[Service Date: November 28, 2011]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC., Petitioner v. QWEST CORPORATION, Respondent	DOCKET UT-053036 (*consolidated*
LEVEL 3 COMMUNICATIONS, LLC Petitioner v. QWEST CORPORATION, Respondent	DOCKET UT-053039 (*consolidated* **PETITION FOR RECONSIDERATION OF LEVEL 3 COMMUNICATIONS, LLC AND PAC-WEST TELECOMM, INC.**

PETITION FOR RECONSIDERATION OF LEVEL 3 COMMUNICATIONS, LLC AND PAC-WEST TELECOMM, INC.

Level 3 Communications, LLC ("Level 3") and Pac-West Telecomm, Inc. ("Pac-West"), pursuant to WAC 480-07-850 and other applicable law, hereby petition for reconsideration of the Commission's final order in consolidated Docket Nos. UT-053036 and UT-053039 ("Order 12"), issued in the above-captioned proceeding with a service date of November 14, 2011.

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The Commission should reconsider its decision that the interconnection agreements between Level 3 and Pac-West (as interconnecting carriers) and CenturyLink (f/k/a CenturyLink) ("CenturyLink") do not require reciprocal compensation for VNXX ISP-bound traffic and that such traffic might be subject to access charges. In addition, the Commission should reconsider its decision holding that legal and policy considerations lead to the conclusion that VNXX ISP-bound traffic should not be considered "local" traffic for purposes of Washington law.

In each case, reconsideration is warranted as a result of developments that were not addressed in Order 12 but that directly affect its reasoning.[1] The Commission's fundamental error, however, was its decision to apply traditional, legacy regulatory concepts (perhaps still applicable to traditional voice traffic) to ISP-bound calls handled via modern, efficient VNXX arrangements. The question in this proceeding should not have been, "Into which legacy regulatory category can new, VNXX arrangements for ISP-bound traffic be shoehorned?" The question should have been, "What regulatory treatment of VNXX ISP-bound traffic makes policy and regulatory sense in light of the unique characteristics of such traffic and the ongoing transition of the industry away from dial-up and towards broadband as the primary means of Internet access?" By focusing on the wrong question, Order 12 reached the wrong answer.[2]

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[1] Level 3 and Pac-West believe that the Commission erred in rejecting each of their arguments in this proceeding, and reserve their right to seek review of those Commission actions. However, in this Petition for Reconsideration, Level 3 and Pac-West focus on matters that the Commission did not address in Order 12.

[2] For example, in paragraphs 91-94 of Order 12, the Commission struggles to determine which legacy regulatory category best fits VNXX calling, and concludes that the answer is, "intraLATA toll." However, in any normal toll calling situation, the entity acting as the IXC imposes toll charges on the originating caller. Neither Level 3 nor Pac-West does so with respect to VNXX calls, and nothing in Order 12 addresses that concern. Whatever VNXX traffic might be, it is not traditional intraLATA toll traffic. Moreover, in that portion of Order 12, the Commission relies on the portions of the agreement between Level 3 and CenturyLink from 2002 regarding general application of Section 251(b)(5), and ignores the 2004 amendment to that agreement stating that "ISP-bound traffic" shall be exchanged "pursuant to the compensation mechanism set forth in the FCC *Core Order*." This specific (and subsequent) provision regarding ISP-bound traffic should prevail over earlier, general terms.

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1. The FCC's Recent USF/ICC Order Compels Reconsideration Of Order 12 On The Issue Of The Scope Of Section 251(b)(5) And Section 251(g).

Order 12 acknowledges that the Federal Communications Commission ("FCC") has recently issued a ruling directly addressing both intercarrier compensation and universal service. Order 12, ¶ 23 at n.25. *See Connect America Fund, et al.,* Report and Order and further Notice of Proposed Rulemaking, Docket Nos. WC 10-90 *et al.* (November 18, 2011) (*"USF/ICC Order"*). That ruling compels reconsideration of Order 12 with regard to the scope of reciprocal compensation under Section 251(b)(5).

