

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

IC 12

In the Matter of)	
)	
QWEST CORPORATION vs. LEVEL 3)	
COMMUNICATIONS, LLC,)	RULING
)	
Complaint for Enforcement of Interconnection)	
Agreement.)	

DISPOSITION: COMPENSATION FOR VNXX-ROUTED
ISP-BOUND TRAFFIC NOT AUTHORIZED
UNDER INTERCONNECTION AGREEMENT

Procedural History

On June 6, 2005, Qwest Corporation (Qwest) filed a complaint against Level 3 Communications, LLC (Level 3), asserting that Level 3 is violating federal law, state law, and terms of the Interconnection Agreement (ICA) executed by the parties. Qwest alleges that Level 3 is assigning local telephone numbers to Internet Service Provider (ISP) customers, even though the ISP’s modem banks (or servers) are not located within the local calling area to which those numbers have been assigned. Qwest asserts that Level 3 improperly seeks payment of reciprocal compensation for such ‘Virtual NXX’ (VNXX) traffic. Qwest further alleges that Level 3 is violating the ICA by obligating Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) trunks.

Level 3 responded to Qwest’s complaint on June 20, 2005. It denies the allegations in the complaint and counterclaims that Qwest is violating the ICA by refusing to compensate Level 3 for the transport and termination of Qwest-originated ISP-bound traffic. Level 3 also counterclaims that Qwest violated the ICA by failing to negotiate an amendment to the agreement reflecting the Federal Communications Commission’s (FCC’s) *Core Communications Order*.¹

¹ *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 Communications Order*”).

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the ALJ issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange of VNXX-routed ISP-bound traffic. Because Section 7.3.4.3 of the ICA provides that the parties shall exchange “ISP-bound traffic (as that term is used in the FCC ISP Order),”² a central issue in this complaint proceeding is whether the FCC’s use of the term “ISP-bound traffic” in that order encompasses VNXX traffic.³ The parties filed briefs addressing that issue on July 18, 2005.

VNXX

In Order No. 04-504, the Commission described VNXX as follows:

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A ‘Virtual NXX’ (VNXX) occurs when a CLEC assigns a ‘local’ rate center code to a customer physically located in a ‘foreign’ rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer’s phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer’s physical location in Portland is a distance of some 50 miles. Thus, under a CLEC’s VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC’s Portland customer. When those same customers call the ILEC’s Portland customers, served out of the same central office as the CLEC’s Portland customer, they are charged intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided

² The ‘FCC ISP Order’ is more commonly known as the ‘ISP Remand Order.’ I use the latter reference throughout this ruling. See, *In the Matter of 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, para. 81, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2000, *remanded sub nom*, *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh’g en banc denied*, (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). (“*ISP Remand Order*.”)

³ ALJ Memorandum, July 5, 2005, at 2.

business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost 21 years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.⁴

For purposes of this case, “VNXX-routed ISP-Bound traffic” describes a situation wherein a CLEC, such as Level 3, obtains numbers for various locations within a state. Those numbers are assigned by the CLEC to its ISP customers even though the ISP has no physical presence (*i.e.*, does not locate its modem banks or server) within the local calling area (“LCA”) associated with those telephone numbers. ISP-bound traffic directed to those numbers is routed to the CLEC’s Point of Interconnection (POI) and then delivered to the ISP’s modem bank/server at a physical location in another LCA.⁵

Qwest takes the position that the FCC’s definition of ISP-bound traffic in the *ISP Remand Order*, and therefore Section 7.3.4.3 of the ICA, encompasses only those circumstances where an ISP modem bank/server is physically located in the same LCA as the end-user customer initiating an Internet call.⁶ Level 3, on the other hand, maintains that the *ISP Remand Order*, read in conjunction with the *Core Communications Order*, requires that reciprocal compensation must be paid on *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic.

Applicable Law

Section 251(b)(5) of the Telecommunications Act of 1996 requires all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In its 1996 *Local Competition Order*,⁷ the FCC found that Section 251(b)(5) reciprocal compensation obligations “apply only

⁴ Order No. 04-504 at 2. (Footnotes omitted.)

