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

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| PAC-WEST TELECOMM, INC., | ) | DOCKET UT-053036 |
| | ) | *(consolidated*) |
| Petitioner, | ) | |
| | ) | ORDER 12 |
| v. | ) | |
| | ) | |
| QWEST CORPORATION, | ) | FINAL ORDER |
| | ) | |
| Respondent. | ) | |
| | ) | |
| . . . . . | ) | |
| | ) | |
| LEVEL 3 COMMUNICATIONS, LLC, | ) | |
| | ) | DOCKET UT-053039 |
| Petitioner, | ) | (*consolidated)* |
| | ) | |
| v. | ) | ORDER 12 |
| | ) | |
| QWEST CORPORATION, | ) | FINAL ORDER |
| | ) | |
| Respondent. | ) | |
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**ORDER DENYING PAC-WEST'S MOTION FOR SUMMARY DETERMINATION; DENYING LEVEL 3'S MOTION FOR SUMMARY DETERMATION; GRANTING IN PART AND DENYING IN PART QWEST'S MOTION FOR SUMMARY DETERMINATION; AND DENYING QWEST'S MOTIONS TO STRIKE, OR IN THE ALTERNATIVE FILE A REPLY**

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## I. INTRODUCTION

*1* **NATURE OF PROCEEDINGS.** In these consolidated proceedings, the Washington Utilities and Transportation Commission (Commission) responds to a remand order from the United States District Court for the Western District of Washington (District Court). The remand order originated with an action by Qwest Corporation (Qwest)[1] in the District Court challenging the Commission's final orders in Dockets UT-053036 and UT-053039. In those orders, the Commission granted Pac-West Telecomm, Inc.'s (Pac-West) and Level 3 Telecommunications, LLC's (Level 3) (collectively Competitive Local Exchange Carriers, or CLECs) petitions for enforcement of their interconnection agreements with Qwest. The Commission found that the CLECs were entitled to compensation for calls bound for Internet service providers (ISP) using "VNXX"[2] traffic arrangements, without regard to whether such calls were considered local or interexchange. The District Court disagreed with the Commission's analysis and remanded the case to the Commission. The District Court directed the Commission to reinterpret the Federal Communications Commission's (FCC's) order on compensation for ISP-bound traffic, known generally as the *ISP Remand Order*,[3] and to classify VNXX ISP-bound traffic as within or outside a local calling area in reaching a decision on the CLECs' petitions for enforcement.

*2* **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, Seattle, Washington, represent Qwest. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Pac-West. Lisa Rackner, McDowell Rackner & Gibson PC, Portland, Oregon, Gregory L. Rogers, In-house counsel, Denver, Colorado, and Tamar E. Finn, Bingham McCutchen LLP, Washington, DC, represent Level 3.

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[1] Following the Commission's final order in Docket UT-100820, entered on March 14, 2011, Qwest Corporation merged with CenturyTel, Inc., becoming CenturyLink. We continue to refer to Qwest in this order given the history of the cases.

[2] "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. Even though the call is between local calling areas (*i.e.*, a long distance or toll call), the call appears local based on the telephone number.

[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

*3* **PROCEDURAL HISTORY.** The procedural history and context of these proceedings is complex, involving two sets of cases before the Commission and two separate appeals in United States District Court. To fully understand this history, it is important to also track the varied decisions of the FCC and the opinions of the D.C. Circuit first rejecting and finally accepting varying legal rationales put forth by the FCC. In this section, we set forth briefly the administrative history before the Commission and the related appeals to United States District Court. In a subsequent section, we describe the thrusts and parries of the D.C. Circuit and the FCC.

*4* The underlying petitions for enforcement in these proceedings were filed on June 9, 2005, and June 21, 2005, by Pac-West and Level 3, respectively. For purposes of this decision, we term these the "enforcement cases." In their petitions, the CLECs asked the Commission to enforce the terms of their interconnection agreements with Qwest concerning compensation for traffic to ISPs, including VNXX traffic. In counterclaims, Qwest asserted the traffic in question was not subject to compensation as ISP-bound traffic and that the CLECs' use of VNXX was illegal.

*5* On February 10, 2006, the Commission resolved the disputes in these enforcement cases on motions for summary determination. The Commission interpreted the CLECs' interconnection agreements and the FCC's *ISP Remand Order,* finding as a matter of law that Qwest must compensate the CLECs for ISP-bound traffic, regardless of whether the traffic originated and terminated within the same local calling area. Pac-West seeks to enforce an agreement the Commission approved on February 14, 2001, in Docket UT-013009, and an ISP-bound traffic amendment to this agreement approved on March 12, 2003, in the same docket. Level 3 seeks enforcement of an agreement approved by the Commission in March 2003 in Docket UT-023042.

*6* On May 23, 2006, Qwest commenced a separate administrative proceeding by filing a complaint with the Commission in Docket UT-063038 against nine CLECs, including Pac-West and Level 3. For purposes of this decision, we term this complaint the "VNXX complaint." In the complaint, Qwest asserted that the CLECs violated state law by using VNXX arrangements to provide ISP-bound service, avoiding access charges.

*7* On July 10, 2006, Qwest appealed the Commission's final orders in the enforcement cases to the U.S. District Court for the Western District of Washington, asking the court to overturn the Commission's orders in those cases.

*8* On April 9, 2007, the District Court issued its decision on the Qwest appeal in the enforcement cases.[4] The court found the Commission's decision in violation of federal law and inconsistent with the FCC's *ISP Remand Order* and remanded the case to the Commission for further proceedings in several identified areas.

*9* On October 5, 2007, a Commission administrative law judge entered an initial order in the VNXX complaint (*Initial VNXX Order),*[5] finding that VNXX traffic is not *per se* unlawful, but is lawful only if subject to appropriate compensation. The *Initial VNXX Order* found that VNXX traffic includes characteristics of both local and interexchange traffic and should be subject to a "bill and keep"[6] compensation mechanism.

*10* On February 15, 2008, the Commission stayed proceedings on the District Court's remand of the enforcement cases until the Commission entered a final order in the VNXX complaint.

*11* On July 16, 2008, the Commission entered its final order in the VNXX complaint (*Final VNXX Order*),[7] upholding the *Initial VNXX Order's* finding that VNXX service was lawful if compensation between the carriers was appropriate. The Commission further found that VNXX ISP-bound traffic was interexchange (non-local) in nature, and ordered that bill-and-keep compensation would apply to all intrastate interexchange VNXX traffic.[8]

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

[5] *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 05, Initial Order (October 5, 2007) (*Initial VNXX Order*).

[6] Bill and keep is a compensation mechanism that requires each carrier to bill its own customers for a service, rather than billing another carrier.

[7] *Qwest Corp. v. Level 3 Communications, LLC, et al.*, Docket UT-063038, Order 10, Final Order Upholding Initial Order; Granting in Part and Denying in Part Petitions for Administrative Review; Modifying Initial Order, Approving Settlement, n.2 (July 16, 2008) (*Final VNXX Order*).

[8] In the *Final VNXX Order*, ¶¶ 21-22, the Commission stated:

> VNXX traffic arrangements occur when the carrier assigns a telephone number from a rate center (NXX) in a local calling area different from the one where the customer is physically located. For example, a customer in Seattle is assigned a number for a local calling area in Olympia. The effect of this assignment is that a call to the VNXX number appears to terminate within the Olympia local calling area, but will actually terminate in the Seattle local calling area. Because intercarrier compensation depends on whether this

*12* On August 7, 2008, the Commission consolidated for decision the Pac-West and Level 3 enforcement cases.

*13* On September 12, 2008, Level 3 and other parties appealed the Commission's *Final VNXX Order* to federal district court. On June 19, 2010, the court stayed a decision in that case pending the Commission's decision on the court's remand in this proceeding involving the enforcement cases.

*14* On February 10, 2009, Pac-West, Level 3, and Qwest filed motions for summary determination in the consolidated enforcement proceedings, asking that the Commission resolve the District Court's remand in light of their interpretations of the FCC's decisions in the *ISP Remand Order* and the more recently issued *Mandamus Order*.[9] On March 26, 2009, the parties filed responses to the motions, followed by various procedural steps in the remanded enforcement cases:

- On April 2, 2009, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses to the motions for summary determination. On April 9, 2009, Pac-West and Level 3 filed responses to Qwest's motion to strike.

- On June 3 and 4, 2009, Level 3 and Qwest, respectively, filed supplemental authority.

- On June 18 and 21, 2009, the parties waived an initial order in this proceeding.

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call is classified as "local" (subject to reciprocal compensation) or interexchange (subject to access charges), the classification decision is central to determining who pays whom and how much.

The great majority of VNXX calls are made to ISPs (ISP-bound traffic). CLECs use VNXX arrangements primarily to serve their ISP customers. VNXX enables the ISP dial-up customers to connect with the Internet without incurring toll or access charges.

(Citations omitted.)

[9] *In re High Cost Universal Service Support, et al.*, WC Docket 05-337, et al., FCC 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008) (*Mandamus Order*).

- On July 21, 2010, the parties filed additional initial supplemental briefs addressing the decision by the U.S. Court of Appeals, Washington, D.C. Circuit (DC. Circuit) in *Core III*, upholding the FCC's *Mandamus Order*.[10]

- On August 11, 2010, the parties filed responses to the initial supplemental briefs.

## II. MEMORANDUM

*15* The primary issue in this proceeding on remand of the enforcement cases is whether the rate the FCC established in its 2001 *ISP Remand Order* for terminating ISP-bound traffic[11] applies only to calls to an ISP that originate and terminate within a local calling area, or whether the rates apply to all ISP-bound calls, including calls between exchanges (*i.e.*, interexchange) and calls commonly referred to as virtual NXX (VNXX) traffic.[12] There is a significant history of case law on this subject, as well as an extensive procedural history on this issue before the Commission. It is worth noting that the issue arose primarily as a consequence of the explosive growth of dial-up internet traffic during the latter half of the 1990s which, eventually, was eclipsed by broadband service.[13] Thus, the dispute here centers on traffic passed between Qwest and other carriers at a time when dial-up traffic was extensive and certain

[10] *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597 (2010) (*Core III*).

