BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC. Petitioner, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-053036 DOCKET NO. UT-053039 (consolidated)
LEVEL 3 COMMUNICATIONS, LLC, Petitioner, v. QWEST CORPORATION, Respondent.	QWEST'S ANSWER TO PETITION FOR RECONSIDERATION FILED BY LEVEL 3 AND PAC-WEST

I. Introduction and Summary

1 This Answer to the Petition for Reconsideration ("Petition") is filed in accordance with the Commission's procedural notice inviting an answer by December 12, 2011. Level 3 and Pac-West filed the Petition on November 28, 2011, requesting reconsideration of the Commission's Order 12, entered on November 14, 2011. Level 3 and Pac-West advance three grounds for reconsideration. However, these arguments do not establish that the Commission's order was in any way erroneous or incomplete. The Commission should deny the Petition and affirm the

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conclusions and results of Order 12.

2 In the Petition, Level 3 and Pac-West attempt to reframe the issues in the case, claiming that after multiple rounds and hundreds of pages of briefing, the Commission asked and answered the wrong question. They now ask that the Commission rule in their favor by answering the question "What regulatory treatment of VNXX ISP-bound traffic makes policy and regulatory sense . . . . ?"[1] , However, in CenturyLink's view, the Commission asked precisely the right question – the one that the District Court directed the Commission to answer on remand. The District Court directed the Commission "to classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area."[2], In addition to answering this question, the Commission also found that VNXX traffic fell within Section 251(g) of the Act and was therefore not subject to reciprocal compensation under Section 251(b)(5).[3] In its order, the Commission considered and rejected each of the arguments that Level 3 and Pac-West had asserted to claim that they are entitled to compensation for VNXX traffic.

3 Level 3 and Pac-West argue that the recent FCC order on universal service funding and intercarrier compensation (the "*USF/ICC Order*")[4] warrants reconsideration of both the legal and policy grounds for Order 12. However, as will be discussed below, there is nothing in that order that supports the results that Level 3 and Pac-West desire. Nor is there anything in WAC 480-120-540 that supports reconsideration or a different result in this case. Finally, Level 3 and Pac-West argue that CenturyLink should be collaterally estopped from seeking to apply intrastate access charges to any VNXX calls bound for an ISP within the state. This theory

[1] Petition for Reconsideration, p. 2.

[2] *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F.Supp.2d 1160, 1177 (W.D. Wash. 2007).

[3] Order 12, ¶¶34, 90.

[4] Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, 2011 FCC LEXIS 4859 (Rel. November 18, 2011).

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fails on multiple levels – most notably because the Louisiana Decision they rely upon involved a different fact pattern and set of issues.

4 Pursuant to RCW 34.05.470 and WAC 480-07-850, a petition for reconsideration may be filed to ask the Commission to change the outcome with respect to one or more issues determined by the Commission's final order. Petitions must clearly identify the portions of the order that are challenged as erroneous or incomplete, and provide legal authority and argument in support of the relief requested.[5] Qwest Corporation, d/b/a CenturyLink QC ("CenturyLink") hereby answers the three arguments made in the Petition.

1. The FCC's Recent USF/ICC Order Does Not Require Reconsideration of Order 12 on the Issue of the Scope of Sections 251(b)(5) and 251(g)[6]

5 On November 18, 2011, the FCC released the USF/ICC order reforming universal service and intercarrier compensation. In this order, the FCC reaffirmed that traffic encompassed by Section 251(g) of the Act is not subject to reciprocal compensation until the FCC "explicitly supersedes" the regulations, orders and policies preserved by Section 251(g).[7] Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing "receipt of compensation."[8] Both the interstate and intrastate access charge regimes

[5] (1) **Petition - timing.** Any party may petition for reconsideration of a final order within ten days after the order is served. The purpose of a petition for reconsideration is to request that the commission change the outcome with respect to one or more issues determined by the commission's final order.

(2) **Petition - contents.** The petitioner must clearly identify each portion of the challenged order that it contends is erroneous or incomplete, must cite those portions of the record and each law or commission rule that the petitioner relies on to support its petition, and must present brief argument in support of its petition.

[6] In footnote 3 of their petition, Level 3 and Pac-West argue that ambiguity as to the scope of traffic addressed in the *ISP Remand Order* should be resolved with reference to the 2008 *ISP Mandamus Order*. This issue has already been extensively briefed and will not be repeated here. Suffice it to say, the amicus brief Level 3 and Pac-West cite made clear that the only traffic addressed by the FCC in the *ISP Remand Order* were calls to ISPs located within the caller's local calling area, as the First Circuit recognized in *Global Naps v. Verizon New England*, 444 F.3d 59, 74-75 (1st Cir. 2006). In 2010, the First Circuit held in *Global Naps v. Verizon New England*, 603 F.3d 71 (1st Cir. 2010), that the *2008 ISP Mandamus Order* was similarly limited to local ISP calls.

