

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

PAC-WEST TELECOMM, INC.,)	DOCKET UT-053036
)	
Petitioner,)	
)	
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
<hr/>		
LEVEL 3 COMMUNICATIONS, LLC,)	DOCKET UT-053039
)	
Petitioner,)	
)	
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	

**MEMORANDUM OF LAW IN SUPPORT OF LEVEL 3'S AND
PAC-WEST'S MOTION FOR SUMMARY DETERMINATION**

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**MEMORANDUM OF LAW IN SUPPORT OF LEVEL 3'S AND
PAC-WEST'S MOTION FOR SUMMARY DETERMINATION**

Introduction

1. Level 3 Communications, LLC ("Level 3") and Pac-West Telecomm, Inc. ("Pac-West") respectfully submit this memorandum of law in support of their motion for summary determination.

Statement of the Case

A. Procedural History

2. This case is before the Washington Utilities and Transportation Commission ("Commission") as a continuation of the remand from the United States District Court for the

Western District of Washington of the Commission's earlier determination¹ that the reciprocal compensation provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), and the parties' Interconnection Agreements ("ICAs") required Respondent Qwest Corporation ("Qwest") to pay to Level 3 and Pac-West reciprocal compensation on Internet Service Provider-bound ("ISP-bound") traffic, including so-called VNXX ISP-bound traffic.² The Court concluded that the Commission misapplied federal law and remanded the matter to the Commission, with directions to:

reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify 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 call, or any other chosen method within the WUTC's discretion.³

3. On remand, the Commission concluded that, under state law, the distinction between local and non-local calling depends on the physical routing points of the call and not the numbers assigned to the called-party ISP by the competitive local exchange carrier serving that ISP customer.⁴ Accordingly, since the Commission followed the directive of the District Court that the *ISP Remand Order*⁵ applied only to "local" ISP-Bound traffic,⁶ the Commission concluded

¹ *Pac-West Telecomm, Inc., Level 3 Comm'ns, LLC v. Qwest Corp.*, UT-053036, UT053039, Order Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Declaratory Review, Order No. 5 (Feb. 10, 2006) ("*Order No. 5*"), *recon. denied, id.*, Order Denying Petition for Reconsideration, Order 6 (June 9, 2006) ("*Order No. 6*").

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

³ *Id.*, 484 F. Supp. 2d at 1177.

⁴ *Pac-West Telecomm, Inc., Level 3 Comm'ns, LLC v. Qwest Corp.*, UT-053036, UT 053039, Order Denying Pac-West's Motion for Summary Determination; Denying Level 3's Motion for Summary Determination; Granting in Part and Denying in Part Qwest's Motion for Summary Determination; and Denying Qwest's Motion to Strike, or in the Alternative File a Reply, Final Order, Order No. 12, ¶¶ 73-77 (Nov. 14, 2011) ("*Order No. 12*"), *recon. denied*, Order Denying Petition for Reconsideration, Order 13 (Feb. 10, 2012) ("*Order No. 13*").

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *rev'd WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*"). Although the Court reversed (but did not vacate) the *ISP Remand Order*, it did not question the jurisdictional nature of ISP-bound traffic

that VNXX ISP-bound traffic was not encompassed within the reciprocal compensation provisions of the parties' ICAs. The Commission concluded:

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 the scope of the 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 compensation, the traffic must fall within a different category. In light of our findings above and our review of the terms of the parties' 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.⁷

4. The Commission stated that it would initiate a separate evidentiary hearing.⁸ The Commission adhered to its conclusions on reconsideration.⁹

B. The Parties' Interconnection Agreements

5. The parties' ICAs play a large role in determining the outcome of this case, so it is important to understand what those agreements say. The 2003 Level 3-Qwest ICA provides that: "The parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order."¹⁰ The Pac-West-Qwest ICA is similar.¹¹

⁶ *Qwest, supra*, 484 F. Supp. 2d at 1170-73.

⁷ *Order No. 12*, ¶ 95.

⁸ *Id.*, Ordering Paragraph 5.

⁹ *See Order No. 13*.

¹⁰ *2003 Level 3 ICA*, § 7.3.6.1. This ICA was approved by the Commission on February 5, 2003 in Docket UT-023042. *See Level 3 Comm'cons, LLC*, UT-023042, Fourth Supplemental Order, Commission's Final Order (Feb. 5, 2003).

In context, it is clear that the term "FCC ISP Order" refers to the ISP Remand Order and the parties and the Commission have so treated it.

Attached to the Brotherson Affidavit as Exhibit E is an unsigned amendment to the Level 3-Qwest ICA. It is not clear that this amendment went into effect. But, in any event, the relevant language on compensation is the same as that quoted in the text. Amendment, § 3.1.

6. The Commission, as discussed above, concluded that VNXX traffic did not fall within the scope of the compensation mechanism set forth in the *ISP Remand Order*. Therefore, the Commission reasoned, the traffic must fall into another category; the Commission chose IntraLATA Toll or Toll-like. There is no explanation for this statement, and elsewhere in Order No. 12 the Commission consistently refers to the traffic as “intrastate, interexchange.”¹² The Level 3 Agreement provides the following definition:

“Exchange Access (IntraLATA Toll)” is defined in accordance with Qwest’s current intraLATA toll serving areas, as determined by Qwest’s state and interstate Tariffs *and excludes toll provided using Switched Access purchased by an IXC.*¹³

The Commission did approve an amendment to the 2003 Level 3 ICA by Order Approving Interconnection Agreement Amendment on April 12, 2006 in Docket UT-023042. The Amendment provided in relevant part that: “The parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC *Core Order*.” *Amendment*, § 2.1.

Level 3 and Qwest entered into a successor ICA that the Commission approved on June 7, 2007 in Docket UT-063009 (“2007 Level 3 ICA”). In its Order approving the 2007 Level 3 ICA, the Commission specifically declined to address the issue of compensation for VNXX ISP-bound traffic. *See Level 3 Comm’ns, LLC*, UT-063006, Final Order Denying Level 3’s Petition for Review; Granting in Part and Denying in Part Qwest’s Petition for Review; Affirming in Part and Modifying in Part Arbitrator’s Report and Decision, Order No. 12, ¶ 19 (June 7, 2007). As a result, the 2007 Level 3 ICA is silent as to the compensation for VNXX ISP-bound traffic, Otherwise, as shown below, it is virtually identical to the 2003 Level 3 ICA in relevant respects.

¹¹ The Pac-West-Qwest ICA that was approved on February 14, 2001 in Docket UT-013009 and was effective at the time that Pac-West filed its original enforcement action in this docket included an ISP-Bound Traffic Amendment that incorporated the FCC’s *ISP Remand Order*. It provided in section 1.4 that “ISP-Bound is as described by the FCC” in the FCC ISP Order and in section 3.2.1 that “Qwest will presume traffic delivered to [Pac-West] that exceeds a 3:1 ratio of terminating [Qwest to Pac-West] to originating [Pac-West to Qwest] traffic is ISP-bound traffic.” The current Pac-West-Qwest ICA, approved on December 3, 2009 in Docket UT-093057, also effectively provides that the parties will exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC’s *ISP Remand Order*. *See Pac-West-Qwest ICA (effective 2009)*, §§ 4.0, 7.3.6.1.