The key question is whether calls to VNXX numbers are covered by Section 251(g). Section 251(b)(5) literally applies to all "telecommunications," and therefore clearly covers VNXX calls, including ISP-bound VNXX calls. Section 251(g), however, protects certain traffic from the immediate imposition of low, cost-based intercarrier compensation rates by preserving, in some respects, the operation of the pre-1996-Act access charge regime. The *USF/ICC Ruling* provides clarification regarding the scope of the Section 251(g) exemption.[3]

Specifically, the *USF/ICC Order* explains how Section 251(g) interacts with Section 251(b)(5). Interpreting the ruling of the D.C. Circuit in *WorldCom v. FCC,* 288 F.3d 432 (D.C. Cir. 2002), the FCC states that the test is whether "the carrier serving the ISP was acting as a LEC – rather than as an interexchange carrier or an information service provider." *USF/ICC*

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[3] Level 3 and Pac-West have previously argued that the FCC has repeatedly held that the geographic end points of a call are entirely irrelevant with regard to whether Section 251(b)(5) applies to it, which makes the "interexchange" nature of VNXX traffic irrelevant. The *USF/ICC Order* yet again reaffirms this ruling, *see id.* at ¶ 761, which confirms the validity of those earlier arguments. Moreover, Level 3 and Pac-West have explained that the FCC's 2001 *ISP Remand Order* is not limited to traffic that is handed off to an ISP in the originating local calling area. Order 12 asserts that the *ISP Remand Order* is so limited, but the FCC itself, in an *amicus* brief to the First Circuit, stated that the *ISP Remand Order* was ambiguous on that point. *See Global NAPs, Inc. v. Verizon New England, Inc.,* 444 F.3d 59, 74 (1st Cir. 2006) ("the ISP Remand Order 'can be read to support the interpretation set forth by either party in this dispute'"). Order 12 should have resolved the ambiguity in the *ISP Remand Order* with reference to the clarity later provided in the 2008 *ISP Mandamus Order, High-Cost Universal Service Support, etc.,* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008), *affirmed, Core Communications, Inc. v. FCC,* 592 F.3d 139 (D.C. Cir. 2010), and, now, the *USF/ICC Order.*

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Order at ¶ 958. Notably, this formulation focuses on the nature of the ***carrier's activities***, rather than in some simple geographic way on the nature of the ***traffic*** being exchanged. Under Section 251(g), therefore, the question is whether the actions of Level 3 or Pac-West actions in providing VNXX arrangements to their ISP customers reasonably constitute "acting as a LEC" as opposed to acting in some other capacity.[4]

Here, even though VNXX traffic from an originating caller to a distant ISP is obviously "interexchange" traffic in a simplistic geographic sense, that observation does not even address, much less determine, the question of whether Level 3 or Pac-West is "acting as a LEC" in providing VNXX arrangements. In fact, that is exactly what Level 3 and Pac-West are doing. NXX codes are assigned to LECs so that LECs can provide telephone numbers to their customers. When a carrier assigns an ISP a telephone number on which that ISP can be reached by dialing a normal PSTN telephone number, that carrier is necessarily and inherently acting as a LEC.

Beyond that, however, what it takes to be legally classified as a LEC is laid out in the Communications Act. A LEC is an entity that provides either telephone exchange service or exchange access. Here, no one has contended that Level 3 or Pac-West is providing exchange access when they establish VNXX arrangements, so the question is whether VNXX is properly understood as a form of telephone exchange service.

Telephone exchange service is defined as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission

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[4] Interestingly, in the *USF/ICC Order,* the FCC notes that Section 251(g) does not literally appear to apply to protect intrastate access charges from Section 251(b)(5) ***at all.*** *USF/ICC Order* at ¶ 766 & n. 1374. Moreover, the FCC's new ruling pointedly does "not resolve this issue" (because its focus is on the new going-forward intercarrier compensation system). To the extent that Order 12 is focused on intrastate traffic, therefore, its extensive reliance Section 251(g) may well be misplaced.