[11] When carriers terminate calls that originate from customers of another local exchange carrier, the originating carrier must pay the terminating carrier reciprocal compensation under section 251(b)(3) of the Act, In the *ISP Remand Order*, the FCC established a lower rate for terminating ISP-bound traffic, $.0007 per minute. The parties dispute which rate applies to terminating VNXX ISP-bound traffic, but do not dispute the rates.

[12] The Commission has more fully defined VNXX service as when a carrier acquires a telephone number for a specific local calling area but calls made to that number actually terminate in another geographic area, although the calls appear to the caller to be local calls. *Final VNXX Order,* n.2, *citing Pac-West Telecom, Inc. v. Qwest Corp.* Docket UT-053036, Order 05, Final Order Affirming and Clarifying Recommended Decision, n.1 (Feb. 10, 2006) and *Level 3 Communications, LLC v. Qwest Corp.* Docket UT-053039, Order 05, Order Accepting Interlocutory Review; Granting, in Part and Denying, in Part, Level 3's Petition for Interlocutory Review, ¶ 10, n.4 (Feb. 10, 2006).

[13] Because of the continued proliferation of broadband and the corresponding decrease in dial-up access to the Internet, the issue in this proceeding, on a prospective basis, will be of decreasing significance.

carriers such as Pac-West and Level 3 "specialized" in serving ISPs, in part, to obtain the benefit of revenue from the higher reciprocal compensation rates that they assumed would apply to terminating ISP-bound traffic.

## A. Legal and Regulatory Background

*16* In the *Final VNXX Order*, the Commission provided an extensive discussion of the rating (*i.e.*, determining whether the call is treated as a local or long distance call for rating purposes) and routing of telephone calls, as well as of the legal and regulatory background related to ISP-bound calls and their delivery by VNXX service arrangements in particular.[14] As that discussion holds true today, we only summarize it briefly here.

*17* Historically, incumbent local exchange providers (ILECs), such as Qwest, assigned customer telephone numbers on the basis of the geographic location of the customer's telephone. The geographically assigned numbers were used to route and rate the calls to and from that number, for purposes of compensation between carriers.

*18* A telephone number typically has ten digits, labeled by telecommunications carriers as NPA-NXX-XXXX. The first three digits are known as the Numbering Plan Area (NPA) or area code. The second set of three digits is the exchange or NXX code. These codes generally correspond to geographic areas served by a local exchange carrier[15] that operates central offices and switches that are identified by NXX codes. When a customer dials a number, the NXX code helps direct that call to a particular central office and in turn helps to route that call to the called number on the terminating end. Historically, the NXX number determines whether a call is to terminate within or outside the local calling area. This in turn determines whether a call is rated a local call or an interexchange call, and determines call compensation between carriers.

*19* If a call is rated as local, then it is generally subject to reciprocal compensation rates. This means that if a local call is between customers served by two carriers, the carriers charge one another for the traffic. The carrier originating the call would bill the customer (normally through a monthly rate) and would compensate the carrier terminating the call for that service. In contrast, interexchange calls are subject to

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[14] *Final VNXX Order*, ¶¶ 16-54.

[15] *See Verizon California, Inc. v. Peevey,* 462 F.3d 1142, 1147-48. (9th Cir. 2006) (*Peevey*).

intrastate access charges. In the latter circumstance, a customer's long distance carrier bills the customer for the call and then in turn pays the local telephone company or companies for originating or terminating the call. Interexchange calls that are made to geographic locations within the state are termed intrastate interexchange calls. For these calls, the state commission may set rates. Interexchange calls that cross state boundaries are classified as interstate calls, subject to the FCC's ratemaking jurisdiction.

*20* As discussed below, the access charge system remains in effect, despite numerous changes to the telecommunications industry that commenced with the passage of the Telecommunications Act of 1996 (the Act).[16] In the *Final VNXX Order*, the Commission described section 251(g) of the Act:

> The Act preserved in section 251(g) the existing compensation scheme for interstate and intrastate interexchange and information access traffic, but under section 251(b)(5) required local exchange carriers to apply a new form of compensation, known as reciprocal compensation, to the transport and termination of telecommunications traffic. The FCC determined that reciprocal compensation obligations under section 251(b)(5) apply only to traffic that originates and terminates within a local calling area, such that the customer initiating the call pays the originating carrier and the originating carrier must pay the terminating carrier for completing the call.[17]

*21* The section 251(b)(5) reciprocal compensation regime for local calling was assumed to be "reciprocal," with a roughly equal balance of compensable traffic exchanged between carriers. However, this did not prove true between carriers affected by the rapid growth of end-users subscribing to dial-up access to the internet. Many CLECs

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[16] 110 Stat. 56, Pub. L. 104-104 (Feb. 8, 1996). Section 251(g) of the Act, 47 U.S.C. §251(g), states that each wire line local exchange company

> shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier [at the time of enactment of the Act] until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.

[17] *Final VNXX Order*, ¶ 18 (citations omitted). Section 251(b)(5) of the Act, 47 U.S.C. §252(b)(5), imposes on every local exchange company "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

began to serve customers seeking a connection to the internet. Calls to an ISP are usually lengthy and are not reciprocal – the ISP does not call you back. Thus, the CLECs identified an opportunity to generate significant revenue by charging other carriers (the carriers generally serving the end users initiating a dial-up call to ISPs) for termination of the ISP-bound calls, but did not themselves have to pay similar termination charges. This imbalance in ISP-bound traffic created an unreasonable arbitrage opportunity among carriers and eventually prompted the FCC, and the courts, to issue several orders intended to address the imbalance.

### 1. FCC Action up to the *ISP Remand Order*

#### a. *Declaratory Ruling*

*22* The FCC first addressed this subject in 1999 in what has been termed the *Declaratory Ruling*.[18] In the *Declaratory Ruling*, the FCC focused only on ISP-bound traffic that originated and terminated within a local area because that was where CLECs were benefitting most from arbitrage related to ISP-bound calls.[19] At that time, most ISP-bound calls were made to ISP modems located within local calling areas. The FCC determined that, though the caller and the ISP were located in the same calling area, the ultimate destination of the call to the ISP was an internet site. Therefore, under this "end-to-end" analysis, the FCC determined that ISP-bound calls were interstate in nature and thus subject to FCC jurisdiction under section 201 of the Act. However, the FCC found that under existing interconnection agreements between carriers, those calls might be subject to reciprocal compensation under section 251(b)(5) of the Act. The D.C. Circuit, in the *Bell Atlantic* case, however, found the FCC's jurisdictional analysis inadequate in light of other FCC precedents and therefore remanded the case to the FCC.[20] On remand, the FCC released a second order in 2001, the *ISP Remand Order*.[21]

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[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*).

[19] *Id*. ¶ 4: "Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." *See also ISP Remand Order*, ¶¶ 10, 13.

[20] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

[21] *See* n.3, *supra*.

### b. *ISP Remand Order*

23 In the *ISP Remand Order*, the FCC affirmed its end-to-end basis for determining that ISP-bound calls were "jurisdictionally" interstate in nature. As mandated by the D.C. Circuit, the FCC elaborated on its earlier analysis, deciding that ISP-bound calls are subject to the FCC's exclusive jurisdiction and not subject to the reciprocal compensation requirements of section 251(b)(5). However, the FCC determined that ISP-bound calls are not "telecommunications services," but are "information services" and, pursuant to section 251(g) of the Act, they fall outside the reciprocal compensation requirement in section 251(b)(5).[22] Exercising its authority under section 251(g), the FCC set a compensation level for ISP-bound calls, which has become the most prominent feature of the *ISP Remand Order.* The new compensation scheme, to be applied prospectively to ISP-bound calls, reflected a gradually declining per-minute-of-use charge, capped after 36 months at $.0007 per minute.[23] The order also established growth caps, determined how the compensation scheme would apply in new markets and applied a "mirroring rule," which requires ILECs to apply the ISP traffic rate to all calls subject to compensation under section 251(b)(5), or apply reciprocal compensation rates to ISP-bound traffic.[24] In essence, the effect of the *ISP Remand Order* was to create, on an interim basis, a new category of traffic for which a "non-access charge" rate would apply until the FCC adopted rules to modify the existing intercarrier compensation scheme.[25]

24 This interim compensation scheme reflected the FCC's concern that the existing intercarrier compensation scheme "created opportunities for regulatory arbitrage and distorted the economic incentives for competitive entry into the local exchange and

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[22] *ISP Remand Order*, ¶¶ 34-35.

[23] The FCC envisioned a three-year transition for CLECs to change their intercarrier practices, but deferred an ultimate decision on bill and keep for all ISP-bound traffic to the Intercarrier Compensation docket addressing comprehensive reform. *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001).

[24] *ISP Remand Order*, ¶¶ 8, 81, 86, 89.

[25] *Id*. ¶2. Simultaneously with the *ISP Remand Order*, the FCC issued a Notice of Proposed Rulemaking in CC Docket 01-92, to develop a unified carrier compensation regime. *See* n 23, *supra*. On October 27, 2011, the FCC unanimously voted to comprehensively reform the intercarrier compensation system in the "Connect America Fund & Intercarrier Compensation Reform Order and Further Notice of Proposed Rulemaking" in Common Carrier Dockets 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109, and 10-208, but has not yet released the order.

exchange access markets."[26] The interim compensation mechanism allowed the FCC to pursue its stated goal to wean carriers, particularly CLECs, from reliance on reciprocal compensation payments and transition them towards a "bill and keep" compensation regime.[27] Bill and keep requires carriers to recover most, if not all, of their own costs from their own end users, and eliminates reliance on or the incentive to exploit the arbitrage opportunity associated with a per-minute reciprocal compensation system.[28] In contrast, under reciprocal compensation, carriers serving ISPs could generate large payments from originating carriers for the traffic imbalance created by the one-way calling patterns generated by their ISP customers.[29] Despite the FCC's efforts, however, questions and disputes quickly arose about how to interpret the *ISP Remand Order*, in part because the FCC was not sufficiently clear about the scope of the ISP-bound traffic to which its new compensation scheme applied.