¹² *See, e.g., Order No. 12*, ¶¶ 61, 77, 96, 136.

¹³ *2003 Level 3 ICA*, § 4.22 (emphasis added).

The 2007 Level 3 ICA is similar and provides that: “[w]here either Party acts an intraLATA toll provider, each Party shall bill the other Party the appropriate charges pursuant to either its respective tariff or price lists.” *2007 Level 3 ICA*, § 7.3.1.

The current Pac-West ICA defines Exchange Access as having the same meaning as in the Communications Act of 1934, as amended (“Act”). *Pac-West ICA*, § 4.0. Section 3(16) of the Act, 47 U.S.C. § 153(16), provides that the term Exchange Access means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. Subsection 48 provides that the term “telephone toll service” means

7. Qwest believes, and the Commission appears to assume, that if Level 3 or Pac-West is the toll carrier, it would owe access charges to Qwest on VNXX traffic routed from Qwest to Level 3 or Pac-West.¹⁴ In fact, however, the ICAs define “Access Services” as “refer[ring] to the interstate and intrastate switched access and private line transport offered for the origination and termination of interexchange traffic,”¹⁵ that is, service offered under the parties’ switched and special access tariffs.

8. Finally, the Level 3 ICA defines “Switched Access Service” as:

The offering of transmission and switching to interexchange Carriers for the purpose of origination or termination of telephone toll service. Switched Access Services include: Feature Group A, Feature Group B, Feature Group D, 8XX access and 900 access and their successors or similar Switched Access Services. *Switched Access Service is a tariffed product and is subject to the terms and conditions of the Qwest Switched Access Tariffs as modified from time to time.* Switched Access traffic is traffic that originates at one of the Party’s end users and terminates at an IXC point of presence, or originates at an IXC point of presence and terminates at one of the Party’s end users, whether or not the traffic transits the other Party’s network.¹⁶

“telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”

¹⁴ See, e.g., *Order No. 12*, ¶¶ 96,139.

¹⁵ *Level 3 ICA*, § 4.2; *2009 Pac-West ICA*, § 4.0.

The 2007 Level 3 ICA has the same definition as the 2003 Level 3 ICA. See *2007 Level 3 ICA*, § 4.0.

The 2001 Pac-West ICA defines “Access Services” as referring to the “Tariffed interstate and intrastate switched access and private line transport services. . . .” *2001 Pac-West ICA*, § (A)2.2.

¹⁶ *Id.*, § 4.67 (emphasis added).

The 2007 Level 3 ICA breaks the definition into two sections. The relevant sentence in the 2007 Level 3 ICA provides that: “Switched Access traffic” as specifically defined in Qwest’s interstate switched access tariff. . . .” *2007 Level 3 ICA*, § 4.0.

The 2009 Pac-West ICA, § 4.0, defines Switched Access Service as “the offering of transmission and switching services to Interexchange Carriers for the purpose of the origination or termination of telephone toll service. Switched Access Services include: Feature Group A, Feature Group B, Feature Group D, 8XX access, and 900 access and their successors or similar Switched Access Services.” It further states that Switched Access Traffic, “as specifically defined in Qwest’s interstate Switched Access Tariffs, is traffic that originates at one of the Party’s end user customers and terminates at an IXC Point of Presence, or originates at an IXC Point of Presence

9. The Level 3 ICA thus makes clear that Qwest *does not* offer Switched Access service under the ICA. Rather, when Qwest offers switched access service, that service is offered *pursuant to its access tariffs, not pursuant to the ICA.*

10. The current Pac-West ICA also makes it clear that Qwest does not offer Switched Access service *under* the ICA, but instead pursuant to its access tariffs. Section 7.3.1 of the 2009 Pac-West ICA provides that “[w]here 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.” The 2001 Pac-West ICA is similar.¹⁷ The Pac-West ICAs do not mention what appropriate charges should be where a party acts as an InterLATA or interstate toll provider. Moreover, Exhibit A of the 2009 ICA and Part H of the 2001 ICA (which set forth the rates to be billed under the respective ICAs) make no reference to InterLATA toll traffic or interstate toll traffic. So to the extent Qwest offers switched access service, it does so pursuant to its access tariffs to the exclusion of the ICA.

Questions Presented

11. The questions presented by this motion are:

1. Does this Commission possess jurisdiction to decide the compensation regime for VNXX ISP-bound traffic?

As such traffic is inherently interstate in nature, the answer is in the negative.

2. As a matter of law, do access charges form an appropriate compensation regime for VNXX ISP-bound traffic?

As Qwest’s tariffs cannot reasonably be construed to encompass VNXX ISP-bound traffic, the answer is in the negative.

and terminates at one of the Party’s end user customers, whether or not the traffic transits the other Party’s network.” The 2001 Pac-West ICA, § (A)2.44, combines these two definitions.

¹⁷ 2001 Pac-West ICA, § (C)2.1.1.

3. Are Level 3 and Pac-West estopped, as a matter of law, from challenging the jurisdiction of the Commission to decide the compensation regime for VNXX ISP-bound traffic?

Because jurisdiction cannot be conferred by estoppel, the answer is in the negative.

4. Is Qwest entitled to recover switched access charges in this proceeding? If so, is all or part of Qwest's claim for such damages barred by the applicable statute of limitations?

Qwest has not asserted any claim seeking switched access charges and should not be permitted to amend its claims now; any new claim would be subject to Washington's two-year statute of limitations.

Standard Applicable to Motions for Summary Determination

12. As the Commission has observed, "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."¹⁸

13. The prehearing conference order issued on May 8, 2012, contemplates that the parties would file motions for summary determination with the expectation that the determination thereof may narrow the issues that may ultimately require evidentiary hearings.¹⁹

Argument

I. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO DETERMINE THE COMPENSATION REGIME APPLICABLE TO VNXX ISP-BOUND TRAFFIC.

14. The Commission's subject matter jurisdiction to address the compensation regime applicable to VNXX ISP-bound traffic depends critically upon the precise terms of the parties'

¹⁸ Order No. 12, ¶41, quoting WAC 480-07-380(2)(a).

¹⁹ *Pac-West Telecomm, Inc., Level 3 Comm'ens, LLC v. Qwest Corp.*, UT-053036, UT-053039, Prehearing Conference Order, Order 14, App. B. (May 8, 2012).

ICAs. ISP-bound traffic—*all ISP-bound traffic*—is jurisdictionally interstate. This Commission has no inherent authority to address rate-making questions regarding interstate traffic. To the contrary, the Commission’s authority to address rate-making matters with respect to interstate traffic arises solely as a result of its role under section 252 of the Act in arbitrating, approving or enforcing interconnection agreements.

15. This is fatal to the Commission’s authority to act in this case. The Commission decided that VNXX ISP-bound traffic does not fall within the reciprocal compensation provisions of the ICAs, which incorporate the FCC’s *ISP Remand Order* by reference. Because those are the only provisions of the ICAs that address this “interstate, interexchange” traffic, the Commission’s decision eliminated any jurisdictional nexus for further Commission action. Indeed, as noted above, the ICAs make clear that IntraLATA Toll and Switched Access Service are provided *outside* the confines of the ICAs. Accordingly, the Commission must now dismiss this case for lack of subject matter jurisdiction.