⁵ Qwest notes that the ISP server or modem banks may be located in another state. VNXX arrangements can also exist for voice traffic. Qwest Brief at 1-2. See also, *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket UM 1058, Order No. 04-504 (Sept. 7, 2004).

⁶ Thus, for intercarrier compensation purposes, Qwest states that the relevant endpoints are the physical location of the calling party and the physical location of the ISP’s servers or modem banks. Qwest describes this arrangement as “local ISP traffic,” to distinguish it from “VNXX-routed ISP-bound traffic.”

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 (1996), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). (“*Local Competition Order*.”)

to traffic that originates and terminates *within a local area* as defined by the state commissions.”⁸

In its 1999 *Declaratory Ruling*, the FCC concluded that ISP-bound traffic was interstate traffic, and therefore not subject to the reciprocal compensation provisions of §251(b)(5).⁹ The FCC “reached this conclusion by applying its end-to-end analysis, traditionally employed in determining whether a call was jurisdictionally interstate or not, stressing that ISP-bound traffic ultimately reaches websites that are typically located out-of-state.”¹⁰

On review in *Bell Atlantic Tel. Cos. v. FCC*,¹¹ the United States Court of Appeals for the District of Columbia (D.C. Circuit) vacated and remanded the *Declaratory Ruling*. The Court held “that the [FCC’s] order had failed to adequately explain why the traditional ‘end-to-end’ jurisdictional analysis was relevant to deciding whether ISP calls fitted the local call or the long-distance call model.”¹²

On remand, the FCC again concluded that the reciprocal compensation provisions of §251(b)(5) should not govern the compensation between two LECs involved in delivering ISP-bound traffic.¹³ This time, however, the FCC abandoned the “local v. long distance” dichotomy used in the end-to-end analysis in the *Declaratory Ruling*.¹⁴ Instead, the FCC held that “under §251(g) of the Act it was authorized to

⁸ Local Competition Order at ¶1034, *ISP Remand Order* at ¶12. (Emphasis added.)

⁹ *ISP Remand Order* at ¶1.

¹⁰ *WorldCom Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Circuit 2002) (*WorldCom*).

¹¹ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000) (*Bell Atlantic*).

¹² *WorldCom*, 288 F.3d at 431.

¹³ *Id.*

¹⁴ *ISP Remand Order* at ¶¶46-47, 54, 56; *See also, Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003), *ISP Remand Order* at: In the *ISP Remand Order*, the FCC explained that it had erred by attempting to characterize ISP-bound traffic as “local” or “long distance.” It held, in part:

45...By indicating that all ‘local calls,’ however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term ‘local call,’ and thus that term could be interpreted as meaning either traffic subject to local *rates* or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term ‘local’ created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs, yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*. There we held that ‘[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2).’ We now hold

‘carve out’ from §251(b)(5) calls made to ISPs located within the caller’s local calling area.”¹⁵ Specifically, the FCC concluded that ISP-bound traffic is “information access” under §251(g), and therefore “excepted from the scope of ‘telecommunications’ subject to reciprocal compensation under §251(b)(5).”¹⁶

On review in *Worldcom v. FCC*, the D.C. Circuit again remanded the *ISP Remand Order* to the FCC. The Court concluded that the FCC erred in relying upon §251(g) “to ‘carve out’ from §251(b)(5) calls made to internet service providers (‘ISPs’) located within the caller’s local calling area.”¹⁷ Emphasizing that its decision was limited to 251(g), the Court stated:

Having found that §251(g) does not provide a basis for the Commission’s action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’ (as those terms are defined in the Act, 47 U.S.C. §§153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the ‘telecommunications’ covered by §251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to §251(b)(5); see §252(d)(B)(i) (referring to bill-and-keep). Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether §251(g) provided the

that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase ‘local traffic’ created unnecessary ambiguities, and we correct that mistake here. *ISP Remand Order* at ¶¶45-46, see also, ¶¶23-31, 54. (Footnotes omitted.)