[7] 47 U.S.C. §251(g).

[8] Order on Remand, *In the Matter of High-Cost Universal Service Support, etc*, 24 FCC Rcd 6475, ¶16 (Rel. November 5, 2008)("*ISP Mandamus Order*"); *see also Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997) ("*CompTel*"), an appeal from the FCC's *Local Competition Order*. In *CompTel*, the Eighth Circuit held that

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are preserved by Section 251(g).[9]

6 In their petition for reconsideration, Level 3 and Pac-West erroneously contend that Section 251(g) of the Act does not encompass VNXX traffic because VNXX traffic allegedly does not involve a service provided to an interexchange carrier. They claim that they function as local exchange carriers ("LECs") when they employ VNXX arrangements and therefore that Section 251(g) does not apply because it speaks of services provided to interexchange carriers and information service providers, not services provided by one LEC to another.

7 Level 3 and Pac-West are simply wrong. As the Commission found and Level 3 and Pac-West concede, VNXX traffic is interexchange traffic, not local traffic, under applicable law.[10] Therefore, the service that Level 3 and Pac-West offer when they engage in VNXX is necessarily an interexchange (or long distance) service. By assigning telephone numbers to ISPs that correspond to a geographic area outside of the local calling area in which the ISP is located, Level 3 and Pac-West create a toll-free interexchange service.[11] Accordingly, they function as interexchange carriers, not local exchange carriers, when they offer VNXX service.[12]

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under Section 251(g) of the Act, "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates."

[9] Notice of Proposed Rulemaking, *In the Matter of Connect America Fund; National Broadband Plan for our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-up*, 2011 FCC LEXIS 315, ¶53 (Rel. February 9, 2011); Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶37, fn. 66 (Rel. April 27, 2001)("*ISP Remand Order*"); In footnote 4 of their petition, Level 3 and Pac-West assert that Section 251(g) may not preserve intrastate access charges. In fact, the FCC recognizes in the USF/ICC order that existing law does preserve the intrastate access charge regime, and then merely declines to decide the existing controversy on this point. USF/ICC Order, ¶766, fn. 1374.

[10] Order 12, ¶77; Petition for Reconsideration, p. 4.

[11] *See, e.g.*, Order Ruling on Arbitration, *In re Petition of MCI Metro Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at *35 (S.C. PUC, January 11, 2006) ("The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for Virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls.").

[12] *In the Matter of Petition that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 19, fn. 80 (2004) ("*IP-in-the-Middle*" decision) ("Depending upon the nature of the traffic, carriers such as

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8 Level 3 and Pac-West assert that in the USF/ICC Order the FCC states that the test is whether "the carrier serving the ISP was acting as a LEC—rather than an interexchange carrier or an information service provider."[13] They argue that this test was derived by interpreting the D. C. Circuit's *WorldCom* decision[14], but fail to mention that in *WorldCom*, the Court was only considering calls placed to an ISP located within the caller's local calling area.[15] *WorldCom* did not involve calls placed to an ISP located outside of the caller's local calling area as is the case with VNXX traffic.

9 According to Level 3 and Pac-West, the FCC's formulation in the USF/ICC Order "focuses on the nature of the carrier's activities, rather than in some simple geographic way on the nature of the traffic exchanged." In fact, the USF/ICC Order says no such thing. The USF/ICC Order focuses on the function the carrier performs to determine its classification and that function is determined by the nature of the traffic at issue.[16] In short, the function the carrier performs is very much dependent in a "simple geographic way on the nature of the traffic exchanged." With VNXX traffic, Level 3 and Pac-West both offer an interexchange service that allows dial-up ISP customers to place interexchange calls to reach their ISP. Because they use VNXX to offer an interexchange service, Level 3 and Pac-West clearly function as interexchange carriers.

10 Level 3 and Pac-West do not function as local exchange carriers when they offer VNXX service. Under the Act, a LEC is an entity that "is engaged in the provision of telephone exchange service or exchange access."[17] Level 3 and Pac-West concede that they do not offer

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commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [Rule 69.5(b)]."

[13] Petition for Reconsideration, p. 3.

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

[15] *Id.*, at 430.

[16] *USF/ICC Order*, ¶¶956-958; *IP-in-the-Middle Decision*, ¶19, fn. 80.

[17] 47 U.S.C. §153(32).

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exchange access when they engage in VNXX.[18] Thus, their classification turns on whether VNXX service constitutes telephone exchange service. It does not.