### c. *World Com* Decision

*25* A number of carriers challenged the FCC's *ISP Remand Order*, and once again the D.C. Circuit criticized the FCC's analysis. In its *WorldCom* decision,[30] the D.C. Circuit rejected the FCC's decision to classify ISP-bound calls as falling under section 251(g). Because there was no ISP-bound traffic prior to the Act, the D.C. Circuit reasoned that the FCC could not rely on section 251(g) of the Act for authority to set rates for ISP-bound traffic. The court concluded that section 251(g) is simply a transitional device that preserves obligations that predated the Act until the FCC devises new compensation rules. However, the *WorldCom* decision did not vacate the *ISP Remand Order*; nor did it overturn the FCC's determination that ISP-bound calls were jurisdictionally interstate in nature. Rather, the court remanded the case to the FCC, directing the agency to better develop its assertion of authority to regulate ISP-bound calls.

*26* At this juncture, the law governing compensation for ISP-bound traffic remained unsettled. While the *WorldCom* court allowed the compensation scheme under the

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[26] *Id*. ¶ 2.

[27] *Id*. ¶¶ 2-7.

[28] *See* n.6, *supra*.

[29] *Id.* ¶ 77.

[30] *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (*WorldCom*).

*ISP Remand Order* to remain in place, the court had questioned the FCC's legal basis for asserting jurisdiction over this traffic. In addition, disputes remained over the scope of the ISP-bound calls subject to the FCC's order.

### 2. State Commission Determination on VNXX ISP-Bound Traffic

*27* Subsequent to the *World Com* decision, but prior to any further FCC action on remand, this Commission was asked to resolve disputes between various telecommunications carriers concerning the proper compensation for a form of ISP-bound calling provided through use of VNXX service. In 2005, Pac-West and Level 3 initiated the enforcement cases, which were petitions for enforcement of their interconnection agreements with Qwest, alleging that Qwest owed them the ISP-bound traffic rate or reciprocal compensation for VNXX ISP-bound traffic. Qwest denied it had an obligation to pay reciprocal compensation for such VNXX traffic arguing this traffic was not exchanged within a local calling area as required by the *ISP Remand Order*. Qwest further contended that VNXX ISP-bound service was a misuse of numbering resources, and violated state law and the terms of the parties' interconnection agreements.[31] In these enforcement cases, the Commission ruled that the *ISP Remand Order*'s interim compensation scheme for ISP-bound traffic applied to all traffic bound for an ISP, including VNXX ISP-bound traffic, regardless of where the traffic originated or terminated.[32] Therefore, the Commission held that Qwest owed the CLECs compensation for termination of ISP-bound traffic from Qwest's customers.

### 3. Subsequent Federal Court Case Law Concerning VNXX ISP-bound Traffic

*28* Following the Commission's orders in the Pac-West and Level 3 cases, various federal courts in the First, Second, and Ninth Circuits entered orders reaching a conclusion opposite to that reached by this Commission regarding the scope of calls

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[31] Qwest's Answer and Counterclaim, Docket UT-053036, ¶¶ 19-32, 57-66, June 16, 2005; *see also* Qwest's Answer and Counterclaim, Docket UT-053039, ¶¶ 22-44, 65-78, June 28, 2005.

[32] *Pac-West Telecom, Inc. v. Qwest Corp.* Docket UT-053036, Order 05, Final Order Affirming and Clarifying Recommended Decision (Feb 10, 2006) (*Pac-West*); *Level 3 Communications, LLC v. Qwest Corp.* Docket UT-053039, Order 05, Order Accepting Interlocutory Review; Granting, in Part and Denying in Part, Level 3's Petition for Interlocutory Review (Feb. 10, 2006) (*Level 3*). *See also 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 UT-023043, Seventh Supplemental Order, Affirming Arbitrator's Report and Decision, (Feb. 28, 2003) ¶¶ 7-10 (*CenturyTel Level 3 Order*).

to which the FCC's interim compensation scheme applied.[33] These courts held that the *ISP Remand Order*'s rates applied only to ISP-bound calls that actually originate and terminate within a local calling area, although the resulting compensation varied depending on the terms of the interconnection agreements and state law and tariffs governing carriers' local calling areas.[34]

*29* The First Circuit concluded that the FCC's focus in the *ISP Remand Order* was compensation for "the delivery of calls from one LECs' end-user customer to an ISP *in the same local calling area* that is served by a competing LEC," and not for all ISP-bound calls.[35] It further determined that although the *ISP Remand Order* did not clearly address ISP-bound VNXX traffic, it did not preempt state commission authority to impose intrastate access charges for such traffic.[36]

*30* Likewise, the Second Circuit in *Global NAPs II* upheld a decision of the Vermont Public Service Board in which the Board-determined local calling areas establish whether a call is a toll or local, including ISP-bound calls. The court stated that "despite the monumental changes Congress had made in telecommunications law, the FCC early indicated that it intended to leave authority over defining local calling areas where it always had been – squarely within the jurisdiction of the state commissions."[37] Consistent with the First Circuit's decision in *Global Naps I*, the court determined that states are not preempted from applying access charges to interexchange ISP-bound traffic or from banning the use of VNXX arrangements.[38]

*31* Finally, in *Peevey*, the Ninth Circuit upheld the California Public Utilities Commission's decision to classify and determine compensation for VNXX traffic,

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[33] *See Global NAPs, Inc. v. Verizon New England, Inc*., et al., 444 F.3d 59 (1st Cir. 2006) (*Global NAPs I*); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006) (*Global NAPs II*); *Peevey*, 462 F.3d 1142 (9th Cir. 2006).

[34] *See Final VNXX Order*, ¶¶ 42-48.

[35] *Global NAPs I*, at 73-74, *quoting ISP Remand Order*, ¶ 13 (emphasis added).

[36] *Id*. at 75.

[37] *Global NAPs II*, at 97.

[38] *Id*. at 100-103. Finding support for its conclusion in the *ISP Remand Order*, the court noted that the FCC's order "expressly states that access services remain subject to FCC jurisdiction or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions." *Id*. at 100.

finding it within the agency's authority over interexchange traffic under the Act and the FCC's *Local Competition Order*.[39]

### 4. District Court Remand of Commission Enforcement Cases

*32* In 2007, following this line of federal decisions, the U.S. District Court for Western Washington reversed this Commission's orders in the enforcement cases. The court held that the *ISP Remand Order* applied only to ISP-bound calls originating and terminating within a local calling area. The court therefore remanded the decisions to the Commission with instructions to:

> reinterpret the *ISP-Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion.[40]

Thus, the court held that the Commission has authority to classify VNXX traffic, and if appropriate, to establish a reasonable compensation scheme for such traffic. No party sought review of this decision.

### 5. Commission VNXX Complaint Case

*33* In July 2008, prior to addressing the District Court's remand in the *Qwest Order*,[41] the Commission issued its *Final VNXX Order*, resolving Qwest's complaint against the CLECs' use of VNXX to provide ISP-bound service. The Commission found that VNXX service was lawful if accompanied by appropriate compensation provisions, and revisited its earlier conclusion that all ISP-bound calls were subject to the FCC's interim compensation scheme under the *ISP Remand Order*. Specifically, the Commission found that while some ISP-bound calls were interstate, others, including many VNXX calls, were intrastate interexchange calls. The Commission further found that:

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[39] *Peevey*, 462 F.3d at 1146, *quoting Local Competition Order*, ¶ 1033: "[T]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *See also Id.* at 1157-58.

[40] *Id.* at 1177.

[41] On February 15, 2008, the Commission stayed proceedings in the remanded Dockets UT-053036 and UT-053039 pending issuance of the *Final VNXX Order*. *See Pac-West*, Order 07 and *Level 3*, Order 07.

> the *ISP Remand Order* did not address VNXX traffic, only the narrow issue of "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC."[42]

*34* The Commission concluded that VNXX services are interexchange in nature and not subject to Section 251(b)(5),"[43] and clarified

> …
>
> that VNXX traffic does not originate and terminate within the same LCA [local calling area]. If it did, the CLECs would have no business rationale to establish VNXX arrangements, the traffic would fall within the *ISP Remand Order* compensation scheme, and this proceeding would be unnecessary. The classification of VNXX traffic as intrastate interexchange is consistent with state and federal law, is within the options suggested by the district court, and is clearly justified under our authority.[44]

The Commission relied on recent federal court decisions that had

> found that distinctions between traffic subject to section 251(b)(5) and that carved out under section 251(g) remain in force, that intrastate interexchange traffic is subject to carve out under section 251(g) and that states retain jurisdiction over intrastate interexchange traffic. Under this analysis, it is unquestionable that states retain authority under the Act and FCC orders to determine compensation for intrastate interexchange traffic.[45]

### 6. The FCC's *Mandamus Order*

*35* Meanwhile, following the *WorldCom* decision in 2002 and frustrated by the FCC's repeated failure to articulate the legal basis for its compensation scheme for ISP-bound traffic, Core Communications filed a petition for a writ of mandamus with the D.C. Circuit seeking an order requiring the FCC to justify its position. After initially denying the petition in 2005 "without prejudice," an exasperated court in 2008 granted the petition and ordered the FCC to enter a final, appealable order by

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[42] *Final VNXX Order*, ¶ 113 (citation omitted).

[43] *Id.* ¶ 129.

[44] *Id.* ¶ 130.

[45] *Id.* ¶ 131.

November 5, 2008, and to explain the legal authority supporting its decision in the *ISP Remand Order*.[46]

*36* In response to the court's directive, the FCC issued its *Mandamus Order*[47] on November 5, 2008, reiterating its decision in the *ISP Remand Order* and concluding that the reciprocal compensation provisions of section 251(b)(5) of the Act cover all "telecommunications," including ISP-bound traffic, not just "local" traffic.[48] The FCC reasoned that the traffic encompassed by section 251(g) (exchange access traffic) is excluded from section 251(b)(5), but found, in agreement with the D.C. Circuit's *WorldCom* order, "that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as there was no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[49]

*37* It is critical to the issues in this proceeding to note that the *Mandamus Order,* released more than seven years following the effective date of the *ISP Remand Order,* did not alter the scope of that order. Rather, as explained below, the FCC merely revised and clarified the legal basis for its authority to establish rates for the narrow category of ISP-bound traffic that is served by two carriers exchanging traffic within a common local calling area. The FCC, in briefs filed with the D.C. Circuit on the petition for mandamus, and on appeal of the *Mandamus Order*, noted that the scope of the ISP-bound traffic to which the compensation scheme applies is limited to that within a local calling area.[50]

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[46] *In re Core Communications, Inc*., 531 F.3d 849, 861-62 (D.C. Cir. 2008). The court expressed its displeasure in no uncertain terms, stating that "at the point, the FCC's delay in responding to our remand is egregious" (*Id.* at 850), and, in effect, giving the FCC one more chance. The court stated: "Having repeatedly, and mistakenly, put our faith in the Commission we will not do so again. If the FCC cannot, within six months, explain its legal authority for the interim rules, we can only presume that this is because there is in fact no such authority." *Id.* at 861.

