[Service Date: August 15, 2005]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

IN THE MATTER OF: LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Docket No. UT-053039 **LEVEL 3 COMMUNICATIONS, LLC'S MOTION FOR SUMMARY DETERMINATION**

TABLE OF CONTENTS

I. MOTION 1
II. INTRODUCTION AND SUMMARY 1
III. STANDARD OF REVIEW 2
IV. FACTUAL BACKGROUND 3
V. ARGUMENT 10
A. Federal Law Requires Qwest to Compensate Level 3 for All Locally Dialed ISP-Bound Traffic at the Rate of $0.0007 per Minute of Use 10
B. Washington Law Provides that the Federal Rules Governing Intercarrier Compensation for ISP-bound Traffic Apply to All Locally Dialed ISP-bound Traffic, Including VNXX 21
C. Level 3 Has Complied With the Change in Law Provisions of the Parties' Interconection Agreement 24
D. Level 3 Has Complied With Section 13.4 of the Parties' Interconnection Agreement 25
E. Level 3 Has Properly Routed Traffic Over LIS Trunks 26
F. Level 3's Proposed Amendment to the Interconnection Agreement Accurately Reflects the FCC's Core Forbearance Order, and the Commission Should Require Qwest to Execute the Amendment 27
VI. CONCLUSION 29

I. MOTION

1. Petitioner Level 3 Communications, LLC ("Level 3") moves for summary determination pursuant to WAC 480-07-380 on the grounds that there are no issues of material fact, and Level 3 is entitled to judgment as a matter of law on Count 2 of Level 3's Petition for Enforcement of Interconnection Agreement with Qwest Corporation ("Petition")[1] and all Counterclaims set forth in Qwest Corporation's Answer to Level 3 Communications' Petition for Enforcement of Interconnection Agreement and Counterclaims ("Answer and Counterclaims")[2]. Further, Level 3 incorporates Count 1 of its Petition into Count 2 and therefore seeks summary judgment on its Petition in its entirety

II. INTRODUCTION AND SUMMARY

2. Level 3's Petition seeks the following relief: (a) enforcement of the change of law provisions of its Interconnection Agreement with Qwest Corporation ("Qwest")[3] by requiring Qwest to execute an amendment reflecting the terms of the Federal Communication's ("FCC") *Core Forbearance Order*[4]; and (b) payment of compensation for the transport and termination of calls to Internet Service Providers ("ISP-bound traffic") originated by Qwest customers, as required by the terms of the *Core Forbearance Order,* the prior decisions of this Commission and the Parties' Interconnection Agreement approved by this Commission.

3. The *Core Forbearance Order* was a narrow ruling by the FCC that modified two discrete provisions of the intercarrier compensation regime for ISP-bound traffic originally established in the FCC's *ISP Remand Order*[5]: (a) the *Order* lifted the artificial cap on

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[1] WUTC Docket No. UT-053039, filed June 8, 2005.

[2] WUTC Docket No. UT-053039, filed June 28, 2005.

[3] Qwest and Level 3 are collectively referred to herein as the "Parties".

[4] *Petition of Core Communications. Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order,* FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*").

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert.den.* 538 U.S. 1012 (2003) (*"ISP Remand Order").*

AITER WYNNE LLP
LAWYERS
601 UNION STREET, SUITE 5450
SEATTLE, WA 98101-2327
(206) 623-4711

compensable traffic; and (b) allowed compensation in new markets. The *Core Forbearance Order* did not disturb the FCC's intercarrier compensation regime for ISP-bound traffic or this Commission's prior decisions applying that regime. Qwest, however, asks this Commission to go beyond the scope of the *Core Forbearance Order* and relitigate issues that this Commission has already decided and that the FCC left undisturbed. Qwest's attempts to relitigate these matters are improper and should be rejected by this Commission.

4. Level 3 has tried to resolve this dispute and to amend the Parties' Interconnection Agreement through negotiations with Qwest pursuant to the Agreement's change in law provision. Qwest does not dispute that, under the FCC's *ISP Remand Order* and *Core Forbearance Order*, it must pay intercarrier compensation to Level 3 for ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the rate of $0.0007 per minute of use ("MOU"). Qwest claims, however, that the FCC's compensation regime applies only if the customer initiating the call and the ISP server receiving the call are physically located in the same local calling area - even though this Commission has previously rejected this argument. As explained below, Qwest's position is inconsistent with federal and state law and summary judgment in Level 3's favor should be granted.

III. STANDARD OF REVIEW

5. Motions for summary determination before the Commission are governed by WAC 480-07-380(2)(a), which provides:

> A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, 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.

This rule further instructs the Commission to consider the standards applicable to motions made under CR 56[6] of the Washington Rules of Superior Court, which governs summary judgment, in considering motions for summary determination. *Id.* Summary determination is appropriate if,

[6] CR 56(c) states that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

based on all of the evidence, there are no issues of material fact and reasonable persons could reach but one conclusion. CR 56; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805, 810 (2005) (en banc). A material fact is "one upon which the outcome of the litigation depends in whole or in part." *Samis v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477, 481 (2003). The Commission must consider the facts in the light most favorable to the nonmoving party. However, once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the nonmoving party to set forth specific facts sufficient to rebut the moving party's contentions. *See Atherton Condo. Apartment-Owner Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250, 257 (1990). Mere allegations or denials are not sufficient. CR 56(e). If the nonmoving party fails to set forth any such facts, summary judgment is proper. *Atherton*, 115 Wn.2d at 516, 799 P.2d at 257.

IV. FACTUAL BACKGROUND

6. Level 3 is an international communications and information services company headquartered in Broomfield, Colorado. Level 3 is a Delaware limited liability company. The company operates one of the largest, most advanced communications and Internet backbones in the world. Level 3 is one of the largest providers of wholesale dial-up services to ISPs in North America and is the primary provider of Internet connectivity for millions of broadband subscribers through its cable and DSL partners.[7]

7. Level 3 provides competitive local exchange telecommunications services in Washington pursuant to this Commission's authorization in Dockets UT-980490 and UT-980492. Level 3 maintains IP-based switching and routing equipment in its gateway located in Seattle, Washington.[8]

8. Qwest is a Delaware corporation with its principal place of business located in Denver, Colorado. Qwest is an incumbent local exchange carrier certified to provide local exchange service and intrastate interexchange service in Washington.[9]

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[7] See the Affidavit of Mack Greene in Support of Level 3 Communications, LLC's Motion for Summary Determination, filed herewith. ("*Greene Affidavit*)

[8] *Id.*

[9] Answer and Counterclaims at ¶ 47.