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> equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(54). Even the "traditional" definition (subpart (A)) recognizes that telephone exchange service may involve literally "interexchange" calling. However, the relevant question under the *USF/ICC Order's* interpretation of Section 251(g) is whether VNXX arrangements constitute a service which is "comparable" to traditional local service. Clearly, it is. Just like traditional local exchange service, the customers of a VNXX arrangement are assigned telephone numbers which are homed on the network of the carrier providing the service. Just like traditional local exchange service, VNXX customers are dialed using normal local dialing patterns. As far as physical interconnection arrangements are concerned, calls to VNXX services are routed as between CenturyLink, on the one hand, and Level 3 or Pac-West, on the other, in exactly the same manner that a traditional local call would be routed. No 1+ dialing (which invokes entirely different call processing and routing arrangements) comes into play. And, of course, in a VNXX arrangement, end users are billed in the same manner applicable to traditional local calls.

None of this is to say that VNXX arrangements are literally identical to traditional local exchange service arrangements; obviously, they are not. But that is not the statutory test. The test for whether an entity is "acting as a LEC" is whether VNXX arrangements are "comparable" to traditional local exchange service. All the factors above show that the answer is "yes."

Because the *USF/ICC Order* explains that Section 251(g) does not apply in situations where the carrier to which access charges would be applied is "acting as" a local exchange carrier, it is evident that the analysis in Order 12 needs to be reconsidered to apply the statutory definition of "local exchange carrier" to determine the result in this case. For the reasons just described, notwithstanding the geographically interexchange nature of VNXX traffic, Level 3 and Pac-West clearly are "acting as" LECs when they provide such arrangements. As a result, the Commission should reconsider Order 12 to the extent that that Order finds that VNXX traffic

falls within the scope of Section 251(g) (permitting access charges to apply) as opposed to section 251(b)(5) (requiring reciprocal compensation).

2. The FCC's Recent USF/ICC Order, Along With Section 480-120-540 Of The Commission's Own Rules, Compels Reconsideration Of Order 12 On The Issue Of The Classification Of VNXX Traffic As Non-Local.

As the Commission properly found, the order on remand from the District Court permits the Commission, in its discretion, to classify VNXX traffic as either local or interexchange as a matter of state law. *See* Order 12 at ¶ 69. In at least one critical respect, Order 12 reflects a misapprehension of the relevant policy considerations. Specifically, it appears that the Commission was concerned that treating VNXX calls as local might degrade rural LECs' ability to continue to provide reasonably priced local service, based on those carriers' historical reliance on access charges to support basic service rates. *See id.* at ¶ 61. That concern was misplaced for at least three reasons.

First, neither Level 3 nor Pac-West has paid originating access charges to rural LECs in connection with calls to VNXX numbers, nor have rural LECs been required to pay any access charges to CenturyLink. Clearly, therefore, as of today rural LECs have not been harmed in their ability to provide affordable local service by virtue of not receiving, or by virtue of having to pay, access charges in connection with VNXX traffic. In this regard, as the Commission itself found, the significance of dial-up traffic to ISPs in the market, both as a means of access to the Internet and as an economic matter, is declining. *See* Order 12 at ¶ 15 & n.13. It is inconsistent with the declining impact of ISP-bound traffic to conclude that classifying VNXX traffic as local for purposes of Washington law would harm rural LECs in any way.[5]

Second, the FCC's *USF/ICC Order* removes any further role for this Commission in setting terminating intrastate access rates, whether at levels designed to support universal service,

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[5] In this regard, Order 12 recognizes that this Commission's jurisdiction to require the payment of intrastate access charges on VNXX traffic is limited to the portion of VNXX calling to ISPs that is intrastate in nature, if any. *See, e.g.*, Order 12 at ¶ 19.