¹⁵ *WorldCom*, 288 F.3d at 430.

¹⁶ *Id.* at 431. Having removed ISP-bound calls from the scope of §251(b)(5), the FCC established an interim compensation regime including a transition to ‘bill and keep,’ whereby each carrier recovers its costs from its own end-users. In arriving at this solution, the FCC pointed to a number of flaws in the prevailing intercarrier compensation mechanism for ISP calls, under which the originating LEC paid the LEC that served the ISP. Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls.... To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules that sought to limit arbitrage opportunities by lowering the amounts and capping the growth of ISP-related intercarrier payments. These tend to force ISP-serving LECs to recover an increasing portion of their costs from their own subscribers rather than from other LECs. *Id.* at 431-432. See also, *ISP Remand Order* at ¶1.

¹⁷ *Id.* at 430. (Emphasis added.)

authority claimed by the Commission for not applying §251(b)(5).

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§251(b)(5) and 252(d)(B)(i)).¹⁸

Discussion.

I. As noted above, the Level 3/Qwest ICA provides that the parties shall exchange ISP-bound traffic as that term is used in the FCC's *ISP Remand Order*, pursuant to the rates specified in the *ISP Remand Order*.¹⁹ The parties appear to agree that, until October 18, 2004, at least, no compensation was due for ISP-bound traffic in accordance with Section 7.3.6.3 of the ICA. That provision basically mirrors the "New Markets Rule" adopted in the *ISP Remand Order*.²⁰

On October 18, 2004, the FCC released its *Core Communications Order*, granting forbearance from the New Markets Rule. Level 3 asserts that the practical effect of that Order is to require intercarrier compensation for all ISP-bound traffic, including VNXX-routed ISP-bound traffic, after October 18, 2004, under Section 7.3.6.2.3.4 of the ICA. That provision contemplates payment at \$.0007 per minute of use (MOU).

Qwest apparently concedes that the *Core Communications Order* requires it to pay Level 3 for "local" ISP-bound traffic originated by Qwest customers

¹⁸ *Id.* at 434.

¹⁹ Section 7.3.4.3 provides: "The Parties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order. The FCC ordered rate for ISP-bound traffic will apply to EAS/Local and ISP-bound traffic in lieu of End Office call termination and Tandem Switched Transport. See Section 7.3.6 of this Agreement for FCC-ordered rates."

Section 7.3.6 of the ICA is entitled 'ISP-Bound Traffic.' Section 7.3.6.1 specifies that 'the Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.' Accordingly, the rates set forth in the ICA mirror the interim compensation rates specified in the *ISP Remand Order*.

²⁰ *ISP Remand Order* at ¶81; *Core Communications Order* at ¶24.

and terminated by Level 3 at the \$.0007/MOU compensation rate.²¹ Qwest's objection, and indeed the principal dispute in this proceeding, concerns whether the ICA requires the parties to exchange compensation for VNXX-routed ISP-bound traffic. In accordance with Section 7.3.4.3, the Commission must determine whether the FCC's definition of "ISP-bound traffic" in the *ISP Remand Order* includes VNXX-routed ISP-bound traffic.²²

II. Qwest argues that prior and subsequent history confirm that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which the customer initiating an Internet call, and the ISP equipment to which that call is directed, are located in the same local calling area. It points out that:

- The FCC's description of ISP traffic in the *Declaratory Ruling* states that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server *in the same local calling area.*"²³
- The *ISP Remand Order* contains essentially the same description of ISP traffic, observing that "an ISP's end-user customers typically access the Internet through an ISP server *located in the same local calling area.*"²⁴
- In the *Bell Atlantic* decision, remanding the *Declaratory Ruling* back to the FCC, the D.C. Circuit stated that the issue before the FCC in the *Declaratory Ruling* was "*whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local.'*"²⁵
- In the *WorldCom* decision, remanding the *ISP Remand Order*, the D.C. Circuit stated that "[i]n the order before us the Federal Communications Commission held that under §251(g) of the Act it was authorized to 'carve out' from §251(b)(5) *calls made to internet service providers ('ISPs') located within the caller's local calling area.*"²⁶

²¹ Qwest Complaint at ¶28; see fn. 6.