9. The Commission has jurisdiction under WAC 480-07-650 and RCW sections 80.01.040, 80.36.080, 80.36.170, and 80.36.186 to investigate the matters raised in Level 3's Petition. In addition, the Commission has jurisdiction to interpret and enforce the terms of the Parties' Interconnection Agreement pursuant to Section 252(e) of the Communications Act of 1934, as amended.[10] The United States Court of Appeals for the Eighth Circuit has affirmed that the Act "vests in the state commission the power to enforce the interconnection agreements they approve."[11]

10. Level 3 and Qwest began exchanging ISP-bound traffic in March 1999 pursuant to the Parties' original interconnection agreement.

11. On or about March 7, 2003, the Parties' successor interconnection agreement was filed with the Commission in accordance with the Commission's final order in Docket No. UT-023042 (referred to herein as the "Interconnection Agreement").

12. The Interconnection Agreement expired on August 7, 2005, but remains in effect until a successor agreement is negotiated. Level 3 and Qwest are currently negotiating a successor agreement.

13. Section 7.1.1 of the Interconnection Agreement provides that Qwest and Level 3 shall interconnect for purposes of exchanging ISP-bound traffic:

> 7.1.1. This section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS / Local traffic), Exchange Access (IntraLATA Toll), *ISP-bound traffic* and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Qwest will provide Interconnection at any technically feasible point within its network. . . . "Interconnection" is as described in the Act and refers, in this Section of the Agreement, to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, ISP-bound traffic, and Exchange Access traffic at points (ii) and (iii) described above. Interconnection, which Qwest currently names "Local Interconnection Service" (LIS) is provided for the

[10] 47 U.S.C. § 252(e).

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

> purpose of connecting End Office Switches to End Office Switches or End Office Switches to local or access tandem switches for the exchange of Exchange Service (EAS/Local traffic); or End Office Switches to access tandem switches for the exchange of Exchange Access (IntraLATA Toll) or Jointly Provided Switch Access traffic.[12]

14. Section 7.2.1.2.6 of the Agreement further provides that "[t]he traffic types to be exchanged under this Agreement includes . . . ISP-bound traffic as described in Section 7.6.3 below."[13]

15. The Agreement provides the rate schedule that is reflected in the *ISP Remand Order*.

> 7.3.6.2.3 Rate Caps - Intercarrier compensation for ISP-bound traffic exchanged between Qwest and [Level] 3 will be billed as follows:
>
> 7.3.6.2.3.1 $0.0015 per MOU for six (6) months from June 14, 2001 through December 13, 2001.
>
> 7.3.6.2.3.2 $0.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.
>
> 7.3.6.2.3.3 $0.0007 per MOU from June 14, 2003 until thirty six (36) months after the effective date of the FCC ISP Order or until further FCC action on intercarrier compensation, whichever is later.[14]

16. In approving the Interconnection Agreement, this Commission ruled that Level 3 is entitled to exchange ISP-bound traffic over the Local Interconnection Service ("LIS") trunks that connected the Parties' networks.[15] The Commission rejected Qwest's arguments that traffic originated by Qwest customers and directed to ISPs serviced by Level 3 should not be included in the calculation of relative use:

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[12] Petition at ¶ 9; Answer and Counterclaims at ¶ 49.

[13] Petition at ¶ 10; Answer and Counterclaims at ¶ 49.

[14] Petition at ¶ 11; Answer and Counterclaims at ¶ 50.

[15] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023042, Fourth Supplemental Order: *Commission's Final Decision*, ¶ 9-11, February 5, 2003. ("*Level 3/Qwest Arbitration Order*").

> Qwest argues that the FCC amended the relative use rule in its most recent order addressing ISP-bound traffic, with the effect of excluding ISP-bound traffic from relative use calculations. Qwest argues further that because the FCC has exempted ISP-bound traffic from reciprocal compensation obligations, the ISP Remand Order also must be read to exclude this traffic from the relative use calculation to apportion costs of interconnection. The Commission does not accept this conclusion. Nothing in the text of the ISP Remand Order suggests that it applies to any functions other than transport and termination on the terminating side of the POI.[16]

17. The Parties also agreed that their Agreement would be modified to reflect changes in law, including any change in law relating to the *ISP Remand Order.*[17] Section 2.2 of the Agreement provides:

> 2.2.The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). . . . To the extent that the Existing Rules should be changed, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.[18]

18. Section 5.18 of the Interconnection Agreement sets forth the dispute resolution provisions. Subsection 5.18.6 provides that "[n]otwithstanding the foregoing, either Party may seek any relief from the Commission, the FCC, or a court of competent jurisdiction for disputes arising under this Agreement."[19] Sections 2.2 and 5.18.6 provide that either party can seek relief from the Commission regarding a dispute arising from the Parties' failure to negotiate an amendment to the Interconnection Agreement to reflect a change in law.

19. This Commission has determined that the FCC's *ISP Remand Order* applies to all ISP-bound traffic and is not limited, as Qwest asserts, to ISP-bound traffic that originates in a

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[16] *Id.* at ¶ 37.

[17] Petition at ¶ 13; Answer and Counterclaim at ¶ 52.

[18] *Id.*

[19] *Greene Affidavit*, Exhibit A.

given local exchange area and terminates at an ISP modem located in the same local calling area. In the most recent arbitration between Level 3 and CenturyTel, the Arbitrator ruled:

> The FCC's *ISP Remand Order* begins with the straightforward statement that: 'In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).' The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends. The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that its result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls. Rather, both emphasize that even when the traffic remains in the local area it is not to be treated for compensation purposes as local traffic.[20]

The Commission went on to note that, "[t]he fundamental issue in this arbitration is whether the FCC's reciprocal compensation rules for ISP-bound traffic, as established in the FCC's *ISP Remand Order*, apply when the ISP's premise (*i.e.*, modem bank) is outside the local calling area."[21] The Commission concluded that, "[we] believe CenturyTel reads too much into what are very general characterizations by the FCC and the appeals court of the issue before it. The substance of the decisions makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic. We believe the arbitrator properly rejected CenturyTel's argument."[22]

20. Three key elements of the FCC's reciprocal compensation mechanism are applicable to the present dispute:

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[20] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, *Fifth Supplemental Order Arbitrator's Report and Decision*, ¶ 35, January 2, 2003, affirmed by the Commission in the *Seventh Supplemental Order: Affirming Arbitrator's Report and Decision.*

[21] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, *Seventh Supplemental Order: Affirming Arbitrator's Report and Decision*, ¶ 7, February 28, 2003. *("Level 3/CenturyTel ArbitrationOrder").*

[22] *Id.* at ¶ *10.*

(a) Rate – The terminating compensation rate began at $0.0015 per minute, and declined over time to $0.001 per minute, and then declined to its current level of $0.0007 per minute. Note, however, that what is in dispute between Level 3 and Qwest in the instant dispute is not the per-minute ***rate*** to apply to ISP-bound traffic; it is the issue of whether Qwest may properly exclude some or all ISP-bound ***minutes*** from compensation at all.