11 Under the Act, the definition of telephone exchange service is tied to whether the service is "within a telephone exchange, or within a *connected* system of telephone exchanges within the same exchange area."[19] In other words, to qualify as "telephone exchange service" the service must be offered within the confines of a local calling area. Service between local calling areas, as is the case with VNXX, is an interexchange service, not telephone exchange service.[20] Interexchange carriers offer interexchange service. Local exchange carriers offer telephone exchange service.

12 None of the attributes of VNXX service that Level 3 and Pac-West rely upon to shoehorn VNXX service into telephone exchange service are so much as mentioned in the definition of telephone exchange service. The fact that customers of VNXX arrangements are assigned telephone numbers which are homed on the network of the carrier providing the service is irrelevant to the definition of telephone exchange service. Nor does the definition of telephone exchange service turn in any way on whether local dialing patterns are used. And the definition of telephone exchange service does not turn on how two carriers are interconnected or whether 1+dialing is used.

13 Level 3 and Pac-West argue that Order 12 needs to be reconsidered to apply the statutory definition of "local exchange carrier" to determine the result in this case.[21] This argument is not based on any new law announced in the USF/ICC Order. Section 251(g) by its terms

[18] Petition for Reconsideration, p. 4.

[19] 47 U.S.C. §153(54)(emphasis added). Part (B) of this definition refers to "comparable" service, but this portion of the definition also addresses services within the same local calling area, such as EAS.

[20] *Farmer's Telephone Company v. FCC*, 184 F.3d 1241, 1243 (10th Cir. 1999)("For the most part, telephone service within the United States is divided between local exchange carriers (LECs) and interexchange carriers (IXCs). LECs provide local telephone service to customers within a given geographic calling area (a local exchange), while IXCs enable customers in different local exchanges to call each other.")

[21] Petition for Reconsideration, p. 5.

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preserves the access charge regime applicable to services provided to interexchange carriers. In their briefs to the Commission, Level 3 and Pac-West both claimed that Section 251(g) did not apply to services provided to local exchange carriers and cited the *WorldCom* decision for that proposition. They had every opportunity to raise the statutory definition of a local exchange carrier or telephone exchange service but did not do so because these definitions simply do not support their position. Their petition for reconsideration on this point should be rejected.

2. Neither the FCC's *USF/ICC Order* Nor 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

14 Level 3 and Pac-West erroneously assert that Order 12 reflects a misapprehension of the relevant policy considerations concerning whether VNXX traffic is either local or interexchange as a matter of state law. In making this argument, Level 3 and Pac-West suggest that the sole policy concern that motivated the Commission's decision to classify VNXX as non-local was the concern that treating VNXX as local might deprive rural LECs of access charges to support basic services. However, the Commission's policy concerns were considerably broader. The line dividing local from interexchange traffic implicates more than just the availability of access charges. It has other implications for cost recovery and intercarrier compensation. For example, classifying VNXX traffic as local traffic would force carriers, including rural carriers, to bear the cost of carrying VNXX traffic to points of interconnection and require them to pay carriers such as Level 3 and Pac-West reciprocal compensation. The Commission expressed concern for rural LEC cost recovery as just one example of the overall policy impact of the treatment of VNXX.

15 Level 3 and Pac-West make three arguments concerning the policy considerations supporting

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Order 12 and none of these arguments withstand scrutiny. First, they argue that they are not paying rural LECs originating access charges today and therefore that rural LECs have not been harmed. However, by conceding that they are not paying originating access charges to the rural LECs, they have admitted that rural LECs with whom they have interconnected are not recovering access charges intended to cover the cost of originating interexchange VNXX calls. The fact that dial-up traffic to ISPs is declining may diminish this harm but it does not eliminate it.

16 Second, Level 3 and Pac-West argue that the USF/ICC Order removes any further role for this Commission in setting terminating intrastate access rates. While that may be true, it is also beside the point. As Level 3 and Pac-West recognize, VNXX traffic implicates cost recovery through originating access charges. In the *USF/ICC Order*, the FCC has deferred consideration of originating access charges and merely caps them for the time being.[22]

17 Third, Level 3 and Pac-West argue that 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. Once again, their argument misses the mark. Originating access charges are a mechanism for recovering the cost of originating interexchange calls. Classifying VNXX calls as local calls effectively denies originating LECs cost recovery and thereby undermines the ability to provide universal service at affordable rates, regardless of whether the lost recovery is called lost originating access or lost universal service.

18 Level 3 and Pac-West cite the Commission's rule on terminating access in the heading for this argument, but do not discuss that rule. Nevertheless, there is nothing in that rule that either compels reconsideration of Order 12 or that could not have been argued in the case to date.