A. All ISP-Bound Traffic Is Jurisdictionally Interstate in Nature.

16. The Ninth Circuit has squarely held that ISP-bound traffic—*all* (or at least virtually all) *ISP-bound traffic*—is jurisdictionally interstate:

Although it is an unsettled question under federal law (and the primary controversy animating these appeals) whether ISP traffic is ‘local’ for purposes of reciprocal compensation provisions in interconnection agreements, under § 251(b)(5), the FCC and the D.C. Circuit have made clear that ISP traffic is ‘interstate’ for jurisdictional purposes.²⁰

17. This decision is fully consistent with a long line of FCC and judicial precedent confirming the use of an end-to-end analysis for purposes of determining jurisdiction. The FCC

²⁰ *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125 (9th Cir. 2003).

has long used an end-to-end analysis to determine whether traffic is jurisdictionally interstate.²¹

In the context of ISP-bound traffic, the FCC has determined, and the Courts have confirmed, that this end-to-end analysis leads to the conclusion ISP-bound traffic is jurisdictionally interstate.

18. In its initial *Declaratory Ruling*, the FCC concluded that ISP-bound traffic was interstate in nature as the “traffic continue[s] to the ultimate destination or destinations, specifically at an internet website that is often located in another state.”²²

19. In its next foray, the FCC reaffirmed its conclusion that ISP-bound traffic is jurisdictionally interstate.²³ In reaching this conclusion, the FCC described Internet traffic as follows:

Most Internet-bound traffic traveling between a LEC’s subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis. Users on the Internet are interacting with a global network of connected computers. The customer contracts with an ISP to provide access to the Internet. Typically, when the customer wishes to interact with a person, content, or computer, the customer’s computer calls a number provided by the ISP that is assigned to an ISP modem bank. The ISP modem answers the call (the familiar squelch of computers handshaking). The user initiates a communication over the Internet by transmitting a command. In the case of the web, the user requests a webpage. This request may be sent to the computer that hosts the webpage. In real time, the web host may request that different pieces of that webpage, which can be stored on different servers across the Internet, be sent, also in real time to the user A single web address frequently results in the return of information from multiple computers in various

²¹ See, e.g., *Teleconnect Co. v. Bell Tel. Co. of Pa.*, File Nos. E-88-83, et al., *Memorandum Opinion and Order*, 10 FCC Rcd 1626 (1995); *Bill Correctors, Inc. v. Pacific Bell*, File No. E-92-100, *Memorandum Opinion and Order*, 10 FCC Rcd 2305 (1995); *AT&T Corp. v. Bell Atlantic – Pennsylvania, Inc.*, File Nos. E-95-007, et al., *Memorandum Opinion and Order*, 14 FCC Rcd. 556 (1998).

²² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 96-98, *Declaratory Ruling*, 14 FCC Rcd 3689, 3697, ¶ 12 (1999), vacated *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). While the Court held that in this order the FCC did not adequately explain the use of its end-to-end analysis for determining compensation, it did not question the use of the analysis “when determining whether a particular communication is jurisdictionally interstate.” *Id.*, 206 F.3d at 13.

²³ *ISP Remand Order*, *supra*, 16 FCC Rcd at ¶¶ 1, 14, 28.

locations globally. These different pieces of the webpage will be sent to the user over different network paths and assembled on the user's display.²⁴

20. In the *Mandamus Order*, the FCC again reaffirmed its conclusion. It held:

. . . the ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority. The Commission unquestionably has authority to regulate intercarrier compensation with respect to interstate access services, rates charged by CMRS providers, and other traffic subject to Commission authority *such as ISP-bound traffic*. Section 2(a) of the Act establishes the Commission's jurisdiction over interstate services, for which the Commission ensures just, reasonable, and not unjustly and unreasonable discriminatory rates under sections 201 and 202.²⁵

21. The District of Columbia Circuit affirmed in *Core* and explicitly endorsed the FCC's conclusion that ISP-bound traffic was jurisdictionally interstate.²⁶

22. In the 2001 Pac-West ICA, the parties specifically agreed that "the FCC has determined that traffic originated by either Party (the 'Originating Party') and delivered to the other Party, which in turn delivers the traffic to an enhanced service provider (the 'Delivering Party') is primarily interstate in nature." They further agreed that such ISP-bound traffic not substantiated as being Local Traffic "shall be presumed to be interstate."²⁷

23. This Commission has concluded that the FCC's compensation regime set forth in the *ISP Remand Order* and reaffirmed in the *Mandamus Order* applies only to "local" ISP-bound traffic (presumably, ISP-bound traffic that reaches some ISP presence in the dialing area local to the

²⁴ *Id.* at ¶ 58.

While it is possible that there could be an ISP-bound call where *all* of the components of the call are physically resident in one state, the odds appear to be so infinitesimally small (and inherently unquantifiable) that they can safely be ignored.

²⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 96-98, *Order on Remand and Report and Order and Notice of Proposed Rulemaking*, 24 FCC Rcd 6475, 6485, ¶ 17 (2008), *aff'd Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

²⁶ *Core, supra*, 592 F.3d at 144.

²⁷ 2001 Pac-West ICA, §(C)2.3.4.1.3.

calling party). Even so, there can be no doubt that the FCC's *jurisdictional* analysis applies to *all* ISP-bound traffic. Regardless of where the traffic originates (from a "local" caller or a caller reaching an ISP through VNXX dialing arrangements), the traffic continues to "Internet websites" "often located in another state," or "in various locations globally." Indeed, the likelihood that the various websites are located in the same state as the caller is virtually nil, particularly if a caller accesses multiple websites during a browsing session. There can be little doubt that ISP-bound traffic, regardless of point of origination, is jurisdictionally interstate.

B. This Commission's Authority To Address Interstate Ratemaking Issues Is Critically Dependent Upon Section 252 of the Act.

24. The fact that the FCC's *compensation regime* for ISP-bound calls may apply only to "local" ISP-bound traffic does not cut back on the FCC's *jurisdiction* over *all* ISP-bound traffic. Thus, and contrary to the Commission's apparent assumption in Order No. 12,²⁸ the fact that the *compensation regime* only applies to some ISP-bound traffic does not create a jurisdictional *lacuna* which this Commission may fill with its *intrastate* ratemaking authority. Rather, it simply means that the relevant ratemaking body—the *Federal Communications Commission*—has not yet decided what compensation regime applies to non-local (VNXX) ISP-bound traffic.²⁹ However, because ISP-bound traffic is jurisdictionally interstate, and because this Commission's rulings establish that VNXX ISP-bound traffic is *not* addressed in the parties' ICAs, the rates applicable to such traffic must be established *by the FCC*; that decision does not default to this Commission as a result of FCC inaction.

²⁸ E.g., Order No. 12, ¶¶ 77, 136.