(b) "Growth Caps" – Prior to the *Core Forbearance Order*, the amount of ISP-bound traffic that was compensable under the interim regime was subject to limits on growth. For the year 2001, a LEC originating ISP-bound traffic owed the LEC terminating that traffic intercarrier compensation for a maximum of four times the number of minutes terminated by that LEC in the first quarter of 2001, plus a ten percent growth factor. For the year 2002, a LEC was entitled to compensation on the number of minutes permitted for 2001, plus a ten percent growth factor. For the year 2003, a LEC was entitled to compensation on the number of minutes permitted for 2002. Traffic that exceeded the growth caps was not eligible for intercarrier compensation. Therefore, traffic in excess of the calculated limits was subject to a terminating compensation rate of zero. The growth caps were eliminated by the *Core Forbearance Order*.

(c) "New Markets Rule–" – Prior to the *Core Forbearance Order*, to be eligible for compensation for the termination of ISP-bound traffic, the LEC seeking compensation had to have exchanged ISP-bound traffic under an interconnection agreement with the LEC from whom it was seeking compensation prior to the adoption of the *ISP Remand Order* on April 18, 2001. This restriction was considered a "new market rule" because it effectively established an intercarrier compensation rate of zero in markets where the LEC began service after April 18, 2001.[23]

21. The FCC's *Core Forbearance Order* lifted the "Growth Caps" and "New Markets" restrictions as of October 8, 2004.

22. With regard to both restrictions, the FCC determined that the public interest was no longer served by limiting compensation paid for the transport and termination of such traffic on the terminating side of the point of interconnection ("POI").[24] For example, the FCC determined that the new market restrictions created different rates for similar or identical functions. This is

[23] *See ISP Remand Order* at ¶ 81 (new market restrictions apply as of the effective date of the order, *i.e.*, 30 days after the date of publication in the Federal Register.)

[24] *See Core Forbearance Order* at ¶ 21.

because two carriers serving ISPs in the same market would be subject to different compensation rates based solely upon when they entered the market. The FCC further determined that public policy favoring a unified intercarrier compensation regime applicable to all traffic outweighed concerns about compensation paid to carriers serving ISPs.[25] Finally, because the FCC's rationale for not enforcing the growth caps and new market restrictions applied with equal force to other telecommunications carriers, the FCC specifically extended the grant of forbearance of the *ISP Remand Order's* new markets and growth cap restrictions beyond the petitioner in that case to all telecommunications carriers.[26]

23. Prior to the FCC's determination in the *Core Forbearance Order*, Level 3 and Qwest were exchanging ISP-bound traffic pursuant to the terms of the Commission-approved Interconnection Agreement.[27] Under that agreement, the companies were exchanging traffic over the LIS trunks, and Qwest was paying Level 3 for all ISP-bound traffic at the rate of $0.0007 for all minutes of use up to the market cap established by the *ISP Remand Order*. During this time period, Qwest did not restrict compensation based on whether the ISP was physically located within the same local calling area as Qwest's end-user customer.

24. On the effective date of the *Core Forbearance Order*, Level 3 began to invoice Qwest for all ISP-bound traffic above the market caps, in addition to the traffic below the caps which Level 3 had previously been invoicing. Qwest has not paid these invoices. Level 3 also sought to amend the Interconnection Agreement to bring it into compliance with the *Core Forbearance Order*.[28]

25. On January 27, 2005, Steve Hansen, Vice President-Carrier Relations for Qwest, responded in writing to Level 3, opening the dispute resolution timeframes.[29]

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[25] *See id.* at ¶ 24.

[26] *See id.* at ¶ 27.

[27] *Greene Affidavit* at ¶ 11.

[28] A copy of this letter was attached to the Petition as Exhibit B.

[29] A copy of this letter was attached to the Petition as Exhibit C.

26. On March 31, 2005, Level 3 delivered to Qwest an amendment to the Parties' Agreement that would implement the *Core Forbearance Order.*[30]

27. Throughout the periods referenced, the Parties continued negotiations toward a new interconnection agreement, which included discussions related to updating existing and successor agreements to reflect recent changes in law, including the *Core Forbearance Order.*

28. To date, more than eight months after Level 3 served notice upon Qwest to implement the terms of the *Core Forbearance Order*, Level 3 and Qwest have been unable to agree upon an appropriate amendment to the Interconnection Agreement.

V. ARGUMENT

B. Federal Law Requires Qwest to Compensate Level 3 for All Locally Dialed ISP-Bound Traffic at the Rate of $0.0007 per Minute of Use

29. In Counterclaim 1, Qwest alleges that Level 3 is violating federal law by billing Qwest the federal reciprocal compensation rate for all ISP-bound traffic. The FCC's decisions in the *ISP Remand Order* and the *Core Forbearance Order* do not support Qwest's position. As discussed below, Level 3 is entitled to judgment as a matter of law.

30. With regard to Counterclaim 1, there are no disputed issues of fact. Qwest admits that, under the FCC's *ISP Remand Order* and *Core Forbearance Order*, it must pay intercarrier compensation to Level 3 for locally dialed ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the rate of $0.0007 per minute of use. Qwest asserts, however, that the FCC's reciprocal compensation regime applies only if the customer initiating the call and the ISP server receiving the call are physically located in the same local calling area. The issue raised by Qwest in its defense – whether the federal reciprocal compensation regime for ISP-bound traffic applies to VNXX ISP-bound traffic – is purely a matter of law that has previously been decided by this Commission.

31. Qwest's position is inconsistent with current law. As this Commission has previously ruled, reciprocal compensation under the *ISP Remand Order* and *Core Forbearance*

[30] A copy of the March 31, 2005 letter from Andrea Gavalas, Vice President of Interconnection Services to Dan Hult of Qwest, which included the proposed amendment, was attached to the Petition as Exhibit D.