[47] *Mandamus Order,* 24 FCC Rcd 6475 (2008).

[48] To reach this conclusion, the FCC asserted that the term "local" is not used in section 251(b)(5), nor defined in the Act. *Mandamus Order*, ¶¶ 7-9.

[49] *Id.* ¶ 16.

[50] Opposition of Federal Communications Commission to Petition for Writ of Mandamus at 26, *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. Dec. 27, 2007) (No. 03-3674), attached as Tab 1 to Qwest's Supplemental Authority, June 3, 2009; *see also* Brief for Federal Communications Commission at 21, *Core Communications, Inc., v. FCC*, 592 F.3d 139, 144 (D.C. Cir. May 1, 2009) (Nos. 08-1365, et al.), attached as Tab 2 to Qwest's Supplemental Authority, June 3, 2009.

*38* Once again, the FCC's decision was challenged in the D.C. Circuit. However, this time, the court upheld the FCC and its reasoning. In its *Core III* decision, the D.C. Circuit recognized the limited nature of dial-up internet traffic, finding:

> [d]ial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and §§ 251-252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within the intersection.[51]

Finding the Act's scope covered the FCC's interim compensation scheme, the court concluded that the FCC possessed the authority under Sections 201 and 251(i) of the Act to set rates for such ISP-bound traffic.

*39* Shortly after *Core III*, the First Circuit Court of Appeals reached a similar conclusion and affirmed the narrow scope of FCC orders relating to ISP-bound traffic, concluding that the FCC's *Mandamus Order* "simply clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage. … the issues the FCC addressed in the 2008 order did not go to regulation of intercarrier compensation for interexchange ISP traffic."[52] The CLECs argue this very issue in this proceeding.

### B. Motions for Summary Determination

*40* The parties filed motions for summary determination requesting the Commission to modify its earlier decision regarding VNXX traffic consistent with recent FCC and court decisions addressing the issue.

*41* Under the Commission's procedural rules, the Commission may grant summary determination where the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[53] Summary determination is

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

[52] *Global NAPs, Inc. v. Verizon New England, Inc., et al*., 603 F.3d 71, 82 (1st Cir. 2010) (*Global NAPs V*).

[53] *See* WAC 480-07-380(2)(a).

appropriate if, based on all the evidence, there are no issues of material fact and reasonable persons could reach but one conclusion.[54]

*42* The Commission must consider the facts in the light most favorable to the non-moving party.[55] Once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the non-moving party to set forth specific facts sufficient to rebut the moving party's contentions.[56] If the non-moving party fails to set forth any such facts, summary determination is proper.[57]

*43* In considering the parties' motions for summary determination, the Commission must also respond to the District Court's instructions in the remand order to: 1) reinterpret the *ISP Remand Order* as it applies to the parties' interconnection agreements; and 2) classify VNXX ISP-bound calls as within or outside a local calling area. Specifically, we must apply the recent decisions on VNXX traffic, review our authority in light of these decisions, and determine the impact of our conclusions on the classification of VNXX ISP-bound calls and the appropriate compensation for such calls. The Commission must then determine whether it is appropriate to grant summary determination to any party.

*44* The CLECs assert that the material facts necessary to address the court's directions on remand are not in dispute. In contrast, Qwest argues that the CLECs have not presented evidence that the traffic in dispute originated and terminated in the same local calling area, or whether the CLECs actually terminated the disputed traffic.[58] While Qwest presents an argument based on affidavits about the amount of VNXX traffic and the compensation owed to Qwest through refunds based on its estimates of disputed VNXX traffic, the parties agree that these factual questions can be addressed through a separate evidentiary proceeding after the Commission resolves the legal issues on remand.[59] Level 3 asserts, in response to Qwest's motion, that material facts

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[54] *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

[55] *Homestreet, Inc. v. State Dept. of Revenue*, 139 Wash. App. 827, 162 P.3d 458, 464 (2007).

[56] *Atherton Condo. Apartment-Owner Ass'n Bd. Of Directors v. Blume Dev. Co*., 115 Wn.2d 506, 512, 799 P.2d 250 (1990)

[57] *Atherton*, 115 Wn.2d at 516.

[58] Qwest Response to Pac-West Motion, ¶ 6; Qwest Response to Level 3 Motion, ¶ 6.

[59] Pac-West Motion, ¶¶ 28-31; Level 3 Motion, ¶ 1; Qwest Motion, ¶ 3; Level 3 Response to Qwest's Motion, ¶¶ 54-61.

that support Qwest's theory about compensation are in dispute, but does not clearly identify the facts in dispute.[60]

*45* The issues on remand are issues of law and fact that may be resolved on motions for summary determination and the evidence the parties have submitted. The District Court asks us to interpret the *ISP Remand Order* (a legal decision addressed in numerous federal court decisions), the parties' interconnection agreements (the relevant parts of which the parties have submitted in this case), and whether VNXX calls fall within or outside of a local calling area (a determination that depends upon state law, rules, and the parties' tariffs and interconnection agreements). For the reasons discussed below, we deny the CLECs' motions for summary determination and grant Qwest's motions for summary determination on the issues of law, including the interpretation of the *ISP Remand Order*, the classification of VNXX traffic, and the interpretation of the parties' interconnection agreements. We deny Qwest's motion as it relates to the amount and nature of the specific traffic in question, and defer consideration of these issues to a separate evidentiary proceeding.[61]

## C. Discussion of Issues

### 1. What is the Applicable Law?

*46* Qwest argues that the District Court's decision is the law of the case and cannot be changed or relitigated.[62] In other words, the Commission is bound by the District Court's conclusion that the *ISP Remand Order* applies federal rates only to ISP-bound traffic that is within a local calling area. Qwest also argues that Washington's rules of contract interpretation require reference to the law at the time the contract was executed.[63]

*47* Qwest contends that even if the FCC's *Mandamus Order* is interpreted as the law applicable to this case, it must be interpreted to retain the same scope as the *ISP*

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[60] Level 3 Response to Qwest's Motion, ¶ 9.

[61] We encourage the parties to file with the Commission all necessary data, analysis and traffic studies to allow the Commission to quickly enter a decision on these factual issues. As the Commission's determination is retroactive, the parties must also file the appropriate evidence of the start and end date for the Commission to determine compensation.

[62] Qwest Response to Level 3 Motion, ¶ 14, *citing In re Wiersma*, 483 F.3d 933, 941 (9th Cir. 2007).

[63] Qwest Memorandum in Support of Motion, ¶ 46, *citing GTE v. Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986).

*Remand Order* when determining the appropriate basis for compensation of ISP-bound traffic, i.e., that the order applies only to ISP-bound traffic within a local calling area. Qwest claims that, even if the Commission determines that the *Mandamus Order* changes the scope of the ISP-bound traffic to which the *ISP Remand Order* applies, the Commission cannot alter the District Court's interpretation of the *ISP Remand Order*.

*48* Level 3 and Pac-West disagree. They argue that the *Mandamus Order* applies in this case, rendering moot the District Court's directions on remand.[64] The CLECs rely on the Ninth Circuit's *Pacific Bell* case that held that state contract laws would apply when reviewing decisions on the arbitration or formation of interconnection agreements. Applicable state law would include "all valid implementing regulations in effect at the time we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision."[65]

*49* Qwest responds that the *Pacific Bell* court was only reviewing the formation of interconnection agreements, not interpreting them for purposes of enforcement as the Commission is doing in this case.

*50* This distinction is without merit. Interconnection agreements are contracts formed within the jurisdictions to which they apply and state commissions have authority under the Act to enforce provisions of agreements they approve.[66] Further, interconnection agreements cover all aspects of the relationship between the contracting parties. Contract formation is but one aspect of the relationship represented by the agreement, and is generally limited to the narrow question of whether a contract between the parties exists under law. The *Pacific Bell* court clearly recognized a state commission's broad authority under section 252(b) of the Act to resolve interconnection disputes between ILECs and CLECs and did not limit its decision only to the formation of interconnection agreements. It would make no sense to limit a commission's jurisdiction to that of contract formation, and strip it of its authority to interpret key contract terms or enforce the obligations set forth in the

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[64] Pac-West Motion, ¶ 9; Level 3 Motion, ¶ 33.

[65] Level 3 Motion, ¶ 26, n.43, *quoting Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1130-1131, n.14 (9th Cir. 2003).

[66] *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

agreement. Following Qwest's argument to its logical conclusion would lead to such a result.

*51* Further, Qwest's argument that the law of the case doctrine governs the Commission's review also must fail. To make this argument, Qwest ignores contrary authority finding that the law of the case doctrine may not apply when changes in law have occurred.[67] The issues in this case involve the interpretation of the *ISP Remand Order*, which in turn interprets the Act. The *ISP Remand Order* itself was subject to remand, requiring us to consider the FCC's *Mandamus Order* and the D.C. Circuit's decision upholding the order, and whether these decisions result in a change in law.

*52* Finally, Qwest's argument regarding state contract law ignores Washington cases that give courts broad latitude when interpreting contract terms in order to ascertain their meaning.[68] In *Berg*, the court found that even a term that seems unambiguous on its face is open to interpretation, and gave the court broad latitude to draw on extrinsic information in interpreting a contract.[69] As the Act authorizes the Commission to arbitrate contract disputes between telecommunication companies in Washington, we draw upon existing state law to interpret the contracts the parties have brought to us for resolution. Qwest cannot now argue that Washington contract law or a relevant subset of it is beyond our purview.