²² ALJ Memorandum at 2; Level 3 Brief at 2.

²³ *Declaratory Ruling* at ¶4. (Emphasis added.)

²⁴ *ISP Remand Order* at ¶10. (Emphasis added.) The FCC does not discuss 'atypical' methods of accessing the Internet. Qwest states that the other methods involve making either a 1+ toll call or an "800" service call to access ISP modem banks located outside an end-user's LCA. Qwest Brief at 2.

²⁵ *Bell Atlantic*, 206 F.3d at 2. (Emphasis added.)

²⁶ *Worldcom*, 288 F.3d at 430. (Emphasis added.) The Court also held "[t]he reciprocal compensation requirement of §251(b)(5). . . is aimed at assuring compensation for the LEC that completes a call originating within the same area.'). *Id.*

III. Level 3 argues that nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic exchanged within the same local calling area. It contends that:

[w]hile 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.²⁷

Level 3 also emphasizes that the *ISP Remand Order* expressly repudiates the FCC’s earlier rulings limiting §251(b)(5) to local telecommunications. In that Order, the FCC stated that it had erred in focusing on the nature of the service (i.e., local or long distance) in interpreting the relevant scope of §251(b)(5). Moreover, it specifically found that “[o]n its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* ‘telecommunications’ they exchange with another telecommunications carrier, without exception.”²⁸ In addition, the FCC stated that “[u]nless subject to further limitation, Section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, – i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier.”²⁹

Level 3 further maintains that *WorldCom* expressly rejects the FCC’s conclusion in the *ISP Remand Order* that §251(b)(5) was “subject to further limitation” because certain types of traffic, including ISP-bound traffic were ‘carved out’ by §251(g). It observes that the Court found that “ISP-bound traffic exchanged between LECs did not constitute ‘information access’ subject to §251(g), as the FCC had asserted.”³⁰ It also stressed that the Court did not “cast any doubt on the [FCC’s] express finding that §251(b)(5) applies, ‘on its face,’ to *all* telecommunications traffic, whether local or otherwise.”³¹ In addition, Level 3 observes that the FCC amended its reciprocal compensation rules to eliminate the word “local” and to apply §251(b)(5) to all telecommunications.

²⁷ Level 3 Brief at 6.

²⁸ *ISP Remand Order* at ¶31. (Emphasis in original.)

²⁹ *Id.* at ¶32. (Emphasis in original.)

³⁰ Level 3 Brief at 5.

³¹ *Id.*

IV. For the reasons set forth below, I find that ISP-bound traffic, as defined in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic:

(a) Level 3 appears to argue that the FCC’s decision to reject the “local v. long distance” dichotomy in the *ISP Remand Order* somehow compels the conclusion that the FCC’s definition of ISP-bound traffic includes VNXX-routed ISP-bound traffic. The problem with that argument is that it confuses the FCC’s description of how ISP-bound traffic is provisioned with the agency’s conclusions regarding how that traffic should be treated for reciprocal compensation and jurisdictional purposes.³² Put another way, the FCC’s decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under §251(b)(5), is unrelated to its longstanding definition of ISP-bound traffic.³³ Beginning with the *Declaratory Ruling* and extending to the *ISP Remand Order*, the FCC has consistently described ISP-bound traffic as “the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by the competing LEC.”³⁴ That definition was adopted by the D.C. Circuit in both the *Bell Atlantic* and *Worldcom* decisions. None of these decisions provide any indication that ISP-bound traffic encompasses VNXX-routed traffic.

(b) Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D.C. Circuit are really only “background statements” and were not intended to place a geographical limitation on the placement of ISP servers or modem banks. On the contrary, Level 3 stresses that “the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream...”³⁵ This argument is unconvincing. First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending it to have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Ruling* and the *ISP Remand Order* that make clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer

³² The Ninth Circuit recognized the distinction “between the jurisdictional analysis of what constitutes ‘interstate’ or ‘intrastate’ traffic, and the analysis of what constitutes ‘local’ or ‘interexchange’ traffic for the purposes of reciprocal compensation.” *Pacific Bell*, 325 F.3d at 1126.