Order applies to all locally dialed ISP-bound traffic regardless of the location of the ISP server to which that call is directed, and therefore encompasses VNXX ISP-bound traffic. The *Core Forbearance Order* simply removed an artificial cap that restricted the number of MOUs for which Level 3 could be compensated for the transport and termination of Qwest's traffic.

1. The *ISP Remand Order* Applies to All ISP-bound Traffic, Including VNXX ISP-bound Traffic

a. The *ISP Remand Order* is Not Limited to "Local" Traffic

32. Qwest asserts that the ISP Remand Order limits its obligation to pay reciprocal compensation for ISP-bound traffic to "local" traffic (where the customer initiating the Internet call and the ISP server receiving the call are in the same local calling area). In other words, Qwest, without offering any new facts or legal decisions, asks the Commission to abandon its previous decision, as well as the statutory analysis of Sections 251(b)(5) and 251(g) adopted in the *ISP Remand Order*, and to re-adopt the view rejected by the FCC in the *ISP Remand Order* and this Commission – that Section 251(b)(5) applies only to "local" telecommunications traffic. The *ISP Remand Order* applies to all ISP-bound traffic, regardless of the geographic location of the ISP server to which the call is directed. The FCC's reasons for rejecting the "local"/"long distance" distinction in this context remain valid. Most importantly, the express language of Section 251(b)(5) applies to *all* telecommunications traffic, not just "local" telecommunications traffic. Qwest's position is not supported by the express terms of the *ISP Remand Order*.

i. History of the ISP Remand Order

33. While this Commission has already decided that all ISP-bound traffic is compensable, it is worth reviewing the history on how the industry reached this stage. In its 1996 *Local Competition Order*, the FCC found that Section 251(b)(5) applies only to local

telecommunications traffic.[31] The FCC applied that rule to ISP-bound traffic in its *ISP Declaratory Ruling*, which relied on the traditional "end-to-end" jurisdictional analysis to conclude that ISP-bound traffic is not "local" because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[32] The D.C. Circuit reversed and remanded that decision saying that the FCC had failed to "provide an explanation why this [end-to-end jurisdictional analysis] is relevant to discerning whether a call to an ISP" should, for intercarrier compensation purposes, "fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs."[33]

34. In the resulting *ISP Remand Order*, the FCC reconsidered whether Section 251(b)(5), by its terms, applies to ISP-bound communications.[34] The FCC repudiated its earlier ruling that the provision is limited to the termination of "local" telecommunications, finding that it had "erred in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of interpreting the relevant scope of section 251(b)(5)," rather than looking to the language of the statute itself.[35] Specifically, the FCC found that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[36] The FCC emphasized that, "[u]nless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all*

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[31] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996); see *also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3693 (¶ 7) (1999) (*"ISP Declaratory Ruling"*).

[32] *See ISP Declaratory Ruling* at ¶ 1; *see also Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000).

[33] *Bell Atlantic*, 206 F.3d at 5.

[34] *See ISP Remand Order* at ¶ 1.

[35] *Id.* at ¶ 26.

[36] *Id.* at ¶ 31 (emphasis in original).

telecommunications traffic—*i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier."[37]

35. The FCC went on to find that Section 251(b)(5) is "subject to further limitation"—specifically, that certain types of traffic enumerated in Section 251(g) are "carve[d]-out" of Section 251(b)(5).[38] That conclusion did not, however, affect the FCC's determination as to the scope of Section 251(b)(5) absent the "limitation" that the FCC believed to be imposed by Section 251(g). The D.C. Circuit rejected the FCC's view that Section 251(g) contains a "limitation" on Section 251(b)(5) with respect to ISP-bound traffic.[39] The court found that Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the Commission to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5). The court further found that there were no pre-1996 Act rules for ISP-bound traffic that Section 251(g) could possibly prescribe, and that therefore ISP-bound traffic exchanged between LECs did not constitute "information access" traffic subject to Section 251(g), as the FCC had asserted.[40] The D.C. Circuit did *not*, however, cast any doubt on the FCC's express finding that Section 251(b)(5) applies "on its face" to *all* telecommunications traffic, whether local or otherwise. Indeed, in deciding not to vacate the FCC's order, the D.C. Circuit found that there was a non-trivial likelihood that the Commission could adopt its rules pursuant to Section 251(b)(5). Accordingly, Qwest's claim that the *ISP Remand Order* applies only to "local" traffic is incorrect and inconsistent with the history of the *ISP Remand Order*.

36. Sections 251(b)(5) and 252(d)(2) govern ISP-bound traffic and are not limited to "local" termination. Further, the terms "originate" and "terminate" in Sections 251(b)(5) and

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[37] *Id.* at ¶ 32 (emphasis in original).

[38] *Id.* at ¶ 38.

[39] *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

[40] *Id.*

252(d)(2) do not exclude traffic delivered to non-local end-points. Qwest attempts to limit Sections 251 and 252 to calls placed to an ISP physically located within the same local calling area as the caller. By their plain terms, however, Sections 251 and 252 contain no such geographic limitation on the scope of calls. They refer simply to the "transport and termination of telecommunications" and the "transport and termination...of calls."[41] Congress chose the broad term "telecommunications" over the much narrower term "telephone exchange service" to describe the scope of the LECs' termination obligations under Section 251(b)(5).[42]

37. Nothing in the *ISP Remand* Order limits reciprocal compensation payments to traffic exchanged within the same calling area. Indeed, while Qwest relies on background statements in the *ISP Remand Order* that discuss ISPs "typically" establishing points of presence in the same local calling area, the FCC's decision was in no way dependent upon the geographic location of the ISP. To the contrary, the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream, all the way to the server on which the actual content was located.[43] In addition, this Commission previously rejected this same argument.[44]

38. It is worth noting that in its *ISP Remand Order*, the FCC noted that a number of CLECs had negotiated interconnection agreements with RBOCs that reduced the compensation rate for ISP-bound traffic when it adopted the new rate structure.[45] Each of those agreements

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[41] 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i).

[42] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Section 251(b)(5) Applies to ISP-Bound Traffic, at 2 (*ex parte* submission of AT&T Corp.)(filed May 28, 2004).

[43] *See ISP Remand Order* at ¶¶ 77-88.

[44] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, *Seventh Supplemental Order: Affirming Arbitrator's Report and Decision*, February 28, 2003.

