iterated the importance of a bill and keep regime for ISP-bound traffic, citing to Colorado, Iowa, and Arizona decisions Qwest says rendered a bill and keep rate for all ISP-bound traffic. *See, e.g. In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, *Ex Parte Notice* of Qwest Corporation (Meetings with Kyle Dixon, Legal Advisor to FCC Chairman Michael Powell), attachment at p. 7 (December 8, 2000) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512258330; and *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, *Ex Parte Notice* of Qwest Corporation (Meetings with Dorothy Atwood, Chief Common Carrier Bureau), p. 2 (January 17, 2001) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512459740.

¹⁸ *See e.g. In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comment of United States Telephone Association, p.2 (April 12, 1999) available at

So, as Level 3 stated in its briefing, the FCC knew at least in early 1999 that states were deeming ISP-bound traffic as "local", that ILECs were claiming it was interstate interexchange service, and/or not compensable unless it originated and terminated in the same local calling area. Therefore the FCC had to have known in April 2001 when they **removed** the word local from their reciprocal compensation rules – 47 C.F.R. § 51.701 – that such change would result in a federal rule applying to **all** ISP-bound traffic.

DATED this 4th day of June, 2007.

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http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743807 ("The Commission's tentative conclusion to require carriers to negotiate inter-carrier compensation agreements for interstate Internet-bound traffic pursuant to Sections 251 and 252 is **inconsistent** with the Commission's decision in the Declaratory Order that **ISP-bound Internet traffic is jurisdictionally interstate traffic**, and its decision in the Local Competition Order that **reciprocal compensation applies only to local traffic**."); *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, *Ex Parte Notice of United States Telephone Association*, p.1 (July 21, 2000) (emphasis added http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511457919 ("Clearly the Commission should reiterate that an Internet-bound call to an ISP **does not** originate and terminate within a single local calling area. Such traffic is **not local** telecommunications traffic and is not subject to reciprocal compensation."); *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comment of SBC, p.1 (April 12, 1999) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743796 ("SBC strongly urges the Commission to reject the misguided efforts of those parties that will undoubtedly attempt to convince the Commission to force-fit Internet-bound traffic into the Section 251/252 "mold" by allowing payment of terminating compensation for **what is clearly not local traffic** envisioned by those sections of the Act. There is **no legal basis** for mandatory terminating compensation or state-supervised negotiation and arbitration processes for this jurisdictionally interstate/interexchange traffic. The 1996 Act, as interpreted by this Commission, **limits the application of such compensation to intrastate and intraexchange** traffic that is transported to *and terminates* on another carrier's network **within the same local area**.").

LEVEL 3 COMMUNICATIONS, LLC RESPONSE TO
QWEST CORPORATION'S REPLY TO LEVEL 3'S
RESPONSE TO QWEST'S PETITION FOR REVIEW

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CERTIFICATE OF SERVICE
Docket No. UT-063006

I hereby certify that on the date given below the original and 3 true and correct copies of the *Level 3's Response to Qwest Corporation's Reply to Level 3's Response to Qwest's Petition for Review*. was sent via email and overnight delivery to:

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On the same date, true and correct copies were sent by regular U.S. Mail, postage prepaid, and by email to interested parties listed below:

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DATED June 4, 2007.

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