³³ As discussed herein, the FCC has consistently recognized that ISP-bound traffic is initiated by an end-user customer making a seven-digit local call to an ISP server/modem bank located in the same local calling area. Once the call reaches the server/modem bank, the ISP utilizes a variety of computer processing and other functions to enable the caller to access the Internet. It is this understanding of ISP-bound traffic that the FCC had in mind as it endeavored to determine whether ISP-bound traffic is eligible for reciprocal compensation. It is also important to note that, in the proceedings that led to the *Declaratory Ruling*, many CLECs argued that ISP-bound traffic actually involved two calls: the first terminating at the ISP’s local server, where a second, packet-switched “call” then commenced. That theory was rejected by the FCC in the *Declaratory Ruling* by applying the end-to-end analysis. The decision to abandon the end-to-end analysis in the *ISP Remand Order* did not, however, alter the FCC’s understanding of how ISP-bound traffic is provisioned. See e.g., *ISP Remand Order* at ¶¶ 9-16.

³⁴ *ISP Remand Order* at ¶13.

³⁵ Level 3 Brief at 6.

initiating the call.³⁶ Third, Level 3’s argument continues to confuse the FCC’s jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is “predominately interstate for jurisdictional purposes.”³⁷ The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC’s holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-user customer initiating the call.

(c) As noted above, Level 3 reads the *ISP Remand Order* and the *Worldcom* decision to mandate that: (a) the reciprocal compensation requirements of §251(b)(5) apply to *all* telecommunications, and (b) that ISP-bound traffic qualifies as telecommunications. These assertions remain open to question.³⁸ Even if Level 3’s interpretation of these decisions is correct, it does not advance its position regarding VNXX traffic. Because VNXX-routed ISP-bound traffic does not fall within the

³⁶ See, e.g., *Declaratory Ruling* at ¶¶4, 7-8, 12, 24 (ftn. 77), 27; *ISP Remand Order* at ¶¶10, 13, 24.

³⁷ The FCC emphasized that it has been consistent in its jurisdictional treatment of ISPs. It further emphasized that “[i]nternet service providers are a class of ESPs [Enhanced Service Providers]. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access.” *ISP Remand Order* at ¶57. (Emphasis in original.) See e.g., ¶¶52-58 for discussion of the ESP exemption.

³⁸ In *WorldCom*, the D.C. Circuit held:

The reciprocal compensation requirement of §251(b)(5), quoted above, is aimed at assuring compensation for the LEC that completes a call originating within the same area. Although its literal language purports to extend reciprocal compensation to all ‘telecommunications,’ the [FCC] has construed it as limited to ‘local’ traffic only. For long distance calls, by contrast, the long-distance carrier collects from the user and pays both LECs – the one originating and the one terminating the call. 288 F.3d at 429. (Citations omitted.)

The D.C. Circuit went on to emphasize that it did not decide “whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’....” Nor did the Court “decide the scope of the ‘telecommunications’ covered by §251(b)(5).” *Id.* at 434.

Likewise, in *Pacific Bell* (issued subsequent to *WorldCom*), the Ninth Circuit held “[b]ecause the FCC has yet to resolve whether ISP-bound traffic is ‘local’ within the scope of §251, the CPUC’s decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with §251.” 325 F.3d at 1130.

More recently, in *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (2004), the U.S. District Court for the District of Oregon held that “VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs.” It further held that VNXX traffic was not local “whether it was ISP-bound or not.” *Universal*, mimeo at 24.

The *Worldcom*, *Pacific Bell*, and *Universal* decisions disclose that there remains considerable uncertainty regarding the future application of “local v. interstate” analysis, as well as the scope of “telecommunications” under §251(b)(5) of the Act.