[45] *See id.* at ¶ 84.

cited by the FCC, including Level 3's agreements with Verizon and SBC, provided for the payment of compensation for VNXX ISP-bound traffic.

ii. The FCC's ISP Remand Order Rules Also Rejected Any Distinction Between Local and Non-local ISP-bound Traffic

39. The rule changes adopted by the FCC in the *ISP Remand Order* demonstrate the FCC's repudiation of its earlier view that Section 251(b)(5) applies only to "local" termination of telecommunications. In the *ISP Remand Order*, the FCC amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart H) in two key respects. First, it eliminated the word "local" in each place it appeared. This is consistent with the FCC's confession that it had erred when it had previously interpreted Section 251(b)(5) to apply to "local" traffic only.[46] Second, in so doing, the Commission expanded the scope of "telecommunications traffic" under the reciprocal compensation rules to cover *all* "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider" except for traffic "that is interstate or intrastate exchange access, information access, or exchange services for such access," which are the specific categories of traffic enumerated in Section 251(g). And, as discussed above, the D.C. Circuit rejected the FCC's argument that ISP-bound traffic was information access excluded from Section 251(b)(5) by operation of Section 251(g).

b. The *ISP Remand Order* Applies to VNXX ISP-bound Traffic

40. Qwest contends that the FCC's *ISP Remand Order* applies only to traffic delivered to ISPs within the same local calling area as the called party, which would preclude its application to VNXX traffic. However, as explained above, this assertion is contradicted by the express

[46] *See id.* at ¶ 26.

terms of the *ISP Remand Order*.[47] The FCC repudiated its earlier ruling from the *Local Competition Order* that the provision is limited to the termination of "local" telecommunications. In *WorldCom*, the D.C. Circuit Court clarified that ISP-bound traffic does not fall within Section 251(g) because there are no pre-1996 Act rules that Section 251(g) could possibly preserve. This same analysis is equally applicable to VNXX traffic bound for an ISP, for which there is also no pre-1996 Act rule governing the exchange of traffic between LECs. Accordingly, the ILECs' claim that ISP-bound traffic that does not originate and terminate within the same local calling area falls outside the scope of Section 251(b)(5) is inconsistent with both the *ISP Remand Order* and judicial interpretations of the 1996 Act.

41. In addition, the D.C. Circuit's decision in *Bell Atlantic v. FCC* rejected the end-to-end analysis of ISP-bound traffic upon which Qwest relies to argue that VNXX calls should be subject to access charges and not reciprocal compensation.[48] As the D.C. Circuit explained, the end-to-end analysis is used to determine the *jurisdiction* of a call, not the compensation that is due. Thus, when the FCC relied on the "end-to-end" analysis to determine that ISP-bound traffic is not "local," the D.C. Circuit reversed and remanded the decision. On remand, the FCC did not explain how the end-to-end analysis was relevant to determining the appropriate compensation model; instead, it relied on Section 251(g) to carve out certain traffic from the reciprocal compensation provisions of Section 251(b)(5). As a result, Qwest cannot rely on the end-to-end analysis to determine which form of intercarrier compensation (access or non-access) should apply to VNXX traffic bound for an ISP.

c. Level 3's VNXX ISP-bound Traffic is not "Exchange Access"

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[47] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-96 and 99-68, Sections 251(b)(5) and Section 252(d)(2) Govern ISP-Bound Traffic and Are Not Limited to "Local" Termination (*ex parte* submission of Level 3 Communications, LLC) (filed June 23, 2004).

[48] *Bell Atlantic,* 206 F.3d at 4-9.

42. Contrary to Qwest's assertions, VNXX service is not exchange access.[49] The 1996 Act defines exchange access as "the offering of access to telephone exchange services or facilities for purposes of origination and termination of telephone toll services."[50] "Telephone toll service" is defined as "telephone service between stations in different areas for which there is a separate charge not included in contracts with subscribers for exchange service."[51] Qwest, however, is unable to point to a "separate charge" levied by Level 3 when it offers ISP-bound VNXX service. The statutory definition plainly contemplates a traditional interexchange call, in which an interexchange carrier charges the end user for interexchange transport separately from that end user's local service. Level 3 offers a tariffed local service called Direct Inward Dialing. This service allows ISPs, or any other customer who wishes to receive inbound calls, to obtain numbers associated with certain local calling areas. When an end user dials that local number, that end user is not billed for making a toll call because the originating caller pays Qwest through its local phone service to be able to make that call. As a result, there is no "separate charge not included in contracts with subscribers for exchange access" and ISP-bound calls to VNXX numbers cannot satisfy the definition of exchange access. Very few – if any – customers of a dial-up ISP would intentionally incur per minute of use charges by placing a toll call to reach that ISP.

2. Treating VNXX ISP-bound Traffic Differently than Other Locally Dialed ISP-bound Traffic Doesn't Make Sense

43. Forcing Level 3 to mimic Qwest's historical network architecture needlessly introduces inefficiency that raises the ISP's costs (and resulting rates) to provide dial-up Internet access to end user customers. VNXX arrangements, by contrast, impose no greater obligation on

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[49] *Id.*

[50] 47 U.S.C. § 153(16).

[51] 47 U.S.C. § 153(48).

Qwest—*i.e.*, Qwest must carry traffic to the same point of interconnection with Level 3 regardless of where the traffic is routed after it reaches the point of interconnection. As a result, Qwest's position regarding VNXX arrangements will limit the availability of affordable Internet access for end user customers and reduce Internet usage.

44. Significantly, VNXX arrangements do not generate additional costs for Qwest beyond those associated with interconnection for any other ISP-bound traffic. All traffic generated by Qwest end users to Level 3's customers is exchanged between the Qwest and Level 3 networks at a POI within a LATA or as negotiated by the Parties in their Interconnection Agreement. Qwest has the obligation to bring its traffic to the POI, regardless of where it originated within the LATA. From that point, Level 3 is responsible for all the transport associated with delivering the call to the called party. Thus, Qwest's transport cost is solely determined by the location of the POI at which Qwest hands off the traffic to Level 3, and not by whether the ISP server is located within Qwest's local calling area, or in a different local calling area or state, as those transport costs are borne by Level 3.

45. VNXX arrangements create economies of scale and scope for ISPs. This, in turn, reduces the cost of, and promotes competition for, dial-up Internet access. First, VNXX arrangements allow ISPs to serve an entire LATA from a single server (or even multiple LATAs or multiple states), reducing the costs of serving larger geographic areas by allowing those areas to share economies of scale and scope. Second, VNXX arrangements enable Level 3 to consolidate switching into regional switching centers that allow Level 3 to take advantage of the decreased cost of processing calls. In fact, as discussed below Qwest has admitted that it uses similar arrangements to serve its own ISP customers. Efficient distribution enables more consumers to benefit from low-priced dial-up Internet access, expanding the availability and

usefulness for those consumers who are not ready to make the jump to broadband or for whom broadband is not yet affordable.