*53* In conclusion, we agree with the CLECs that both the FCC's *Mandamus Order* as well as the *ISP Remand Order* are applicable to our decision here. In the *Mandamus Order*, the FCC finally provided the D.C. Circuit an explanation of its legal authority to issue the pricing rules contained in the *ISP Remand Order*,[70] a decision the D.C. Circuit upheld on appeal. The *Pacific Bell* case provides persuasive authority that the Commission should apply the current law in effect when interpreting the parties' intention as to the application of the *ISP Remand Order*, which has been specifically incorporated into the parties' interconnection agreements. However, as discussed further below, neither the *Mandamus Order* nor the *Core III* decision upholding it change the relatively narrow scope of traffic addressed by the *ISP Remand Order* – the "subset of ISP-bound traffic, specifically, [dial up] ISP-bound traffic within a

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[67] *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

[68] *See Berg v. Hudesman*, 115 Wn.2d 660, 801 P.2d 222 (1990).

[69] *Berg*, 115 Wn.2d at 666-69.

[70] *Mandamus Order*, ¶ 5, *citing In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008).

local calling area."[71] Contrary to the CLECs' arguments, the District Court's decision is not moot.

### 2. What is the Correct Interpretation of the *ISP Remand Order* in Light of the *Mandamus Order*?

*54* The Commission must answer two questions of law in interpreting the *ISP Remand Order* and the subsequent *Mandamus Order*: first, whether the scope of the *Mandamus Order*, like the *ISP Remand Order*, is limited to ISP-bound calls within a local calling area; and second, whether section 251(g) excludes *all* ISP-bound traffic from reciprocal compensation obligations under section 251(b)(5). Consistent with their positions throughout these proceedings, the CLECs and Qwest are diametrically opposed on these issues.

*55* The CLECs contend that the FCC intended its *Mandamus Order* to apply to all ISP-bound traffic, not simply ISP-bound traffic within a local calling area. They rely on the FCC's finding that the reciprocal compensation provisions of section 251(b)(5) cover all "telecommunications," not just local traffic, because the definition of "telecommunications" does not include the term "local."[72] Further, the CLECs argue that under the analysis in *WorldCom* and the *Mandamus Order*, no ISP-bound traffic may be carved out from section 251(b)(5) by applying section 251(g). The CLECs assert that, under this analysis, section 251(b)(5) traffic includes *all* ISP-bound traffic and such traffic would be subject to reciprocal compensation. They cite to the FCC's statements, which are contrary to the *ISP Remand Order*, that the access traffic encompassed by section 251(g) of the Act could not have included ISP-bound traffic as there was no pre-Act ISP-bound traffic.[73] Finally, Pac-West points out that there was no intercarrier compensation arrangement for VNXX ISP-bound traffic prior to the Act.[74]

*56* Qwest argues that the *Mandamus Order* does not explicitly reject applying the *ISP Remand Order's* rates to the narrower scope of ISP-bound calls. Additionally, Qwest contends that neither the *ISP Remand Order* nor the *Mandamus Order* specifically mention VNXX ISP-bound calling. Qwest further points out that even though the

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

[72] Pac-West Motion, ¶ 10; Level 3 Motion, ¶¶ 2, 27-31.

[73] Pac-West Motion, ¶¶ 10-15; Level 3 Motion, ¶¶ 44-52.

[74] Pac-West Motion, ¶¶ 11-13.

FCC in the *Mandamus Order* no longer classifies ISP-bound calls as carved out by section 251(g), the order made clear that the access charge system for interexchange calls remains in place under the Act. Qwest contends that the FCC's end-to-end analysis for ISP-bound calls within a local calling area would also logically apply to all ISP-bound calls. Thus, Qwest asserts that all ISP-bound calls are interstate in nature. However, Qwest argues that calling arrangements like VNXX existed prior to the Act, and were subject to federal and state access rules, exempting certain calls from interstate access charges and allowing states to determine the compensation for such calls.[75] Thus, Qwest claims that VNXX ISP-bound calls should be classified as either intrastate or interstate interexchange calls, subject to the relevant access charges. Qwest says that when the CLECs in this case provide VNXX ISP-bound service they are, in reality, interexchange service providers and that the VNXX calls are subject to interexchange access charges under section 251(g).

*57* As to the first question of law, we find that the *Mandamus Order* has no effect on the District Court's interpretation of the scope of the *ISP Remand Order*. Therefore, we follow the court's analysis and decision, which held that "the *ISP Remand Order* addressed the compensation structure of a subset of ISP-bound traffic, specifically, ISP-bound traffic within a local calling area."[76] By this, the court referred, in part, to the FCC's discussion of arbitrage by companies seeking to maximize revenue through reciprocal compensation for traffic in local calling areas. We are persuaded that the *Mandamus Order* only clarified the legal rationale supporting the *ISP Remand Order's* compensation scheme, which was later affirmed in the D.C. Circuit and First Circuit. It did not create a new regulatory scheme by expanding the scope of traffic to which the FCC's rates established in the *ISP Remand Order* apply.[77]

*58* Determining the impact of the *Mandamus Order* on the FCC's authority to regulate ISP-bound VNXX calls is less clear. In the order, the FCC clarified its earlier legal analysis and found that section 251(g) did not exclude ISP-bound calls from section 251(b)(5) compensation. Without modifying its conclusion that ISP-bound traffic is interstate in nature, it asserted concurrent jurisdiction under sections 201and 251(b)(5) as the foundation for establishing its interim compensation scheme for ISP-bound traffic.

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[75] Qwest Memorandum, ¶¶ 68-72.

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

[77] Qwest Supplemental Initial Brief, ¶ 20, *citing Global NAPs V* at 82.

*59* The CLECs assert that the FCC's revised legal analysis effectively makes *all* ISP-bound traffic subject to the rates in the *ISP Remand Order*. They argue that the FCC intended to include all ISP-bound traffic in its interim compensation scheme because it included that "the transport and termination of all telecommunications exchanged with LECs is subject to reciprocal compensation."[78] Under this analysis, the CLECs argue that traffic bound for ISPs is section 251(b)(5) traffic subject to reciprocal compensation. The administrative simplicity of the CLECs' position is superficially attractive because it would create a single compensation rate that would apply to all ISP-bound calls, thereby eliminating any billing distinction between local, interexchange and interstate calls. In contrast, Qwest's position would result in more than one compensation scheme for different types of ISP-bound traffic. For example, the *ISP Remand Order* rate would apply to ISP-bound calls within a local calling area, intrastate toll or access charge rates might apply to interexchange ISP-bound calls within a state, and interstate access rates might apply to interstate ISP-bound calls. Nevertheless, while Qwest's position may appear to be counterintuitive[79] and more complex to administer, we conclude this result to be correct from both a legal and policy point of view.

*60* Therefore, we join other state commissions and federal courts in concluding that the FCC's use of the term "ISP-bound traffic" in the *Mandamus Order* did not mean "all" ISP-bound traffic. Rather, we believe the FCC intended to limit the order's scope to that of the *ISP Remand Order*: those calls terminating within a local calling area.[80] Our assessment is bolstered by the First Circuit Court of Appeals which reached this same conclusion in the most recent decision involving yet another dispute between Global NAPS, Inc., and Verizon New England, Inc., over the scope of the *ISP Remand Order* and interpretation of the parties' interconnection agreement.[81] As with the First Circuit in *Global Naps V*, we see nothing in the *Mandamus Order* that

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[78] Pac-West Supplemental Initial Brief, ¶ 10, *quoting Mandamus Order*, ¶ 15; *see also* Level 3 Supplemental Initial Brief, ¶ 9.

[79] The Commission recognized this in its *Final VNXX Order*, referring to Lewis Carroll's story of Alice's Adventures in Wonderland. *See Final VNXX Order*, ¶ 15, n.11 and ¶ 28, n.25.

[80] Thus, other ISP-bound calls might fall within the section 251(g) exclusion, although ISP-bound calls within a local calling area would not.

[81] *Global NAPS V*, 603 F.3d at 82 ("The 2008 Second Remand Order simply clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage. [T]he issue the FCC addressed in the 2008 order did not go to regulation of intercarrier compensation for interexchange ISP traffic.")

divests, in whole or part, the authority we retain to determine the scope of local and interexchange calling areas.[82] Our previous order determined that ISP-bound traffic using VNXX services is not local traffic and should not be included in the scope of traffic subject to the FCC's new compensation scheme.[83] We see no legal requirement to abandon our classification of VNXX traffic. We now turn to the policy arguments raised by the issue.

*61* As we discussed in the *Final VNXX Order*, ceding to the CLECs' position might have the effect of eroding the careful distinction that exists between local and interexchange traffic. Classifying VNXX calls as interstate could undermine the authority of states to regulate intrastate interexchange telecommunications traffic and the associated revenues. For example, if all ISP-bound calls were classified as interstate traffic subject to the FCC's rates, we could unreasonably jeopardize the existing access charge system, on which telecommunications' companies rely to cover the costs they incur to support the services afforded the customer of another company. The small and rural local exchange companies rely heavily on these access charges to provide lower cost service to their customers and to comply with federal and state laws that compel certain benefits to rural customers. Without this support, companies serving rural populations would suffer from undercapitalization or be forced to extract lost revenue from their customers – a result contrary to the federal laws creating the rural support system. We do not believe such a far-reaching result was intended by either the FCC or any court that has taken up the VNXX question following the *ISP Remand Order*.

*62* We also note the interplay and relevance of certain terms of the parties' interconnection agreements. The terms "local" and "interexchange" are identified and used within the agreements to govern the transport and termination of telecommunications traffic between respective networks.[84] At the time these terms

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[82] *See Global NAPs V*, at 82-83.

[83] *See Final VNXX Order*, ¶¶ 130-132.