FCC's definition of ISP-bound traffic, it is irrelevant whether ISP-bound traffic is telecommunications subject to reciprocal compensation.

(d) Level 3 suggests that paragraph 84 of the *ISP Remand Order* supports its position because the FCC made reference to agreements negotiated between CLECs and RBOCs that provided compensation for VNXX traffic. In that paragraph, the FCC explained the reasons why its interim compensation regime included rate caps “to limit carriers’ ability to draw revenue from other carriers, rather than from their own customers.” The third reason cited by the FCC was “that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements.”³⁹ The FCC’s discussion, however, makes no mention of VNXX-routed ISP-bound traffic. To argue that a passing reference to “negotiated agreements” somehow expands the FCC’s definition of ISP-bound traffic is unreasonable.

(e) Level 3 suggests that the fact that VNXX calls are “locally dialed” is sufficient to bring those calls within the FCC’s definition of ISP-bound traffic. Thus, as long as an end-user customer makes a seven-digit call to access an ISP, it is unnecessary to impose a geographical limitation on the location of the ISP’s server/modem bank. This is a convenient theory, but it is inconsistent with the characterization of ISP-bound traffic that has been consistently used by the FCC and the D.C. Circuit.

(f) Level 3 next argues that the *Core Communications Order* requires that the definition of ISP-bound traffic include VNXX-routed traffic. It states that “[t]he 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.”⁴⁰ It also points out, among other things, that the FCC recognized that the ISP dial-up market has changed, and that it is necessary to promote efficient investment in telecommunications services and facilities.⁴¹ Level 3 stresses that precluding VNXX-routed traffic from ISP-bound traffic will result in unnecessary investment expense, create the need for a separate compensation system, and encourage regulatory arbitrage.⁴²

Despite Level 3’s claim, there is nothing in the *Core Communications Order* that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic.⁴³ Moreover, as Qwest points out, it would

³⁹ See also, *ISP Remand Order* at ¶85.

⁴⁰ Level 3 Brief at 11.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ At most, the FCC decision in *Core Communications* to forbear from the New Market’s rule signalled its intention to permit the continued payment of reciprocal compensation for ISP-bound traffic. But, as

be highly unusual for the FCC to invoke a policy that would impact state authority (*i.e.*, regulation of intrastate access charges) without making some mention of that fact.

Level 3's VNXX-related policy arguments are irrelevant to the issue before the Commission. The Commission's task is to interpret the Level 3/Qwest ICA; specifically, whether the term "ISP-bound traffic," as used in the *ISP Remand Order*, encompasses VNXX-routed traffic. That inquiry does not include an evaluation of the parties' competing policy arguments.

(g) Level 3 argues that the legal and factual issues in this case are intertwined and that an ALJ ruling interpreting Section 7.3.4.3 of the ICA is inappropriate at this time. I disagree with that assessment. In my opinion, the relevant FCC and judicial interpretations of ISP-bound traffic are dispositive of this issue.

(h) Because this ruling has a substantial impact upon the interests of the parties, I am automatically certifying it to the Commission. In the final analysis, the interests of both parties are better served by having the agency resolve this matter as soon as possible. That is especially true given the parties have already indicated that the Commission's decision will be appealed no matter who prevails. The sooner the parties obtain final resolution regarding the treatment of VNXX-routed ISP-bound traffic, the sooner they will be able to devote their energies and resources to more productive pursuits.

RULING

For the reasons set forth above, I find that the term "ISP-bound traffic," as used in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic. Accordingly, Section 7.3.4.3 of the Level 3/Qwest ICA does not require the exchange of compensation for this traffic.

Objections to this ruling shall be filed with the Commission no later than August 30, 2005. Replies to objections shall be filed with the Commission no later than September 9, 2005.

Dated at Salem, Oregon, this 16th day of August, 2005.

Samuel J. Petrillo
Administrative Law Judge

emphasized in this ruling, that decision has no bearing on this matter because VNXX-routed traffic does not fall within the FCC's definition of ISP-bound traffic, as that term is used in the *ISP Remand Order*.