46. Qwest's position would force ISPs that are not customers of Qwest to divide their operations according to the antiquated system of geographic exchange boundaries. Indeed, if Qwest had its way, the only way for competitors to operate a dial-up Internet access service would be to forego regional servers, and locate a server in every Oregon local calling area. This type of backward-looking and discriminatory industrial policy would particularly harm consumers.

3. The *Core Forbearance Order* Simply Makes More Minutes of Use Compensable

47. The *Core Forbearance Orde*r did not change the FCC's regime requiring compensation for all ISP-bound traffic (including VNXX) at the rate of $0.0007. The *Core Forbearance Order*, by lifting the restrictions of the Growth Caps and New Markets restrictions, simply increased the number of minutes of use for which carriers should be compensated for terminating ISP-bound traffic.

48. The *Core Forbearance Order* reaffirms that a CLEC using local dialing patterns for ISP-bound traffic is entitled to receive intercarrier compensation for terminating such ISP-bound traffic. The FCC's retention of the Rate Cap and Mirroring rules and forbearance from the New Markets and Growth Cap rules has made it clear that ISP-bound traffic encompasses traffic that is terminated to an ISP by means of VNXX routing.

49. The Growth Caps rule imposed a cap on the total ISP-bound minutes for which a LEC could receive compensation.[52] The New Markets rule provided that if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP Remand Order*, the two carriers must exchange this traffic on a bill-and-keep basis.[53]

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[52] *ISP Remand Order* at ¶ 78.

[53] *Id.* at ¶ 81.

50. The FCC in the *Core Forbearance Order* recognizes that the ISP dial-up market since the issuance of the *ISP Remand Order* has changed, thereby requiring reassessment of the *ISP Remand Order* adopted rules. In analyzing the *ISP Remand Order* rules, the FCC focused on the potential for arbitrage of transport and termination rates between local voice traffic and ISP-bound traffic.[54] Also, the rationale embraced by the FCC was to promote *efficient investment* in telecommunications services and facilities.[55]

51. In affirming the goal of establishing efficient network investment signals, the FCC does not set forth a requirement for a CLEC to establish a local presence in order to receive intercarrier compensation for ISP-bound traffic. Rather, the focus is on cost equivalency—with the statement that because delivery costs between ISP-bound traffic and local voice traffic are equivalent, CLECs are entitled to receive intercarrier compensation for transport and termination of ISP-bound traffic on the terminating side of the POI.[56] Of note is that the FCC did not state that ISP-bound traffic should be compensated in the same manner as local voice traffic. Instead, the FCC retained the functional and jurisdictional distinction between ISP-bound traffic and local voice traffic, while adhering to the goal of uniform intercarrier compensation (i.e., that transport and termination of ISP-bound traffic and local voice traffic be compensated at the same rate).[57]

52. To exclude VNXX from the definition of ISP-bound traffic would require significant and unnecessary incremental network investment expense and two separate compensation constructs. One compensation construct would be based upon cost equivalency between local voice calls and ISP-bound traffic and the other scheme would be non-cost based between the two types of calls. If VNXX were not included within the definition of ISP-bound

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[54] *Core Forbearance Order* at ¶¶ 18, 19, 20, 21.

[55] *Id.* at ¶ 19.

[56] *Core Forbearance Order* at ¶ 24

[57] *Id.*

traffic, the resulting two-tiered compensation approach would undercut both the principle of efficient network architecture and investment and the goal of a uniform intercarrier compensation framework. A two-tiered compensation scheme contradicts the FCC's stated goals in the *Core Forbearance Order*.

B. Washington Law Provides that the Federal Rules Governing Intercarrier Compensation for ISP-bound Traffic Apply to All ISP-bound Traffic, Including VNXX

53. In Counterclaim 2, Qwest alleges that Level 3 is violating state law by billing Qwest the federal reciprocal compensation rate for all VNXX ISP-bound traffic. This Commission's decision in Docket UT-023043 directly contradicts Qwest's position. Level 3 is entitled to judgment as a matter of law.

54. With regard to Counterclaim 2, there are no disputed issues of fact. Qwest admits that, under the FCC's *ISP Remand Order* and *Core Forbearance Order*, it must pay intercarrier compensation to Level 3 for locally dialed ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the federally-mandated rate of $0.0007 per minute of use. Qwest asserts, however, that the FCC's reciprocal compensation regime for ISP-bound traffic applies only if the customer initiating the call and the ISP server receiving the call are physically located in the same local calling area. Under Qwest's interpretation of the law, Qwest is not required to pay reciprocal compensation for virtual NXX ("VNXX") traffic. The issue before the Commission is whether the federal reciprocal compensation regime for ISP-bound traffic applies to NVXX ISP-bound traffic. This issue is purely a matter of law that has previously been decided by this Commission.

55. This Commission's decision in Docket UT-023043 directly contradicts Qwest's position. In that case, CenturyTel argued that the *ISP Remand Order* mandated compensation for

ISP-bound traffic only if the originating caller and the ISP server receiving the call are located in the same local calling area. The Commission rejected this argument, stating that:

> CenturyTel argues that both the FCC and the D.C. Circuit Court [WorldCom] decisions characterize the issue as one of proper compensation for calls to *local* ISPs. CenturyTel emphasizes the use of the word "local." We believe CenturyTel reads too much into what are very general characterizations by the FCC and the appeals court of the issue before it. The substance of the decision makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously opffered by the FCC for its treatment of ISP-bound traffic. We believe the arbitrator properly rejected CenturyTel's argument.[58]

56. The Commission affirmed the arbitrator's decision that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[59] At the time of this decision, the FCC had determined that, if carriers were not exchanging ISP-bound traffic in the first quarter of 2001, then traffic exchanged after that date would be at bill and keep. This provision of the *ISP Remand Order* is referred to the "New Markets exclusion", which the FCC eliminated in the *Core Forbearance Order.* This change, however, does not affect this Commission's decision in the Level 3/CenturyTel arbitration that the FCC's intercarrier compensation requirements applied to all ISP-bound traffic. This Commission did not decide that bill-and-keep was the correct compensation mechanism; it simply decided that the federal compensation mechanism applied to VNXX ISP-bound traffic, no matter what the FCC decided that mechanism should be.[60] In fact, during the proceeding, the Commission specifically recognized that the FCC had preempted the Commission's authority to determine the correct

[58] Level 3/CenturyTel Arbitration Order at ¶ 10.

[59] *Id.* at ¶¶ 1, 35.