[84] *See* March 16, 2001, Interconnection Agreement between Qwest Corporation and Pac-West, § 4, Exh. D to Smith Affidavit in Support of Qwest Memorandum; *see also* December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, § 4, Exh. C to Smith Affidavit in Support of Qwest Memorandum; *see also* May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; *see also* October 2, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Level 3, Exh. E to Brotherson Affidavit in Support of Qwest Memorandum.

were incorporated into the agreements, the parties must have intended some meaning to the terms as they serve as the basis for determining whether traffic is or is not subject to intrastate access charges. If the CLECs' position is that the *Mandamus Order* altered the scope of the traffic covered by the FCC's intercarrier compensation scheme in the *ISP Remand Order,* then the parties' interests would be served by amending their agreements to effect this result.[85] It is notable that none of the parties, particularly the CLECs, sought to invoke the change of law provisions of their respective interconnection agreements with Qwest to expand the scope of traffic subject to the ISP-bound compensation scheme in the manner asserted by the CLECs.

### 3. What is the Correct Classification of ISP-bound VNXX Calls?

*63* One of the District Court's directions on remand was for the Commission to "classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion."[86] We address the court's classification directive below.

*64* Classifying VNXX calls involves not only determining whether the calls are within or outside a local calling area based on state laws and rules, but also how the calls fit within the compensation scheme of the Act, *e.g*., section 251(b)(5) or section 251(g).

*65* In the *Final VNXX Order*, the Commission determined that VNXX calls, including ISP-bound VNXX calls, should be classified as interexchange calls (*i.e*., not local) and that those calls that terminated inside the state of Washington were intrastate interexchange calls, subject to the Commission's jurisdiction to determine compensation.[87] In reaching this conclusion, the Commission relied in part on the District Court's analysis of the *ISP Remand Order*.

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[85] The parties' agreements include "change of law" provisions that would allow such an amendment. *See* May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, § 6, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; *see also* October 2, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Level 3, Exh. E to Brotherson Affidavit in Support of Qwest Memorandum.

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

[87] *Final VNXX Order*, ¶¶ 130-34 ("Although the FCC chose to remove references to 'local' traffic from its rules, it is abundantly clear that it did not intend to eliminate state control over intrastate interexchange traffic or the historically geographic basis for classifying traffic." *Id.* ¶ 132.)

*66* The CLECs argue that the FCC's *Mandamus Order* rejected a geographic analysis of call classification, no longer relying on the term "local," and concluded that such traffic is only section 251(b)(5) or section 251(g) traffic, not "interexchange" or "local." The CLECs argue that the Commission should not rely on its decision of call classification in the *Final VNXX Order*, as the order does not consider the FCC's most recent analysis in the *Mandamus Order*.

*67* Qwest contests whether the *Mandamus Order* precludes the use of geography for call classification and argues that nothing in the *Mandamus Order* undercuts or preempts a state's authority to classify calls based on state law and tariff. Qwest also rejects the CLECs' contentions that the terms interexchange and local are no longer valid in determining call classification. Qwest argues that the classification of VNXX traffic, including ISP-bound VNXX traffic, in the *Final VNXX Order* is correct and that the Commission should continue to rely on that analysis in this proceeding.

*68* Both parties argue that the Commission has the discretion and flexibility under the remand decision to classify calls.

### a. How should the Commission classify VNXX ISP-bound calls?

*69* Under the District Court's direction, the Commission may use the assigned telephone numbers, the physical routing points of the calls, or any other chosen method *within the Commission's discretion* to determine whether VNXX calls are within or outside a local calling area.[88] The court recognized that state commissions have authority to designate and control local calling area boundaries that differentiate "local" calls from "interexchange" calls. The local call boundary decisions made by state commissions determine the appropriate intercarrier compensation to which a carrier is entitled.

*70* The CLECs argue that the Commission may use the assigned numbers, consistent with their argument that the traffic is "locally-dialed," to determine whether VNXX calls are local, and that the Commission is not restricted to a geographic analysis. Further, the CLECs argue that the FCC rejected a geographic analysis in the *Mandamus Order*. In contrast, Qwest argues that the Commission should use geographic or physical routing points to determine whether VNXX calls originate outside a local calling area.[89] Here, Qwest follows the analysis of our *Final VNXX*

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

[89] Qwest Memorandum, ¶¶ 45-53.

*Order* and identifies provisions in state statute and rule, its tariffs, the CLECs' tariffs and the parties' interconnection agreements to support its position. Qwest argues that the Commission's legal findings in the *Final VNXX Order* on call classification are still applicable.[90] Qwest also asserts that, to the extent the Commission finds that the *Mandamus Order* rejects the concept of "local" traffic, the order is a change of law under the parties' interconnection agreements: the agreements include the term "local" as synonymous with reciprocal compensation under section 251(b)(5). We conclude that the *Mandamus Order* has not affected our jurisdiction to classify intrastate calls.

*71* Neither the *ISP Remand Order* nor the *Mandamus Order* eliminated the distinction between local and interexchange calls. Rather, those orders found that, even though ISP-bound calls within a local calling area fell under the reciprocal compensation provisions of section 251(b)(5), the calls were interstate calls under an end-to-end analysis. Because those ISP-bound calls were interstate in nature, the FCC had the authority to set the rates for such calls under Section 201.

*72* Our *Final VNXX Order* properly classified VNXX calls under our jurisdiction, and the FCC's *Mandamus Order* does not dictate a change from our earlier decision. In the *Final VNXX Order*, we found that VNXX calls were not local but interexchange in nature. If these calls were terminated inside the state of Washington, then they were subject to the Commission's jurisdiction and properly classified as intrastate interexchange calls. Nothing in the *ISP Remand Order* or the *Mandamus Order* limits our authority to classify intrastate VNXX traffic. As to our classification analysis in the *Final VNXX Order*, we relied on state law, the applicable rules, Qwest's governing tariff and the parties' interconnection agreements to reach this conclusion.[91] We repeat this analysis briefly here.

*73* State law distinguishes local and interexchange traffic based on the geographic endpoints of the call. State statutes authorize the Commission "to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies."[92] This allows the Commission to "define the geographical limits of a company's obligation to provide service on demand, and to delineate boundaries between local

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[90] *Id.* ¶¶ 54-58.

[91] *Final VNXX Order*, ¶ 148.

[92] RCW 80.36.230.

and long distance calling."[93] As we noted in the *Final VNXX Order*, "[o]ur rules define a local calling area as 'one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges'."[94] The geographic areas that establish the local calling areas and distinguish between local and long-distance calling are defined in exchange maps in the Commission-approved tariffs of local exchange companies such as Qwest.[95] Importantly, the CLECs' interconnection agreements with Qwest have adopted its same local calling area.[96]

*74* Neither the *ISP Remand Order* nor the *Mandamus Order* eliminated the distinction between local and interexchange calls. Rather those orders found that, even though ISP-bound calls within a local calling area fell under the reciprocal compensation provisions of section 251(b)(5), the calls were interstate calls under an end-to-end analysis. Because those ISP-bound calls were interstate in nature, the FCC had the authority to set the rates for such calls under section 201. We find nothing in the *ISP Remand Order* or the *Mandamus Order* that affects our authority to classify intrastate VNXX traffic.

*75* The CLECs argue that in our *Final VNXX Order* we erred in our call classification analysis by using criteria other than the number dialed. They assert that "locally-dialed" calls (*i.e.* calls with local phone numbers) are local calls for the purpose of determining appropriate compensation for VNXX ISP-bound traffic, without regard to the geographic location of the called number. We disagree.

*76* The CLECs VNXX service is based upon network arrangements or telephone number resources that create the illusion that calls to their ISP customers are local. In fact, terminating these calls may involve numerous switching and transport facilities that would not be necessary to terminate a call within the boundaries of the originating caller's local calling area (*i.e.*, geographically local).[97] Under the CLEC's analysis, these additional costs would be borne by the terminating company and avoided by the CLECs (originating company). For example, carriers could conceivably locate their

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[93] *In re Electric Lightwave*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994).

[94] *Final VNXX Order*, ¶ 148, *quoting* WAC 480-120-021.

[95] *Id.*; *see also* Qwest Memorandum, ¶¶ 46-49.

[96] *Final VNXX Order*, ¶ 148; *see also* Qwest Memorandum, ¶ 52; *see also* Smith Affidavit, Exh. C and D.

[97] We note that the transport capacity requirements likely exceed that of ordinary calls because of the length of time ISP-bound calls are connected to the ISP server.

ISP modems virtually anywhere, with no actual physical presence or customers within a local exchange, and expect Qwest (or any other facilities-based carrier) to both transport VNXX calls to them and pay them the ISP-bound rate set forth in the *ISP Remand Order*. We find it contrary to public policy to allow such regulatory gamesmanship to occur given the importance of intercarrier compensation revenues, which are used to maintain a robust interconnected telecommunications network and to support important statutory policy goals such as universal service.

*77* Furthermore, the rules for classifying calls as local or interexchange in Washington have been clearly delineated and understood by the parties. When the CLEC's adopted Qwest's local calling areas by and through their interconnection agreements, we have to believe that they understood the financial implications of their actions. No matter what innovative network or numbering arrangements have been made to facilitate ISP-bound traffic, calls are either local as defined by our rules or they are not. If they terminate outside the callers local exchange, we treat them as interexchange in nature and require compensation as such. This is the import of our *Final VNXX Order* and we believe our analysis then and now to be correct. The CLECs should bear the cost of using Qwest's network to serve their customers. This is a fundamental principle of intercarrier compensation that is reflected in interconnection agreements between these parties and those of all other companies within our jurisdiction.

### b. Is the Commission's *Final VNXX Order Res Judicata* in this Proceeding?

*78* The Commission recognized in its *Final VNXX Order* that "principles of *res judicata* may apply to narrow the issues in the dispute in the remand proceedings."[98] Qwest relies on this statement and the Washington case on the doctrine of *res judicata*, *Rains v. State*,[99] to argue that the principles of *res judicata* require the Commission to apply its findings from the *Final VNXX Order* in this proceeding. Level 3 argues against application of *res judicata*.

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[98] *Final VNXX Order*, ¶ 24.

[99] *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983).