²⁹ The FCC has stated as much. In an amicus brief filed in one of the many *Global NAPS* cases, the FCC's General Counsel acknowledged that "the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area." *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 74 (1st Cir. 2006), quoting *FCC Amicus Brief*.

25. In its undisputed that this Commission has no inherent authority to address interstate ratemaking matters. In *Smith v. Ill. Bell Tel. Co.*, the Supreme Court held:

The separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.³⁰

26. This jurisdictional split between the interstate and intrastate spheres of authority was carried forward into the Communications Act. Section 2(a) of the Communications Act reserves to the Federal Communications Commission *exclusive* authority over “interstate and foreign commerce in communications by wire and radio. . . .”³¹ At the same time, section 2(b) of the Communications Act denies to the FCC jurisdiction over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio. . . .”³²

27. The Telecommunications Act of 1996 changed this fundamental dichotomy in certain respects, but, significantly, not in others. The Telecommunications Act imposed new duties upon incumbent local exchange carriers (and others), embodied in sections 251 and 252. The Supreme Court has confirmed that, under sections 201(b) and 251(d)(1) of the Act, the FCC has authority to issue regulations to implement sections 251 and 252, even where the subject matter undeniably involved intrastate services.³³

³⁰ 282 U.S. 133, 148-49 (1930).

³¹ 47 U.S.C. § 152(a); *see, e.g., Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (questions concerning the duties, charges and liabilities of telephone companies with respect to interstate services are to be governed exclusively by federal law); *New York Tel. Co. v. New York State Pub. Serv. Comm’n*, 631 F.2d 1059 (2d Cir. 1980).

³² 47 U.S.C. § 152(b); *see, e.g., La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986).

³³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 378-80, 384-85 (1999).

28. Similarly, sections 252(a)(2), (b)-(c), (e) of the Telecommunications Act authorize state commissions to mediate, arbitrate, and approve or reject interconnection agreements. In approving or rejecting interconnection agreements, state commissions must consider whether an agreement “meet[s] the requirements of section 251 of this title, *including* the regulations prescribed by the [Federal Communications] Commission pursuant to section 251 of this title. . .

.”³⁴ There is also no dispute that state commissions possess the authority to interpret and enforce, as well as approve or reject, interconnection agreements.³⁵

29. Interconnection agreements often address both (traditionally) interstate and intrastate matters, so, by authorizing state commissions to act upon such agreements, Congress authorized state commissions, to that extent, to act in areas that would traditionally be considered interstate. Agreement provisions dealing with compensation for ISP-bound traffic fall into this category. However, section 252 does not confer free-standing authority upon state commissions to engage in interstate ratemaking. As the Ninth Circuit has held:

It is clear from the structure of the Act ... that the authority granted to state commissions is confined to the role described in § 252 – that of arbitrating, approving and enforcing interconnection agreements. . . . The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic.³⁶

30. A state commission may obtain the authority, under section 252, to deal with intercarrier compensation for certain ISP-bound traffic, even though that traffic is jurisdictionally interstate. But that authority exists only with respect to ISP-bound traffic that is *affirmatively addressed* by

³⁴ 47 U.S.C. §252(c)(2)(B) (emphasis added).

³⁵ *See Verizon Md., Inc. v. Public Serv. Comm’n of Maryland*, 535 U.S. 871, 880 (2002) (observing the argument, without deciding it, that “a state commission’s authority under § 252 implicitly encompasses the authority to interpret and enforce an interconnection agreement that the commission has approved”).

³⁶ *Pacific Bell*, *supra*, 325 F.3d at 1126-27; *see also MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000); *MCI Telecomms. Corp. v. Bell Atl. – Pa.*, 271 F.3d 491, 516 (3d Cir. 2001).

an interconnection agreement—because the presence of terms dealing with the topic in an interconnection agreement is the *sole ground* for state commission authority to act in the first place. ISP-bound traffic—and any other interstate traffic—that carriers may exchange, but that is not expressly addressed in an interconnection agreement, is simply beyond the jurisdictional reach of a state regulator.

31. That local (intrastate) facilities are being used to complete ISP-bound calls does not change the analysis. The Courts have consistently held that the FCC’s *exclusive* interstate ratemaking authority extends to local facilities that are used to complete interstate calls.

32. In *New York Tel.*, *supra*, the Second Circuit invalidated the New York State Public Service Commission’s assertion of ratemaking authority over FX/CCSA circuits that were physically intrastate, but used to provide interstate FX/CCSA services. The Court held:

It is no less logical to classify the individual telephone lines as the point of reception in FX or CCSA systems than to define the local exchange service as that point. Even those FCC cases treating FX under the bifurcated jurisdictional view contain support for the assertion of jurisdiction because they note that ‘this Commission’s jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission’s ultimate destination.’ *Southern Pacific*, 61 *F.C.C.2d* at 146. The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.³⁷

33. The FCC itself has reached the same conclusion on numerous occasions.³⁸

34. Thus, in this case, this Commission’s assumption that if an ISP-bound call reaches an ISP modem in a different local calling area than that of the caller (but still within the same state), the call is “intrastate, interexchange and therefore automatically within the Commission’s jurisdiction with respect to compensation for such call”³⁹ is simply incorrect. The Commission

³⁷ *New York Tel. Co.*, *supra*, 631 F.2d at 1066.

³⁸ *Teleconnect*, *supra*; *Bill Correctors*, *supra*; *AT&T Corp. v. Bell Atlantic – Pennsylvania*, *supra*.

³⁹ See, e.g., *Order No. 12*, ¶ 134.

is undoubtedly correct that it retains jurisdiction to determine the boundaries between local and non-local calling, both in general and for the purpose of determining the scope of reciprocal compensation (“local” calling) under the parties’ ICAs.⁴⁰ It does not follow, however, that *this* Commission has ratemaking authority with respect to rates applicable to VNXX ISP-bound traffic in those cases (to the extent they exist) where the ISP’s modem equipment is in Washington, but in a different calling area than the end user making the call. For ISP-bound traffic that is *not* addressed by the agreements—and, as shown below, this Commission’s own rulings seem to put VNXX ISP-bound traffic in that category—this Commission has no authority to act unless there is some *other* jurisdictional nexus to make this jurisdictionally interstate traffic subject the Commission’s ratemaking authority. As is shown below, in this case, based upon these parties’ ICAs, that jurisdictional nexus is missing.

C. This Commission’s Section 252 Authority Does Not Extend To Determining Compensation for VNXX ISP-Bound Traffic.

35. Because the Commission’s jurisdiction to deal with interstate traffic arises entirely from the terms of the parties’ ICAs, the scope of the ICAs between Level 3 and Qwest and between Pac-West and Qwest define the scope of the Commission’s authority in this case. Unless the issue of VNXX ISP-bound traffic is covered by the ICAs, the Commission has no authority to address the issue.

36. The interconnection agreement between Level 3 and Qwest provides that:

The Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.⁴¹

As discussed above, the Pac-West ICA essentially provides the same thing.⁴² The Commission has already determined that VNXX ISP-bound traffic is *not* subject to compensation “pursuant to

⁴⁰ *Order No. 12*, ¶ 134.