[22] *USF/ICC Order*, ¶¶777-778.

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WAC 480-120-540 governs terminating access charges, and provides for a universal service component, and Level 3 and Pac-West argue that only originating access charges could apply to VNXX in any event. This may be true, but the policy concern that the Commission expressed in ¶ 61 of Order 12 was not that VNXX would deprive carriers of universal service monies, rather, it was that the CLECs' position on VNXX might erode the careful distinction that exists between local and interexchange traffic. This policy consideration remains valid, and nothing in the Commission's rules or the recent FCC order changes that.

19 In summary, the three factors Level 3 and Pac-West raise in Part 2 of their Petition for Reconsideration do not warrant reconsideration of the Commission's policy determination that VNXX calls should be classified as non-local as a matter of state law. And they certainly do not change state law. As the Commission recognized: "State law distinguishes local and interexchange traffic based on the geographic endpoints of the calls."[23]

3. The Doctrine of Collateral Estoppel Does Not Bar The Imposition of Originating Access Charges In This Case.

20 Finally, Level 3 and Pac-West argue incorrectly that the Commission should rule that CenturyLink is collaterally estopped from arguing that intrastate access charges apply to any VNXX ISP-bound calls. They base their argument on the Louisiana Public Service Commission's decision in *CenturyTel of Central Louisiana v. MCIMetro Access Transmission Services*, 2011 La. PUC LEXIS 68 (La. PUC May 10, 2011)(the "*Louisiana Decision*"). This case involved a different set of issues than are present in this case and does not collaterally estop CenturyLink from arguing that Level 3 and Pac-West owe CenturyLink intrastate originating access charges.

21 Level 3 and Pac-West provided the *Louisiana Decision* to the Commission as supplemental

[23] Order 12, ¶73.

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authority in July of 2011. In that submittal letter, they characterized the case as having issues "similar" to those in this case, not identical. They also argued the applicability of the reasoning in that case to the case at hand in an August 24, 2011 letter to the Commission. Thus, the Commission has already had a chance to consider this argument, and reconsideration is not warranted on this basis. In any event, the case does meet the criteria for applying the doctrine of collateral estoppel.

22 In the *Louisiana Decision*, the parties did not have and ICA, and Verizon argued that it was entitled to charge *terminating* switched access charges on VNXX traffic that was delivered to ISP modems located outside the state of Louisiana. Verizon was the carrier that used VNXX number assignment. Verizon's argument was rejected for three reasons. First, Verizon had previously taken the contrary, and we would note *correct* position, that the carrier that originates VNXX traffic is entitled to originating access from the terminating carrier.[24] As Verizon argued, the terminating carrier functions as an interexchange carrier with respect to VNXX. Second, Verizon's tariff conflicted with the Commission's determinations concerning how optional EAS traffic was to be treated in Louisiana.[25] Third, Verizon's intrastate access tariff did not apply to this traffic because it was interstate traffic that did not originate and terminate within Louisiana.[26]

23 Obviously, this case does not involve a Verizon intrastate tariff or Louisiana Commission determinations concerning optional EAS traffic in Louisiana. And while there may be some traffic that is delivered to an ISP modem located outside of Washington, it cannot be said that

[24] *Louisiana Decision*, *38, *56.

[25] *Id.*, ** 48-50.

[26] Id., *55, *61-*62

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all of the traffic terminates outside of Washington. For these reasons, the *Louisiana Decision* is completely distinguishable and does not preclude an award of intrastate access charges to CenturyLink in Washington.

24 Under the FCC's rules, an ISP is treated as an end user for purposes of applying access charges.[27] Under this rule, when the caller and the ISP are located within the same state, the FCC's rule calls for the application of intrastate access charges even though the traffic is technically interstate traffic when analyzed on an end-to-end basis. In this case, some of the traffic at issue originates in Washington and is delivered to an ISP modem located within Washington. Accordingly, CenturyLink is entitled to charge originating access for this traffic because it originates and terminates in Washington.

25 Here, collateral estoppel does not apply because the facts that led the Louisiana Commission to find that intrastate *terminating* access charges do not apply to optional EAS traffic in Louisiana are different from the facts that establish CenturyLink's entitlement to *originating* intrastate access charges in this case. The issues that determine whether intrastate access charges apply are not identical.

26 The Commission should deny the Petition and expeditiously schedule a proceeding to determine the nature of the VNXX traffic and the compensation due.

[27] *ISP Remand Order*, ¶11: *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002)

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DATED this 12th day of December, 2011

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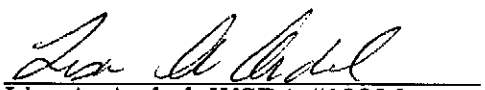

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