*79* In *Rains*, the Washington supreme court held:

> Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.[100]

Whether there is identity of a cause of action depends on:

> (1)[W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.[101]

*80* Qwest asserts that the doctrine of *res judicata* applies in this proceeding and that all elements of the *Rains* test are met.[102] Qwest argues that the subject matter of the current case and the VNXX complaint proceeding are identical – the classification of VNXX ISP-bound calls and the scope of the *ISP Remand Order*.[103] Qwest asserts that the causes of action were the same, as they arose out of the same nucleus of facts and involve substantially the same evidence,[104] that the parties are the same in the cases,[105] and that the quality of the parties is the same, in that they were all able to defend their legal and factual positions in the cases.[106]

*81* Level 3 asserts that the doctrine of *res judicata* is not applied to state administrative decisions with the same rigidity as a court decision and that a court must apply the

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[100] *Rains*, 100 Wn.2d at 663, *citing Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 558 P.2d 725 (1978).

[101] *Id.* at 663-64, *quoting Constantini v. Tran World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 570 (1982), *quoting Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980).

[102] Qwest Memorandum, ¶¶ 63-64.

[103] *Id.* ¶¶ 14-19, 64; Qwest Supplemental Initial Brief, n.2.

[104] Qwest Memorandum, ¶ 64.

[105] *Id.* ¶¶ 43, 64.

[106] *Id.* ¶ 64.

law in effect at the time it reviews a state decision.[107] On this basis, Level 3 asserts the Commission cannot rely on the *Final VNXX Order*, and must reevaluate its findings in light of the *Mandamus Order*.[108] Further, Level 3 disputes that all elements in *Rains* are met, arguing that there is a lack of identity of cause of action. Level 3 claims that the causes of action in this proceeding and VNXX complaint did not involve the same nucleus of facts or the same evidence.[109] Specifically, Level 3 asserts the Commission did not consolidate the cases following the remand, as it would have required reopening the record to provide an opportunity to present additional evidence.[110] Level 3 also states that the *Final VNXX Order* acknowledged that it was not interpreting Pac-West's and Level 3's interconnection agreements in the proceeding.[111] Finally, Level 3 claims that it did not have the opportunity in the VNXX complaint proceeding to present evidence on the location of its modems.[112]

*82* Pac-West does not address Qwest's *res judicata* argument. However, Pac-West asserts that the *Final VNXX Order* does not govern compensation for VNXX traffic under the parties' existing interconnection agreement, at least with respect to VNXX traffic that is not ISP-bound traffic, as the *Final VNXX Order* constitutes a change in law and cannot be applied retroactively.[113]

*83* We decline to dismiss this case on the basis of *res judicata* for three reasons. First, *res judicata* usually is applied to prevent a litigant from filing a new case. In this instance, we are responding to a district court order on remand rather than addressing a new lawsuit filed before the Commission. Further, Level 3 raises appropriate concerns about the identity of the cause of action in these cases and the VNXX complaint, given the effect of the *Mandamus Order*.

*84* Second, we concur with *Level 3* that a court must exercise care in whether to give an administrative decision *res judicata* effect. Some federal courts have found the

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[107] Level 3 Opposition, ¶ 49, *quoting U.S. v. Lasky*, 600 F.2d 765, 768 (9th Cir. 1979), *citing American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 10 (5th Cir. 1974).

[108] *Id.* ¶¶ 9, 49, 52; Level 3 Supplemental Reply Brief, ¶¶ 10, 13-16.

[109] Level 3 Opposition, ¶ 51.

[110] *Id.*, *quoting* Docket UT-063038, Order 09, at ¶¶ 18-19, 22.

[111] *Id.* ¶ 51.

[112] *Id.*

[113] Pac-West Response, ¶ 19.

application of the doctrine to administrative cases less useful in preventing relitigation of issues, and note that in reviewing cases *de novo*, as in this matter, the court will usually give weight to the administrative decision maker, given the agency's expertise in a particular area.[114]

*85* Finally, applying the doctrine of *res judicata* in these enforcement cases likely would result in a remand from the District Court in the VNXX complaint case, and we would be back to square one evaluating the impact of the FCC's *Mandamus Order* on our jurisdiction. That would result in an unnecessary procedural loop that would serve no purpose other than to further burden the court and the Commission.

*86* In any event, we find that we reach the same decision on call classification as in the *Final VNXX Order* regardless of whether we apply the doctrine in these proceedings. Our analysis of call classification is determined by state law, and the parties' tariffs and agreements, which supports our decision in the *Final VNXX Order* and in this order.

### 4. How Should the Commission Interpret the Terms of the Parties' Interconnection Agreements?

*87* While we conclude that the *Mandamus Order* does not affect our jurisdiction over compensation for intrastate VNXX traffic, we must address here the parties' assertions regarding the impact of the *Mandamus Order* on their interconnection agreements. The parties' arguments stem from the change of law provisions in their interconnection agreements and failure to exercise these provisions in the face of a changing regulatory environment.

*88* In the alternative to its primary arguments regarding the effect of the *Mandamus Order*,[115] Qwest contends that even if the FCC intended in the order that all ISP-bound traffic must be compensated at FCC rates, any change affecting the parties would have to follow the process set forth in their interconnection agreements. Qwest points to the agreements' change of law provisions, which require a written amendment to incorporate any changes of law.

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[114] *See American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 10 (5th Cir. 1974); *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973).

[115] *See* ¶¶ 46-47, 67, *supra*.

*89* The CLECs claim that the parties' interconnection agreements specifically include terms that dictate compensation for ISP-bound traffic according to the terms of the *ISP Remand Order*.[116] Alternatively, the CLECs claim that, under the *Mandamus Order*, ISP-bound traffic is subject to compensation under section 251(b)(5). Under the mirroring rule of the *ISP Remand Order*,[117] which is still applicable and to which the parties agreed, the CLECs claim that Qwest must compensate them under the FCC rate for this traffic.

*90* We determined above that: (1) the *Mandamus Order* does not change the scope of the *ISP Remand Order* and the compensation scheme it created, which only applies to calls within a local calling area; (2) that the section 251(g) exclusion still applies to ISP-bound traffic outside of a local calling area, and (3) that VNXX traffic does not originate and terminate within a local calling area. Thus, we find that the parties' interconnection agreements and amendments, which require compensation at the rates set by the FCC, are not determinative of the rate for the narrow scope of ISP-bound traffic at issue in this case. Similarly, because we have found that VNXX ISP-bound traffic is subject to the section 251(g) exclusion, the traffic is *not* subject to compensation under section 251(b)(5).

*91* The Pac-West agreement includes the following terms and provisions:

- "Exchange Service" is defined as "traffic that is originated and terminated within the local calling area as defined by Qwest's then current EAS/local serving areas, and as *determined by the Commission*."[118]
- "Access Services" is defined as "the interstate and intrastate switched access and private line transport services offered for the origination and/or termination of interexchange traffic."[119]
- "Exchange Access (IntraLATA Toll)" is defined as "in accordance with Qwest's current IntraLATA toll serving areas, as determined by Qwest's state

[116] They reiterate their assertion that the *Mandamus Order* makes clear that the rates for ISP-bound traffic established in the *ISP Remand Order* apply to *all* ISP-bound traffic.

[117] *See* ¶ 23, *supra.*

[118] March 16, 2001, Interconnection Agreement between Qwest Corporation and Pac-West, § 4.2.2, Exh. D to Smith Affidavit in Support of Qwest Memorandum (emphasis added).

[119] *Id.* § 4.2.

and Interstate Tariffs and excludes toll provided using Switched Access purchased by an IXC."[120]

- "Where either party acts as an IntraLATA Toll provider, each Party shall bill the other the appropriate charges pursuant to its respective Tariff or Price Lists …."[121]

*92* Under these terms, it appears that VNXX traffic does not meet the definitions of Exchange Service or Access Services, but does meet the definition of IntraLATA Toll.

*93* Similarly, the Level 3 agreement includes the same definitions of "Access Services," "Exchange Service," and "Exchange Access (IntraLATA Toll)."[122] As with the Pac-West agreement, Level 3 and Qwest agreed that "Where either party acts as an IntraLATA Toll provider, each party shall bill the other the appropriate charges pursuant to its respective Tariff or Price Lists."[123]

*94* The provisions of the parties' agreements concerning ISP-bound traffic provide that "EAS/Local traffic" is compensated under the reciprocal compensation rate, while ISP-bound traffic, as described by the *ISP Remand Order*, is subject to compensation under the FCC rates.[124]

*95* The agreements rely on the *ISP Remand Order* to determine the scope of ISP-bound traffic subject to the FCC's ISP-bound traffic rate. As we limit that scope in this order to ISP-bound calls within a local calling area, the VNXX traffic in question does not qualify for compensation at that rate. The terms of the agreements also limit reciprocal compensation under section 251(b)(5) to traffic within a local calling area. As the VNXX traffic in question does not qualify under the agreements as either subject to compensation under the *ISP Remand Order* or section 251(b)(5) reciprocal

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[120] *Id.* § 4.22.

[121] *Id.* § 7.3.1

[122] December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, §§ 4.2, 4.24, and 4.22 respectively, Exh. C to Smith Affidavit in Support of Qwest Memorandum.

[123] *Id.* § 7.3.1.

[124] May 24, 2002, ISP Bound Traffic Amendment to Interconnection Agreement between Qwest Corporation and Pac-West, §§ 1-3, Exh. D to Brotherson Affidavit in Support of Qwest Memorandum; *see also* December 13, 2002, Interconnection Agreement between Qwest Corporation and Level 3, §§ 4, 7.3.6., Exh. C to Smith Affidavit in Support of Qwest Memorandum.

compensation, the traffic must fall within a different category. In light of our findings above and our review of the terms of the parties' interconnection agreements, we interpret those agreements to require Pac-West and Level 3's VNXX ISP-bound traffic to be treated as IntraLATA Toll or Toll-like traffic, unless the parties subsequently agree to different terms.