⁴¹ *Level 3 ICA*, § 7.3.6.1

the compensation mechanism set forth in the FCC ISP Order.” Indeed, this is the whole point of Order No. 12. Other than referring to compensation pursuant to the ISP Order, however, the ICAs do not address ISP-bound traffic. It would appear, therefore, that—because all ISP-bound traffic, including VNXX ISP-bound traffic, is jurisdictionally interstate—the Commission has no jurisdictional “hook” with which to set intercarrier compensation or other rates with respect to this traffic.

37. The Commission has suggested that the traffic is IntraLATA Toll.⁴³ Aside from the fact that IntraLATA Toll traffic is necessarily *intrastate* traffic (which VNXX ISP-bound traffic is not), this Commission suggestion was apparently based on the assumption that intrastate, interexchange traffic (a term that the Commission seems to use interchangeably with IntraLATA Toll) would be subject to intrastate access charges.⁴⁴ That assumption, however, takes the traffic out of the category of IntraLATA Toll, as defined in the Level 3 ICA.⁴⁵ More fundamentally, the Commission appears to have used the term “IntraLATA Toll” to mean, simply, that VNXX ISP-bound traffic is not *local*.⁴⁶ While that may be true, it does not confer jurisdiction on the Commission to set intercarrier compensation rates for this *interstate* traffic. The ICAs also explicitly *exclude* Switched Access Service from their purview.⁴⁷

⁴² *Pac-West ICA*, §§ 4.0, 7.3.6.1, Exhibit A § 7.7.1.

⁴³ *See, e.g., Order No. 12*, ¶¶ 61, 96, 139.

⁴⁴ *Id.*, ¶ 61 (“For example, if all ISP-bound calls were classified as interstate traffic subject to the FCC’s rates, we could unreasonably jeopardize the entire access charge system, on which telecommunications companies rely to recover the costs they incur to support the services afforded the customers of another company.”).

⁴⁵ The Level 3 ICA excepts from its definition of IntraLATA Toll “toll provided using Switched Access purchased by an IXC.” *Level 3 ICA*, § 4.22.

⁴⁶ *See, e.g., Order No. 12*, ¶¶ 96, 139-40.

⁴⁷ *Level 3 ICA*, § 4.67 (“Switched Access Service is a tariffed product and is subject to the terms and conditions of the Qwest Switched Access Tariffs as modified from time to time.”). *Pac-West’s ICA* also refers to “Switched Access Traffic” as it is specifically defined in Qwest’s Switched Access Tariffs. *Pac-West ICA*, §4.0. *See supra* at 5 n.16.

38. Given these ICA terms, the Commission may not invoke its *intrastate* ratemaking authority to set any intercarrier compensation rates for jurisdictionally interstate VNXX ISP-bound traffic and, in particular, may not apply intrastate access charges to this traffic. And, the Commission may not apply *interstate* switched access charges to VNXX ISP-bound traffic because the subject of compensation for that traffic is not within the scope of the ICAs, and hence is beyond the limited delegation of authority to this Commission, in section 252, to address interstate matters.

D. The Federal Cases Cited by the Commission Do Not Support Its Jurisdictional Assumptions.

39. The Commission cites to several federal appellate cases to support its assumption that it has jurisdiction to determine the ratemaking treatment for VNXX ISP-bound traffic.⁴⁸ The cited cases, however, do not provide the support that the Commission seeks. The Second Circuit *Global NAPS* decision did not even address the issue of ISP-bound traffic. The Second Circuit held:

Given Global's carefully worded complaint (which does not address this access fee issue) and careful presentation of the issues, we conclude that *the question whether ISP-bound traffic is subject to access fees is not before us.*⁴⁹

40. The First Circuit *Global NAPS* cases⁵⁰ are also not supportive of the Commission's jurisdictional assumptions here. In those cases, the issue was whether Global NAPS could, at a very late stage of the proceedings between that carrier and Verizon, opt out of one agreement

⁴⁸ Order No. 12, ¶¶ 28-31.

⁴⁹ *Global NAPS Inc. v. Verizon New England, Inc.* 454 F.3d 91, 97 n.6 (2d Cir. 2006) (emphasis added).

⁵⁰ See, e.g., *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006); *Global NAPS, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010).

that was being negotiated and opt into another agreement.⁵¹ The Massachusetts Department of Telecommunications and Energy (“Massachusetts DTE”) refused to permit Global NAPS to opt into a Sprint agreement and approved an agreement negotiated between Verizon and Global NAPS that *explicitly permitted the assessment of access charges*. As the Court observed, the Agreement contained the following provision:

[Global NAPS] shall pay Verizon’s originating access charges for all [VNXX] Traffic originated by a Verizon Customer, and [Global NAPS] shall pay Verizon’s terminating access charges for all [VNXX] traffic originated by a [Global NAPS] customer.⁵²

41. In addition, in those cases, Global NAPs, as appellant, framed the cases as involving issues of *preemption* (i.e., whether the FCC had acted to preempt the states from exercising intrastate ratemaking authority that the state regulators otherwise possessed). The First Circuit appears to have *assumed* that the traffic at issue was intrastate traffic over which the state regulator could legitimately act.⁵³ The Court did *not* ask the question whether, in fact, there was any intrastate traffic over which the state commission could exercise any authority and it does not appear that this question was even presented and—even if it is was presented implicitly—the ICA in that dispute specifically addressed it.⁵⁴ Hence, the First Circuit *Global NAPS* cases are

⁵¹ *Global NAPS, supra*, 444 F.3d at 66.

⁵² *Id.*

The ICAs here contain no such provision and, to the contrary, specifically excluded access charges from their purview.

⁵³ *See* 603 F.3d at 81 (explaining that Court held that FCC did not intend to preempt “state authority to regulate interexchange ISP traffic;” 444 F.3d at 69 (entitling Section IV of the opinion as “Preemptive Effect of the ISP Remand Order.”))

⁵⁴ Indeed, the First Circuit upheld the determination by the Massachusetts DTE imposing intrastate access charges on Global NAPS’ ISP-bound traffic that *Global NAPS had conceded originated and terminated within the Commonwealth of Massachusetts*. *See* 603 F.3d at 88-89 (“To calculate the amount of damages, the district court first had to decide how many minutes of traffic were subject to access charges. The calculation involved three issues: how many minutes of calls were carried between 2003 and 2006; *what percentage of traffic was intrastate and subject to the DTE’s order*, and what percentage of traffic was local and therefore subject reciprocal compensation rather than access charges. The Court then needed to decide what rate per minute GNAPS had to

not determinative of the issue presented here—whether there is any intrastate ISP-bound traffic over which the Commission may properly assert jurisdiction in the first instance

42. In *Peevey*, the Court also framed its decision in terms of preemption with respect to the reach of the *ISP Remand Order* and none of the parties challenged, on jurisdictional grounds, the California Public Utilities Commission’s decision to impose call origination charges.⁵⁵

43. None of the cases relied upon by the Commission answers the question presented here. The question is *not* one of preemption. Rather, the question is whether state commissions have, absent any tie to an interconnection agreement, jurisdiction to impose a rate regime on local facilities used to complete interstate traffic. The answer is negative and therefore once this Commission determined that the FCC’s compensation regime does not apply to VNXX ISP-bound calls, given the specific terms of the ICAs at issue in this case, this Commission has left itself no choice but to dismiss this case for lack of subject matter jurisdiction.