[60] *Id.* at ¶ 20.

intercarrier compensation mechanism to apply to ISP-bound traffic, but had not preempted the Commission's authority to arbitrate other interconnection issues relating to ISP-bound traffic.[61]

57. In its Answer and Counterclaims, Qwest mistakenly asserts that this Commission's decision in UT-033035 effectively overrules its decision in UT-023043.[62] Qwest states:

> In the AT&T/Qwest arbitration proceeding [Docket UT-033035], there was a dispute about the definition of a "local" call. The Commission ruled that the definition of local exchange service would remain limited to traffic that originated and terminates within the same Commission-determined local calling area, (rejecting AT&T's request for a definition based on "the calling and called NPA/NXXs" (i.e., Virtual NXX (or VNXX))). The Arbitrator in that proceeding had also ruled that reciprocal compensation for calls that terminate outside the local calling area in which they originate is inappropriate, and thus that such traffic should be compensated on a bill and keep basis, and the Commission adopted the Arbitrator's Report.[63]

58. Qwest misinterprets the Commission's decision in UT-033035. Although it is true that the Commission rejected AT&T's definition of a local call, the Commission and the Arbitrator recognized that Qwest's definition (which limited the definition of Exchange Service or EAS/Local Traffic to traffic originated and terminated in the same local calling area, as defined by the Commission) should not be interpreted to prevent AT&T from competing with Qwest's FX offerings.[64] In addition, the Commission was deciding the correct definition for "Exchange Service" or "Extended Area Service (EAS)/Local Traffic," not the definition of ISP-bound traffic.

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[61] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC. and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, *Third Supplemental Order Confirming Jurisdiction*, October 25, 2002.

[62] Answer and Counterclaims at ¶ 12.

[63] *Id.* (footnotes omitted).

[64] *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b)*, Docket No. UT-033035, *Final Order Affirming Arbitrator's Decision; Approving Interconnection Agreement*, February 6, 2004. at ¶¶ 13-16 (citing Arbitrator's Report).

59. Furthermore, although it is true that the Commission adopted the Arbitrator's Report, the Commission specifically stated that the Arbitrator's comments about the appropriate reciprocal compensation mechanism for VNXX traffic were dicta and "do not bind the parties to specific arrangements, nor do they bind us if we must ultimately resolve a dispute over implementation."[65]

60. This Commission has determined that FX-like ISP-bound calls should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[66] Therefore, Qwest's failure to pay the federally-mandated rate for transport and termination of VNXX ISP-bound traffic is a violation of state law, and Level 3 is entitled to judgment as a matter of law on Counterclaim 2.

C. Level 3 Has Complied With the Change in Law Provision of the Parties' Interconnection Agreement

61. In Counterclaim 3, Qwest asserts that Level 3 has violated Section 2.2 of the Parties' Interconnection Agreement by invoicing Qwest for the transport and termination of Qwest-originated VNXX ISP-bound traffic, rather than negotiating an amendment to the Agreement to reflect the *Core Forbearance Order*.

62. With respect to this Counterclaim, there is no disputed issue of material fact. Both Level 3 and Qwest agree that an amendment to the Interconnection Agreement is necessary to reflect the FCC's decision in the *Core Forbearance Order*. The Parties have been unsuccessful in negotiating such an amendment. Qwest claims that it presented a proposed amendment that complied with the order, "but Level 3 has rejected Qwest's proposed language."[67] As demonstrated in section IV.F below, Qwest's proposal was directly contrary to state and federal

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[65] *Id.* at ¶ 16.

[66] *Level 3/CenturyTel Arbitration Decision.* at ¶¶ 1, 35.

[67] Answer and Counterclaims at ¶ 70.

law. Level 3 presented an amendment to Qwest, but Qwest rejected Level 3's proposal. Accordingly, Level 3 has continued to invoice Qwest in accordance with the *Core Forbearance Order* and the decisions of this Commission in order to perfect and maintain its claim.

63. Given this failure to agree, Section 2.2 provides that the Parties should resolve the issue pursuant to the dispute resolution provisions of the Agreement. Section 5.18 governs dispute resolution and allows either party to seek resolution of a dispute before this Commission.[68] That is exactly what Level 3 has done by filing its Petition. Accordingly, Level 3 has not violated Section 2.2 of the Interconnection Agreement and is entitled to judgment as a matter of law.

D. Level 3 Has Complied With Section 13.4 of the Parties' Interconnection Agreement

64. In Counterclaim 4, Qwest alleges that Level 3 is violating Section 13.4 of the Interconnection Agreement by "misassigning local telephone numbers to ISP servers which are physically located outside the local area to which the telephone number is assigned." Section 13.4 states:

> Each Party is responsible for administering NXX codes assigned to it. Each Party is responsible for updating the LERG data for NXX codes assigned to its switches. Each Party shall use the LERG published by Bellcore or its successor for obtaining routing information and shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner.

65. Qwest's claims that Level 3 is violating Section 13.4 of the Interconnection Agreement by assigning NXX codes to ISP servers which are that are not physically located

[68] Interconnection Agreement at § 5.18.6.

inside the local area to which that telephone number is assigned, despite the fact that this is no different than what Qwest does in offering its wholesale dial-up and FX services.[69]

66. Moreover, Qwest fails to provide any facts to explain how Level 3 has violated this section of the Interconnection Agreement. Qwest simply states that "[t]hrough its actions described above, Level 3 is violating these obligations." However, Qwest alleges no facts regarding Level 3's alleged failure to update the LERG data with the NXX codes assigned to its switches or to provide all required information regarding its network and no facts to support the allegation that Level 3 has not properly administered the NXX codes assigned to it. Accordingly, Qwest has failed to state a claim upon which relief may be granted and Level 3 is entitled to summary judgment as a matter of law.

E. Level 3 Has Properly Routed Traffic Over LIS Trunks

67. In Counterclaim 5, Qwest alleges that Level 3 has improperly routed VNXX ISP-bound traffic over LIS trunks. With regard to this Counterclaim, there are no disputed issues of material fact. Both Parties agree that Qwest has routed ISP-bound traffic from its end users to Level 3 over the LIS trunks established under the Interconnection Agreement between the parties. The only issue is whether the Interconnection Agreement permits this exchange of traffic, which is a question of law.

68. The Interconnection Agreement authorizes the Parties to exchange ISP-bound traffic over LIS Trunks.[70] ISP-bound traffic is defined "as that term is used in the FCC ISP [Remand] Order."[71] Qwest disputes that VNXX ISP-bound traffic is "ISP-bound traffic" as

[69] *See* Qwest's Response to Level 3's Data Request No. 24, attached as Exhibit A to the Affidavit of Mack Greene, filed herewith ("*Greene Affidavit*").