#### 5. How Should the Commission Determine Compensation Under the Parties' Agreements?

*96* We note that Qwest has submitted detailed affidavits of Larry B. Brotherson, Philip A. Linse and Ted D. Smith with its motion for summary determination. These affidavits, among other things, address the compensation that Qwest argues that Pac West and Level 3 owe the company if the Commission adopts Qwest's interpretation of the interconnection agreements and the law. Pac-West and Level 3 dispute these facts, and Level 3 notes that the out-of-state location of its ISP modems, not yet in evidence, may result in the Commission's lack of jurisdiction. Granting a motion for summary determination is not appropriate where, as in the issue of the level of compensation, there are material facts in dispute. In light of our finding that the VNXX traffic in question is IntraLATA Toll or Toll-like traffic under the agreements, and the parties' disputes about the amount and type of traffic at issue, it is necessary to develop a full evidentiary record as to the exact location of the CLECs' ISP modems, at the time of the traffic in question in this proceeding, in order to determine which traffic is subject to our jurisdiction and should be subject to such toll rates. If no party seeks an appeal of this decision, or upon a decision on appeal, we will initiate an evidentiary proceeding to address the issue of compensation.

### D. Qwest's Motion to Strike

*97* After the parties filed responses to each other's motions for summary determination, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses, or in the alternative, a motion for leave to file a reply, attaching a reply.

#### 1. Qwest's Motion for Leave to File a Reply

*98* Under the Commission's procedural rules, parties may not file replies to an answer to a pleading without Commission authorization.[125] Parties may attach a reply to the

[125] WAC 480-07-370(1)(d).

motion. If the Commission does not act within five business days of the filing date of the motion, the motion is deemed denied.[126]

*99* Qwest filed its motion for leave to file a reply on April 1, 2009. The Commission did not act on the motion within five business days. Thus, Qwest's motion to file a reply is denied. The Commission must not consider any arguments Qwest presents in its reply.

### 2. Qwest's Motion to Strike

*100* In the alternative, Qwest filed a motion to strike portions of Pac-West's and Level 3's responses to its motions for summary determination. Pac-West and Level 3 both filed timely responses to this motion.

*101* As to Pac-West's response, Qwest asserts that Pac-West raises a new issue in its discussion of Qwest's Market Expansion Line (MEL) service, a service Pac-West claims is similar to foreign exchange (FX) service and to which Qwest does not apply access charges. FX service is similar to VNXX service. Qwest argues that as it did not discuss MEL service in its motion, it is not appropriate for Pac-West to raise the issue in its answer.

*102* In response, Pac-West asserts it was discussing MEL service in response to Qwest's claim that Pac-West was acting as an interexchange carrier (IXC) when providing VNXX service. Pac-West identified FX and MEL service as instances where Qwest provides a service similar to VNXX as a LEC, not an IXC. Pac-West argues that discussing MEL service should not come as a surprise to Qwest as the topic was addressed in the Commission's VNXX complaint proceeding.

*103* Similarly, Qwest asserts that Level 3 raises a new claim in its response by seeking a ruling that Qwest may not impose transport charges on Level 3. Qwest argues that Level 3 never raised this issue on appeal to the District Court or in its motion for summary determination.

*104* Level 3 argues that it is allowed to respond to arguments Qwest made throughout its motion and supporting memorandum, specifically that Qwest is entitled to originating charges for VNXX traffic. Level 3 asserts that Qwest opened the door to a response that such charges are precluded by federal law and under a prior Commission order.

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[126] WAC 480-07-370(1)(d)(ii).

*105* We deny Qwest's motion to strike. In the portion of the responses to which Qwest objects, both Pac-West and Level 3 were addressing arguments and claims Qwest had made in its memorandum supporting its motion for summary determination. Neither party raised any new issue that should be stricken from their pleading. Pac-West responded to an argument Qwest raised about FX service by providing examples of a similar Qwest service arrangement that is not subject to access charges. Similarly, Level 3 responded to repeated arguments by Qwest that it is entitled to originating charges for VNXX traffic.

## III. FINDINGS OF FACT

*106* Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

*107* (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

*108* (2) Qwest is engaged in the business of furnishing telecommunications services including, but not limited to, providing basic local exchange service to the public for compensation within the state of Washington.

*109* (3) Level 3 and Pac-West, are competitive local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310-.330.

*110* (4) The Commission approved an interconnection between Pac-West and Qwest on February 14, 2001, in Docket UT-013009, allowing Pac-West and Qwest to exchange ISP-bound traffic.

*111* (5) The Commission approved an ISP amendment to the Pac-West and Qwest interconnection agreement, incorporating the *ISP Remand Order*, on March 12, 2003, in Docket UT-013009. The amendment provides that the parties may exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.

*112* (6) Pac-West provides ISP-bound service to its customers using VNXX arrangements.

*113* (7) In December 2004, Qwest began to withhold compensation to Pac-West for VNXX traffic.

*114* (8) Pac-West filed its petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic.

*115* (9) In its *Final Order Affirming and Clarifying Recommended Decision*, UT-053036, February 10, 2006, the Commission found that Pac-West's claimed compensation was valid under the parties' interconnection agreement, on grounds that the *ISP Remand Order* required the FCC compensation rate for all ISP-bound traffic whether that traffic was deemed local or interstate.

*116* (10) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003 in Docket UT-023042, allowing Level 3 to exchange ISP-bound traffic with Qwest.

*117* (11) The interconnection agreement between Level 3 and Qwest provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.

*118* (12) Level 3 filed its petition for Enforcement of Interconnection Agreement on June 21, 2005, alleging that Qwest refused to compensate Level 3 for all local and ISP-bound traffic.

*119* (13) In its *Order Accepting Interlocutory Review; Granting, In Part and Denying, In Part, Level 3's Petition for Interlocutory Review,* Docket UT-053039, February 10, 2006, the Commission found that Qwest owed Level 3 compensation for ISP-bound VNXX traffic.

*120* (14) As a result of Qwest's challenge of the Commission's final orders in the enforcement cases, the U.S. District Court for the Western District of Washington ordered the cases remanded to the Commission, to reinterpret the *ISP Remand Order* in light of the parties' interconnection agreements and to classify VNXX ISP-bound calls as local or interexchange.

*121* (15) The Commission consolidated the District Court's remand of the enforcement cases, Dockets UT-053036 and UT 053039, for decision on August 27, 2008.

*122* (16) On November 8, 2008, the FCC issued its *Mandamus Order*, clarifying the basis for its authority to regulate and establish compensation for the ISP-bound traffic addressed in the *ISP Remand Order*.

*123* (17) The nationwide telephone numbering system was designed so that the first six digits of each ten-digit telephone number enabled telephone companies to assign a physical location to a telephone customer's specific telephone number, and telephone companies continue to use this geographic indicator to identify and separate calls into local or interexchange calls for retail billing to end users or assessing charges to another carriers.

*124* (18) The NXX code identifies the central office and switch that an incumbent local exchange carrier will use to route a telephone call.

*125* (19) Under Washington law, call rating, *i.e.*, whether a call is local or long distance, and subject to toll charges, is based on Commission-established geographic areas or exchanges.

*126* (20) The geographic areas that distinguish between local and long distance calling in Qwest's service territory are defined in exchange maps in Qwest's Commission-approved tariffs.

*127* (21) The CLECs have adopted Qwest's local calling areas in their interconnection agreements with Qwest.

*128* (22) VNXX traffic arrangements occur when a carrier assigns a telephone number from a rate center in a local calling area different from the one where the customer is physically located.

## IV. CONCLUSIONS OF LAW

*129* Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

*130* (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *RCW Title 80.*

*131* (2) The Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

*132* (3) The *ISP Remand Order* addressed only ISP-bound calls from one LEC's end user customer to an ISP within the same local calling area that is served by a competing LEC, not all ISP-bound calls or VNXX traffic.

*133* (4) The *Mandamus Order* clarified the legal basis in the *ISP Remand Order* for the FCC's jurisdiction over ISP-bound traffic within a local calling area, and the compensation for such traffic.

*134* (5) State commissions have authority under federal law to define local calling areas and determine appropriate compensation for intrastate interexchange traffic. *See Global NAPs I*, 444 F.3d at 62-63, 73; *Global NAPs II*, 454 F.3d at 97; *Peevey*, 462 F.3d at 1146; *Qwest*, 484 F. Supp. 2d at 1163, 1175-77.

*135* (6) In Washington, telephone calls are classified as local or interexchange based on geographic calling areas, not on the basis of assigned telephone numbers.

*136* (7) VNXX traffic does not originate and terminate within the same local calling area and is thus either intrastate interexchange traffic subject to Commission determined compensation and not subject to section 251(b)(5) of the Act, or interstate interexchange traffic subject to the FCC's jurisdiction.

*137* (8) The FCC has identified regulatory arbitrage and traffic imbalances caused by CLEC reliance on ISP-bound traffic, and sought to address these issues through interim compensation measures in its *ISP Remand Order*.

*138* (9) An interconnection agreement is a contract. The meaning of an interconnection agreement is governed by the intent of the parties as determined from reading the contract as a whole, the subject matter and objective of the contract, the circumstances of making the contract, the subsequent acts and conduct of the parties, and the reasonableness of the parties' intentions.

*139* (10) Given our decision on the interpretation of the scope of the *ISP Remand Order* and the classification of VNXX traffic, the parties' interconnection agreements do not allow VNXX ISP-bound calls to be compensated under the rate established in the *ISP Remand Order*, but appear to require compensation as Intra-LATA Toll or Toll-like traffic.

*140* (11) It is necessary to conduct a further evidentiary proceeding to determine the location of the ISP modems in each Qwest local calling area and to determine the volume of VNXX ISP-bound traffic subject to compensation.

## V. ORDER

**THE COMMISSION ORDERS:**

*141* (1) Qwest's motion for summary determination is granted as to issues of law, including the interpretation of the *ISP Remand Order*, the classification of VNXX traffic, and the interpretation of the parties' interconnection agreements.

*142* (2) Qwest's motion for summary determination is denied to the extent it seeks resolution of the amount and nature of the traffic for which Qwest seeks compensation.

*143* (3) Level 3's and Pac-West's motions for summary determination are denied.

*144* (4) Qwest's motion for leave to file a reply, or in the alternative, to strike portions of Level 3's and Pac-West's responsive briefs is denied.

*145* (5) The Commission will initiate a separate evidentiary proceeding to determine the placement of ISP modems in Qwest local calling areas and the appropriate level of retroactive compensation due to the parties pursuant to this order.

DATED at Olympia, Washington, and effective November 14, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**