II. AS A MATTER OF LAW, QWEST’S ACCESS TARIFFS DO NOT APPLY TO VNXX ISP-BOUND CALLS.

44. The Commission appears to assume that, because the compensation regime set forth in the *ISP Remand Order* does not apply to VNXX ISP-bound calls, the access charge regime must apply.⁵⁶ Such an assumption, in effect, treats the access charge regime as some sort of “default” compensation mechanism for VNXX ISP-bound traffic.⁵⁷

45. This assumption is not correct. The question of whether an exchange carrier’s access charges apply is not as simple as looking at the originating and termination points of the call, and applying access charges to any “interexchange” traffic. To the contrary, the specific terms of the

pay Verizon for access charges and the interest rate. The Court found that *GNAPS had admitted* that Verizon had sent GNAPS more than 10 billion minutes of calls.” (Emphasis added.)

⁵⁵ *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1158-59 (9th Cir. 2006).

⁵⁶ *See supra* at 2-5.

⁵⁷ *Order No. 12*, ¶ 61.

exchange carrier's access tariff must be examined to determine if, in fact, those terms apply to the specific factual situation at hand.

46. In *Farmers & Merchants' Mutual Tel. Co.*,⁵⁸ the District of Columbia Circuit affirmed an FCC determination that because: (a) certain conference calling companies did not "subscribe" to Farmers' tariffed services because they were not "end users" as defined in Farmers' tariffs; and (b) the tariffs provided that Farmers could only "bill for switched access services when it delivers a call to an entity that 'subscribes' to that service under its tariff," Farmers improperly attempted to bill switched access charges to Qwest.⁵⁹ There was no question in that case that the traffic at issue there started and ended in different states, or that the parties calling into the conference services were using normal interstate long distance dialing patterns, etc. The calls were clearly "interstate" and "interexchange." But Farmers could not assess access charges under its tariff because the specific service it was providing to the interexchange carrier (Qwest, in that case) was not the "access service" it was offering under its tariff.

47. The FCC has reached the same result in other cases as well. For example, in *YMAX*,⁶⁰ the FCC rejected claims by YMAX that AT&T owed it access charges because the physical services actually provided by YMAX (the local exchange carrier) to AT&T (the interexchange carrier) did not correspond to the tariff description of those services. Similarly, the FCC found, in *Northern Valley*, that Northern Valley's tariff was inconsistent with the FCC's governing rules. Thus, because the tariff did not require that an end user receiving traffic be a paying customer of

⁵⁸ *Farmers & Merchants Mutual Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011).

⁵⁹ *Id.* at 719-20.

⁶⁰ *AT&T Corp. v. YMAX Communications*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011).

the local exchange carrier (as the FCC's rules require), the tariff was void and access charges could not be assessed.⁶¹

48. Again, there was no dispute in any of these cases that the calls for which the LEC was attempting to impose access charges on the interexchange carrier were literally "interexchange" in nature, in the sense that the calls started and ended in different local calling zones (in those cases, different states). That fact in isolation, however, established only that the exchange carrier's access charges *might* apply. Whether such access charges *actually did* apply could only be determined after a careful review of the applicable tariff language and detailed factual findings regarding the specific physical services the exchange carrier was providing. That same sort of analysis is required here before it would be legally permissible to assess Qwest's access charges, from its tariffs, on VNXX ISP-bound traffic.

49. A review of Qwest's intrastate access tariff demonstrates that it does not apply to the traffic at issue.⁶² The tariff provides "detailed descriptions of each of the available Switched Access Services,"⁶³ but, without question, the tariff does *not* depict the serving arrangements applicable to VNXX ISP-bound traffic.

50. Although it is, from some perspectives, closely analogous to Feature Group A ("FGA") access, VNXX traffic is not Feature Group A as defined in the Qwest tariff. That tariff provides that "[a] seven-digit local telephone number *assigned by the Company [Qwest]* is provided for

⁶¹ *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332 (2011).

⁶² Presumably, if the Commission were to attempt to impose access charges it would need to do so on the intrastate traffic (of which there is none) involved and hence, the relevant review is of Qwest's intrastate traffic. Were one to examine Qwest's interstate tariff, however, the result would be the same.

⁶³ *Qwest Corporation*, WN U-44, Access Service, Washington, § 6.2 (Aug. 30, 2000) ("*Qwest Intrastate Tariff*"). The provision goes on to state that: "Each service is described in terms of its specific physical characteristics and calling patterns, the transport provisioning, the transmission specifications with which it is provided, the optional features available for use with it and the standard testing capabilities." *Id.*

access to FGA in the originating direction.”⁶⁴ Here, the telephone number provided to the ISP is assigned by Level 3, not Qwest, thus taking the service outside the definition of FGA.⁶⁵

51. Similarly, the Feature Group B provisions of Qwest’s access tariffs do not apply because calls in this case are not dialed in the “form of uniform access code 950-XXXX for carriers.”⁶⁶

52. Feature Group C is inapplicable as it applies only to AT&T (and is no longer offered in any event).⁶⁷

53. Feature Group D, or equal access, is also not applicable here. While the calling party (Qwest’s end user customer) may be presubscribed to an interexchange carrier of its choice and assigned to a 101XXXX access code,⁶⁸ the end user does not reach its presubscribed interexchange carrier when it dials the VNXX number assigned to a particular ISP.

⁶⁴ *Id.*, § 6.2.1(A)(5) (*emphasis added*).

⁶⁵ To the extent that Level 3 or Pac-West is viewed as providing interstate access to “its” interexchange carrier operations by means of providing local telephone numbers that end users may dial to make long distance calls, the most analogous form of switched access being provided by Level 3 and Pac-West would appear to be Feature Group A. In that case, the governing rule for assessing access charges is not that both exchange carriers should bill the interexchange carrier (the “meet point billing” rule applicable to more common “Feature Group D” access). Instead, the rule is that the two exchange carriers involved in originating a Feature Group A call that connects to an interexchange carrier are to negotiate in good faith to establish some arrangement for sharing some portion of whatever revenues the exchange carrier that directly serves the interexchange carrier may obtain from the interexchange carrier. *See Access Billing Requirements for Joint Service Provision*, Memorandum Opinion and Order, 4 FCC Rcd 7183, ¶¶ 22-23 (Com. Car. Bur. 1989). *See also Bell Atlantic Delaware, Inc. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12946, ¶ 14 & n.48 (1999) (suggesting that Feature Group A rules apply to the situation of two LECs providing PSTN connectivity to an ISP).

Thus, even if Level 3 or Pac-West is found to be (in part) an interexchange carrier in connection with its provision of VNXX arrangements, the net result of such a finding would appear to be simply that Level 3 or Pac-West and Qwest should negotiate some equitable result, rather than the Commission deciding anything at all about intercarrier compensation.

⁶⁶ *Qwest Intrastate Tariff*, § 6.2.2(A)(6).