[70] Interconnection Agreement at ¶ 7.2.1.2.

[71] Interconnection Agreement at ¶ 7.3.4.3.

defined in the *ISP Remand Order*. However, as this Commission has already decided[72], the *ISP Remand Order* encompasses VNXX ISP-bound traffic. Because the Interconnection Agreement was approved by this Commission, and the exchange of all ISP-bound traffic is authorized under Section 7.2.1.2 of that agreement, Level 3 is entitled to summary judgment as a matter of law.

F. Level 3's Proposed Amendment to the Interconnection Agreement Accurately Reflects the FCC's *Core Forbearance Order*, and the Commission Should Require Qwest to Execute the Amendment

69. In Count II of its Petition, Level 3 asks the Commission to order Qwest to execute an amendment to the Interconnection Agreement that correctly reflects the *Core Forbearance Order*.[73] The Commission should find, as a matter of law, that the Parties should adopt Level 3's proposal, should require Qwest to execute the amendment as of the effective date of the *Core Forbearance Order*, and should require Qwest to compensate Level 3 accordingly.

70. There are no disputed issues of fact with regard to Count II. Both Qwest and Level 3 agree that an amendment to the Interconnection Agreement is required in order to reflect the change in law set forth in the FCC's *Core Forbearance Order*. The only issue is one of law—whether Qwest's proposed amendment or Level 3's more accurately reflect the terms of that Order.

71. Qwest's proposed amendment states:

> 1.3 Qwest will not pay reciprocal compensation on traffic, including ISP-bound traffic, originated by the Qwest end user customer that is not terminated to the CLEC's end use customer physically located within the same Qwest local calling area (as approved by the state Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether the CLEC's end user customer is assigned an NPA-NXX associated with a rate center in which the Qwest customer is physically located (a/k/a "VNXX Traffic").

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[72] *See Level 3/Qwest Arbitration Order.*

[73] A copy of Level 3's proposed amendment is attached as Exhibit B to the *Greene Affidavit.*

> 1.4 For the purposes of Relative Use Factor (RUF) calculation, if and where applicable to facilities charges within the Agreement, CLEC is responsible for all ISP-bound traffic originated by the Qwest end user customer and all traffic, including ISP-bound, that is not terminated to the CLEC's end user physically located within the same Qwest local calling area (as approved by the state Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether the CLEC's end user customer is assigned an NPA-NXX associated with a rate center in which the Qwest customer is physically located (a/k/a "VNXX Traffic").[74]

72. As discussed above, this Commission has specifically ruled that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[75] Accordingly, Qwest's proposed paragraph 1.3 directly contradicts this Commission's *Level 3/CenturyTel Arbitration Order* and inaccurately reflects state and federal law.

73. In addition, Qwest's proposed paragraph 1.4 states that for the purposes of the Relative Use Factor (RUF) calculation, CLEC is responsible for all ISP-bound traffic originated by the Qwest end user customer. This is inconsistent with this Commission's prior decision in Docket UT-023042, which is the decision approving the very Interconnection Agreement that the Parties are seeking to amend.[76] In its order approving the Agreement, the Commission found that *Qwest*, not Level 3, is responsible for all ISP-bound traffic originated by its end user customers for purposed of the RUF calculation.

74. Level 3's proposed amendment states that "the Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC *Core Order*" and that "[c]ompensation for ISP-bound traffic will be at the rate of $0.0007 per minute."[77] Given this

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[74] Exhibit C to the *Greene Affidavit.*

[75] *Level 3/CenturyTel Arbitration Order* at ¶¶ 1, 9, 10.

[76] *See* Level 3/Qwest Arbitration Order.

[77] Exhibit B to the *Greene Affidavit* at ¶¶ 2.1, 2.2.

Commission's ruling in the *Level 3/CenturyTel Arbitration Order*, ISP-bound traffic would include VNXX ISP-bound traffic. Level 3's proposed amendment accurately reflects state and federal law. Accordingly, this Commission should require Qwest to execute this Amendment.

75. Level 3's proposed amendment has an effective date of October 8, 2004, which was the effective date of the *Core Forbearance Order*. Level 3 is entitled, as a matter of law, to payment of reciprocal compensation for all ISP-bound traffic originated by Qwest's end user customer since that date, including VNXX traffic, at the rate of $0.0007 per minute of use. To hold otherwise would permit ILECs such as Qwest to avoid any negative financial impacts associated with a change in the law by refusing to negotiate an amendment in a timely manner. This would give all ILECs a perverse incentive to delay negotiation of amendments to reflect changes in the law, which would be inconsistent with the Section 251 of the Act. Therefore, this Commission should find, as a matter of law, that the Parties should adopt Level 3's proposal, should require Qwest to execute the amendment as of the effective date of the *Core Forbearance Order*, and should require Qwest to compensate Level 3 accordingly.

VI. CONCLUSION

76. For the above reasons, Level 3 is entitled to judgment as a matter of law on Count 2 of the Petition and all Counterclaims in the Answer and Counterclaims. Accordingly, Level 3 respectfully requests that the Commission enter an order, pursuant to WAC 480-07-380, granting summary determination in Level 3's favor on these claims.

RESPECTFULLY SUBMITTED this 15th day of August, 2005.

LEVEL 3 COMMUNICATIONS, INC

By: _____

Gregg Strumberger, Esq.
Victoria Mandell, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Tel: (720) 888-2620
Fax: (720) 888-5134
E-Mail: gregg.strumberger@Level3.com
victoria.mandell@Level3.com

Attorneys for Level 3 Communications, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of August, 2005, 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:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
__x__ Overnight Mail (UPS)
____ Facsimile (360) 586-1150
__x__ Email (records@wutc.wa.gov)

I hereby certify that I have this 15th day of August, 2005, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of:

Lisa A. Anderl
Adam L. Sherr
Qwest Corporation
1600 7th Avenue, Room 3206
Seattle WA 98191

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
__X__ Overnight Mail (UPS)
____ Facsimile (206) 343-4040
__x__ Email (lisa.anderl@qwest.com)

On Behalf Of:

Alex M. Duarte
Qwest Corporation
421 SW Oak Street
Portland OR 97204

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
__x__ Overnight Mail (UPS)
____ Facsimile (503) 242-8589
__x__ Email (alex.duarte@qwest.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of August, 2005, at Seattle, Washington.