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or otherwise. Intrastate terminating access rates, including rates of small rate-of-return ILECs, will be phased down to interstate levels by July 2013. *See USF/ICC Order* at ¶ 801 (schedule for phase-down of intrastate access rates). Under the regime of the *USF/ICC Order,* concerns about the impact of access charges, or lack of them, on universal service issues are entirely misplaced.

Third, Order 12 ignores the fact that it is only originating access charges that would ever apply to VNXX calls. Under the Commission's rules, to the extent that a carrier seeks to obtain universal service funding by means of access charges, such funding shall be made part of ***terminating*** access fees. VNXX calling would never involve terminating access under any scenario, so the prospect of rural ILECs not receiving access charges on VNXX traffic cannot have any impact on such ILECs' ability to provide affordable service. As a result, Order 12 is misguided in expressing concern regarding the potential of lost universal service support, through access charge revenues, for rural ILECs.

Level 3 and Pac-West submit that these factors warrant reconsideration of the Commission's policy determination that VNXX calls should be classified as non-local as a matter of Washington law.

3. The Commission Should Rule That CenturyLink/CenturyLink Is Collaterally Estopped From Seeking To Apply Intrastate Access Charges To Any ISP-Bound Traffic.

Finally, the Commission should rule that CenturyLink is collaterally estopped from arguing that any intrastate access charges apply to any VNXX ISP-bound calls. As the Commission succinctly noted, as of March 24, 2011, "Qwest Corporation merged with CenturyTel, Inc., becoming CenturyLink." Order 12 at ¶ 1 n.1. Qwest Corporation undoubtedly perceived that it and its shareholders would receive many benefits by virtue of that merger, but it must now take the bitter with the sweet. On the specific issue of the classification of VNXX calls to ISPs, CenturyLink's position is diametrically opposed to the old Qwest position. In fact, CenturyLink has aggressively argued for, and obtained, a ruling from another state regulator

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specifically holding that the inherently interstate nature of all calls to ISPs means that it is never appropriate to impose intrastate access charges with respect to such calls.[6] CenturyLink's successful pursuit of that ruling makes it unjust and inequitable to permit it to seek exactly the opposite result in this case.

As the Supreme Court of Washington has recently stated:

> Collateral estoppel is a doctrine of issue preclusion. It bars relitigation of issues of ultimate fact that have been determined by a final judgment. *State v. Vasquez, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).* Collateral estoppel requires that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004).*

Williams v. Leone & Keeble, Inc. 171 Wn.2d 726, 731, 254 P.3d 818, 821 (Wash. 2011). All of these factors are met with respect to the Louisiana case in which CenturyLink obtained a ruling that intrastate access charges cannot apply to VNXX ISP-bound traffic. (1) The central question of whether intrastate access charges can apply to such traffic is identical in both cases; (2) the judgment of the Louisiana PSC is a final judgment on the merits; (3) CenturyLink is clearly in privity with its own corporate affiliates on this topic; and (4) CenturyLink will not suffer an injustice if it is precluded from relitigating this question. With respect to the latter point in particular, Level 3 and Pac-West submit that it would work an injustice to permit CenturyLink to strategically game the regulatory system to seek to collect intrastate access charges on VNXX ISP-bound traffic in some states (here, Washington) while avoiding paying such charges in others (Louisiana) based on diametrically opposite claims regarding the classification of the relevant traffic as interstate in nature.

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[6] CenturyTel of Central Louisiana, LLC, d/b/a CenturyLink v. MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, Docket No. U-31211 In re: Petition for Declaratory Ruling on the compensation scheme applicable to ISP-bound traffic routed to MCIMetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, Order No. U-31211 (La. PSC May 10, 2011).

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4. Conclusion.

For the reasons stated above, Level 3 and Pac-West respectfully request that the Commission reconsider its conclusion in Order 12 that VNXX ISP-bound traffic is not properly treated as local traffic under Washington law, including its conclusion that intrastate access charges could ever properly apply to such traffic.

Respectfully submitted,

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I hereby certify that I have this 28th day of November, 2011, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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