⁶⁷ The tariff provides that “FGC access . . . is available only to providers of MTS and WATS . . .” *Id.*, § 6.2.3(A)(1).

⁶⁸ *See id.*, § 6.2.4(A)(8).

54. VNXX dialing is also not DID Switched Access Service as that service provides “trunk side switching with line treatment via DTT [direct trunked transport].”⁶⁹ That service appears to be a variant of Feature Group A access in which the local numbers assigned for interexchange access in a “direct inward dialing” arrangement rather than a simple Feature Group A line with a single telephone number. This is clearly not what Qwest is providing here in the VNXX context. Qwest is merely providing a line side connection to its end user customer.

55. 8XX access and 900 access require that calls be dialed in the “8XX” and “900” dialing formats, respectively.⁷⁰ VNXX ISP-bound traffic is not dialed in this way.

56. The “similar and successor services” phrase in the tariff also does not help Qwest’s cause. There are no similar and successor services listed in Qwest’s tariff. Moreover, “a service that does not ‘fall within the plain meaning’ of the tariff is not governed by the tariff whether or not it is ‘functionally similar’ to a tariffed service.”⁷¹

57. Qwest’s own tariff conclusively demonstrates that the services and/or functionalities that Qwest provides to Level 3 and Pac-West in the context of VNXX ISP-bound calls are *not* described in Qwest’s intrastate access tariff. Even if it were possible to stretch a phrase here or provision there to arguably cover VNXX in some situations, without question the tariff does not *clearly* cover VNXX, and a cardinal canon of tariff construction is that any ambiguities are to be construed against the drafter.⁷²

⁶⁹ *Id.*, § 6.2.5(A)(1).

⁷⁰ *Id.*, §§ 6.2.6(A), 6.2.7.

⁷¹ *Farmers & Merchants, supra*, 668 F.3d at 722, quoting *W. Union Corp. v. S. Bell Tel. & Tel. Co.*, 5 FCC Rcd 5128, 5132-33 (1990).

⁷² See *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Order, 13 FCC Rcd 22568, 22575-76, ¶¶ 12-13 (1998); *Commodity News Serv., Inc. v. Western Union*, 29 F.C.C. 1208, 1213 (1960).

58. As a matter of law, Qwest access tariffs do not apply to VNXX ISP-bound service. If there is such a claim in this case, the Commission should dismiss it.

III. AS A MATTER OF LAW, PAC-WEST AND LEVEL 3 ARE NOT BARRED BY WAIVER, ESTOPPEL, LACHES, OR OTHER EQUITABLE DOCTRINES FROM CONTESTING THE JURISDICTION OF THE COMMISSION.

59. Qwest is expected to argue that Pac-West and Level 3 have waived, or are otherwise equitably barred from asserting, their argument that the Commission lacks subject matter jurisdiction to determine compensation for VNXX ISP-bound traffic. Qwest's contention lacks merit as a matter of law.

60. Lack of jurisdiction over the subject matter renders a court (or administrative tribunal) powerless to pass on the merits of the controversy brought before it.⁷³ Either the tribunal has subject matter jurisdiction or it does not—subject matter jurisdiction does not turn on, and cannot be acquired by, agreement, waiver, or estoppel.⁷⁴ Thus, although litigants may waive their right to assert a lack of *personal* jurisdiction, they cannot, as a matter of law, waive their right to contest *subject matter* jurisdiction.⁷⁵ *Accordingly, any party (and the tribunal sua sponte, for that matter) may raise the issue of lack of subject matter jurisdiction at any time (including on appeal).*⁷⁶

⁷³ See *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); see also *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 409, 403 P.2d 54 (1965) (Donworth, J., concurring in part and dissenting in part); *State of Washington ex rel. Pioli v. Higher Education Personnel Board*, 16 Wn. App. 642, 646, 558 P.2d 1364 (1976).

⁷⁴ *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011); *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959).

⁷⁵ *Skagit Surveyors and Engineers, supra*, 135 Wn.2d at 556.

⁷⁶ *Id.*; see also *In re Saltis*, 94 Wn.2d 889, 893, 621 P.2d 716 (1980).

61. As a matter of law, Pac-West and Level 3 cannot be deemed to have waived their argument, and cannot be estopped to assert, that the Commission lacks subject matter jurisdiction to determine compensation for ISP-bound VNXX traffic.⁷⁷

IV. THE COMMISSION SHOULD NOT PERMIT QWEST TO ASSERT A CLAIM FOR PAST ACCESS CHARGES.

62. This case is fast approaching its seventh anniversary. To date, Qwest has conspicuously failed to assert any claim for past access charges. It is far too late for Qwest to do so now, and the Commission should not permit Qwest to do so.

A. The Commission Should Not Permit Qwest To Amend Its Pleadings To Assert Claims for Past Access Charges.

63. As of the date of this filing, Qwest has not asserted a counterclaim in this proceeding seeking recovery of access charges for VNXX ISP-bound traffic. Qwest has asserted four counterclaims against Pac-West, as follows:

Count 1: Claiming that Pac-West violated federal law by reason of its alleged “knowing misassignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located, ... misuse of such telephone numbering resources, and ... subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic ...” Qwest asks the Commission to order that Pac-West cease these alleged activities.

Count 2: Claiming that Pac-West violated Washington state law by reason of its alleged “knowing misassignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located, ... misuse of such telephone numbering resources, and ... subsequent attempts to bill Qwest

⁷⁷ Moreover, as a factual matter, there is no basis to find an estoppel in any event. Earlier in this litigation, Level 3 and Pac-West took the position that the compensation regime in the *ISP Remand Order*, as clarified in the *ISP Mandamus Order*, covered all ISP-bound traffic, including VNXX ISP-bound traffic. The parties’ ICAs expressly cover—and therefore expressly give the Commission jurisdiction over—compensation for ISP-bound calling within the scope of the *ISP Remand Order*. Given that the federal court and the Commission have now ruled that VNXX ISP-bound traffic is *not* embraced by the *ISP Remand Order*, there is nothing inconsistent with Level 3 and Pac-West pointing out—correctly—that a consequence of that ruling is that the Commission’s jurisdictional nexus for dealing with VNXX ISP-bound traffic has been destroyed.

the *ISP Remand Order* rate for such VNXX traffic” Qwest asks the Commission to order that Pac-West cease these alleged activities.

Count 3: Claiming that Pac-West is in breach of Section (G)3.7 of the ICA, which provides that “[e]ach Party is responsible for administering NXX codes assigned to it” and requires that each party “shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner.” Qwest asks the Commission to find that Pac-West is in breach of the ICA provision and to invalidate Pac-West’s bills.

Count 4: Claiming that Pac-West is violating the ICA by attempting to obligate Qwest to send non-local ISP traffic over LIS trunks. Qwest asks the Commission to order Pac-West to cease routing VNXX traffic over LIS trunks to Qwest, and to invalidate Pac-West’s bills to Qwest.⁷⁸

64. And Qwest has asserted five counterclaims against Level 3, as follows:

Count 1: Claiming that Level 3 violated federal law by reason of its attempts to bill Qwest the *ISP Remand Order* rate for its VNXX traffic. Qwest asks the Commission to order Level 3 to: cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located; cease charging Qwest for such traffic; and properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.

Count 2: Claiming that Level 3 violated Washington state law by reason of its attempts to bill Qwest the *ISP Remand Order* rate for its VNXX traffic. Qwest asks the Commission to order Level 3 to: cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer’s ISP Server is physically located; cease charging Qwest for such traffic; and properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.

Count 3: Claiming that Level 3 violated the Change in Law provisions of the ICA by billing Qwest for traffic that Qwest contends is not covered by the FCC’s *Core Forbearance Order*, and notwithstanding the parties’ failure to reach agreement on an ICA amendment pursuant to that order. Qwest asks the Commission to issue an order finding Level 3 in breach of its contractual obligations, in violation of Washington law, and to invalidate Level 3’s bills.

⁷⁸ See *Pac-West Telecomm, Inc. v. Qwest Corp.*, Docket UT-053036, Qwest Corporation’s Answer to Petition for Enforcement of Interconnection Agreements, ¶¶ 56-66 (June 28, 2005).

Count 4: Claiming that Level 3 is in breach of Section 13.4 of the ICA, which provides that “[e]ach Party is responsible for administering NXX codes assigned to it” and requires that each party “shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner.” Qwest asks the Commission to find that Level 3 is in breach of the ICA provision and to invalidate Level 3’s bills.

Count 5: Claiming that Level 3 is violating the ICA by attempting to obligate Qwest to send non-local ISP traffic over LIS trunks. Qwest asks the Commission to order Level 3 to discontinue the practice of misassigning telephone numbers and cease routing VNXX traffic over LIS trunks to Qwest, and to invalidate Level 3’s bills to Qwest.⁷⁹

65. *Qwest did not assert any counterclaim, against either Pac-West or Level 3, seeking access charges.* Also, Qwest did not make any claim for switched access charges in its complaint in the generic VNXX proceeding, Docket UT-063038.⁸⁰

66. Qwest should not be permitted to amend its counterclaims at this late stage of the proceeding, because to do so would cause severe prejudice to Pac-West and Level 3. Qwest’s counterclaims have been pending for almost seven years without any notice that a claim for access charge compensation would be made. The first time the issue was raised is when the *Commission* alluded to it in its Order No. 12, dated November 14, 2011.⁸¹ Allowing Qwest to claim switched access charges now would prejudice Pac-West and Level 3 because (at the least): (1) Pac-West and Level 3 will have had no opportunity to reconfigure their networks so as to

⁷⁹ See *Level 3 Comm’cns, LLC v. Qwest Corp.*, Docket UT- 053039, Qwest Corporation’s Answer to Level 3 Communications’ Petition for Enforcement of Interconnection Agreement and Counterclaims, ¶¶ 64-78 (June 15, 2005).

⁸⁰ See *Qwest Corp. v. Level 3 Comm’cns, et al.*, UT-063038, Complaint of Qwest Corp. for an Order Prohibiting VNXX (May 22, 2006).

The closest Qwest came was its request for an order “requiring respondents to comply with Qwest’s access tariffs if they wish to enable toll free long distance dialing for their own customers and customers of other local exchange companies. *Id.*, ¶ 46. The relief sought is plainly prospective and was not a claim for damages in the nature of past access charges. Moreover, as discussed above, Qwest’s access tariffs do not address VNXX arrangements and so simply do not apply to those arrangements.

⁸¹ *Order No. 12*, ¶¶ 96, 139.

minimize their exposure to such charges; and (2) Pac-West and Level 3 will have had no opportunity to recoup those charges from *their* customers. This prejudice is severe and cannot be eliminated or mitigated retroactively. For this reason, a motion to amend should not be allowed and Qwest should not be permitted to seek access charges for ISP-bound VNXX traffic.⁸²

67. There is an additional reason why an amendment should be disallowed as to Pac-West, specifically—the Pac-West bankruptcy.⁸³ On November 19, 2007, the bankruptcy court issued an order confirming Pac-West’s plan of reorganization.⁸⁴ The effect of that order was to discharge any potential claims by Qwest seeking access charges that were allegedly incurred prior to the November 19, 2007 confirmation date, and to permanently enjoin Qwest from pursuing such claims.⁸⁵

B. The Commission Should Confirm That Claim Seeking Access Charges Is Governed by the Two-Year Statute of Limitations.

68. Even if Qwest asserts a new claim for access charges after seven years (in the nature of a new complaint or otherwise), the Commission must determine what statute of limitations applies to the new claim. There is no specific statute of limitations that applies to a claim for recovery of

⁸² See *McDonald, et al. v. State Farm Fire and Casualty Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992) (motion to amend denied due to prejudice to the nonmoving party); *Del Guzzi Construction Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (the “touchstone” for denying a motion to amend is prejudice to the nonmoving party).

⁸³ On April 30, 2007 Pac-West and certain affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, Case No. 07-10562 (BLS).

⁸⁴ *Findings of Fact, Conclusions of Law, and Order Under 11 U.S.C. § 1129(a) and (b) and Fed. R. Bankr. P. 3020 Confirming the Final Modified Second Amended Joint Plan of Reorganization of Pac-West Telecomm, Inc. and its Debtor Affiliates (With Technical Amendments)*, dated November 19, 2007.

⁸⁵ See *Final Modified Second Amended Joint Plan of Reorganization of Pac-West Telecomm, Inc. and its Debtor Affiliates (With Technical Amendments)* at §§ 11.1 and 12.2 (Nov. 19, 2007).

access charges pursuant to Qwest's tariff. In the absence of such a specific statute, the "catch-all" two-year statute of limitations in RCW 4.16.130 applies:

4.16.130 Action for relief not otherwise provided for. An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.

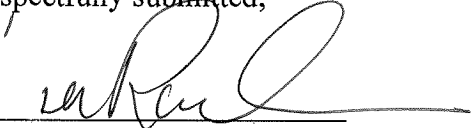
69. Accordingly, under any new complaint that Qwest might seek to file, it can only seek switched access charges that allegedly accrued during the two-year period immediately preceding the effective date of the amendment.⁸⁶

⁸⁶ Because the Commission should not permit to amend any of its existing pleadings, any new complaint could not relate back to the original pleadings in these cases or in Docket UT-063038. See, e.g., *Ellzey v. United States*, 324 F.3d 521, 524 (7th Cir. 2003) (before relation back occurs, proposed "amendment must be appropriate under the criteria of Rule 15(a)"); *Neverson v. Bissonete*, 261 F.3d 120, 126 (1st Cir. 2001) ("Rule 15(c) simply does not apply where . . . the party bringing suit did not seek to 'amend' or 'supplement' his original pleading, but, rather, opted to file an entirely new [action] at a subsequent date."); *Stansfield v. Douglas County*, 146 Wn.2d 116, 121, 43 P.3d 498 (2002) (the threshold question is whether the amendment is permissible in the first place).

Conclusion

70. For the foregoing reasons, the Commission should grant Level 3's and Pac-West's motion for summary determination as requested herein.

Respectfully submitted,


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