BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC; ET AL Respondents. . . . . . . IN THE MATTER OF THE REQUEST OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC D/B/A VERIZON ACCESS TRANSMISSION SERVICES AND QWEST CORPORATION FOR APPROVAL OF NEGOTIATED AGREEMENT UNDER THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. UT-063038 DOCKET NO. UT-063055 QWEST'S RESPONSE TO PETITIONS FOR REVIEW OF LEVEL 3, BROADWING, PAC-WEST, ELI/ADVANCED TELCOM, AND WITA

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Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

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Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

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Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

1. This matter comes before the Washington Utilities and Transportation Commission ("Commission") on a complaint by Qwest Corporation ("Qwest"). On October 5, 2007, the *Initial Order*[1] was issued. On October 25, 2007, Level 3 Communications, LLC ("Level 3"), Broadwing Communications, LLC ("Broadwing"), Electric Lightwave, Inc./Advanced Telecom, Inc. ("ELI/ATI"), Pac-West Telecomm, Inc. ("Pac-West"), and the Washington Independent Telephone Association ("WITA") filed Petitions for Administrative Review of the *Initial Order*.

2. Qwest, pursuant to WAC 480-07-825(4), hereby files its response to the Petitions for Administrative Review filed by Level 3, Broadwing, ELI/ATI, Pac-West, and WITA.

I. INTRODUCTION

3. The VNXX issue—whether and how it may be used in Washington, and under what terms and conditions—is properly handled by the *Initial Order*. The VNXX numbering and dialing issues have existed for many years, but have never squarely been addressed. After several attempts to address the issue in other proceedings, at least one of which was thwarted by Level 3[2], the Commission can put this issue to rest by affirming and adopting the findings and conclusions of the *Initial Order*.

4. The *Initial Orde*r does not grant Qwest all the relief it sought, but does, based on appropriate legal and policy considerations, strike a balance that all parties should find acceptable. It is consistent with the treatment of VNXX in other jurisdictions, and, contrary to the claims of the CLECs, it is one that can be implemented.

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[1] Initial Order, *Qwest Corporation v. Level 3 Communications, et al. & In the Matter of the Request of MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corporation for Approval of Negotiated Agreement Under the Terms of the Telecommunications Act of 1996*, Docket Nos. UT-063038 & UT-063055 (October 5, 2007) ("*Initial Order*").

[2] Order Declining to Enter Declaratory Order, *In re the Petition of WITA For a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UT-020667 (August 19, 2002).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

5. The fact that some of the CLEC parties continue to use VNXX does not make VNXX permissible or compensable as either "local" traffic or as ISP traffic under the *ISP Remand Order*.[3] Indeed, the balance attained by the *Initial Order* denies Qwest access charges for traffic that is interexchange traffic. However, recognizing the importance of VNXX to the CLECs, and how other jurisdictions have handled VNXX, the *Initial Order* allows CLECs to continue to use VNXX. What the *Initial Order* does, through its bill and keep ruling, is to deny reciprocal compensation and ISP compensation for VNXX traffic. That holding is proper, as the traffic is neither local nor within the scope of the *ISP Remand Order,* and therefore not compensable as such. Rather, it is traffic that originates in one exchange and terminates in another by use of a local dialing pattern. It is not true foreign exchange ("FX") service, and it should not be compensated based on the legal and technological loopholes that have thus far enabled CLECs to use VNXX numbering and routing.

II. QWEST RESPONSE TO SPECIFIC ISSUES BY PARTIES

A. The Claim that the Relief Granted in the *Initial Order* is Beyond the Scope of the Issues in this Case Should be Rejected

6. Level 3 and Pac-West claim erroneously that the *Initial Order* addresses and resolves issues beyond the scope of Qwest's Complaint. They claim that Qwest's only request for relief was that the Commission declare VNXX unlawful and ban its use, and that the Complaint did not raise intercarrier compensation issues. Based on their claims that the status quo requires Qwest to pay compensation for VNXX traffic,[4] and that Qwest failed to raise compensation issues, they argue the Commission may not resolve intercarrier compensation issues related to VNXX (and

[3] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

[4] As discussed below in section II.I, the suggestion of the CLECs that the Commission decided the VNXX issue several years ago is untrue. An examination of pre-*ISP Remand Order* decisions of the Commission clearly demonstrate that the Commission was addressing only local ISP traffic, where the caller and the ISP were located in the same local calling area ("LCA").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

presumably all obligations of Qwest to pay terminating compensation on VNXX traffic must continue).[5]

7. This argument is fundamentally flawed. Qwest's Complaint (particularly when considered in the light the circumstances that led to its filing) clearly encompasses the relief granted by the *Initial Order*. While it did seek relief that could have included the outright ban of VNXX-routed services, that request merely set the outside parameter of Qwest's requested relief—the relief fashioned in the *Initial Order* resides well within the issues raised and addressed in this docket. Second, even if one were to accept, for the sake of argument, that the issues resolved in the *Initial Order* are broader in scope than the specific issues raised in Qwest's Complaint, it was clear in Qwest's initial testimony, in particular the testimony of Mr. Brotherson and Dr. Fitzsimmons, that compensation for VNXX traffic was at the very heart of this docket. Thereafter, all parties, including Pac-West and Level 3, addressed a full range of issues related to VNXX. The most fundamental of those issues was the compensation regime that should apply to VNXX traffic, if allowed. Yet at no time, not when testimony was filed addressing compensation, not when the testimony was introduced, and not during the two rounds of briefs (all of which addressed compensation issues in detail) did either Pac-West or Level 3 object to the Commission's consideration of these issues. Just like the other parties, Pac-West and Level 3 addressed the compensation issues they now argue the *Initial Order* should not have decided. If a party believes a party or witness is raising issues in a case that are beyond the issues properly before an agency, that party had an obligation to object. Neither Pac-West nor Level 3 did so.

8. It is worth examining the Complaint itself. It is true that Qwest requested that the Commission ban VNXX, but that was only one option that Qwest presented in its prayer for relief. The issue of compensation for VNXX traffic was raised throughout the Complaint, and is referred to

[5] Level 3 Petition ¶¶ 2, 9, Pac-West ¶¶ 4-9.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

specifically in paragraphs 15, 16, 20 (three times), 22, 25, and 31. For example, paragraph 25 of the Complaint states: "Some or all of the Respondents have concurred in Qwest's local calling areas. However, to the extent that they allow and enable VNXX calling without payment of *appropriate compensation for interexchange* calls, Respondents are in violation of prescribed exchange areas." The Complaint seeks five specific items of relief, but also includes a request for "such *other and further relief* that the Commission deems appropriate." Under any fair reading of the Complaint, compensation for VNXX was an issue explicitly raised by Qwest for the Commission to decide.

9. In its petition, Level 3 recounts the history that led to Qwest's Complaint in this matter. Referring to the Commission's orders in the Pac-West and Level 3 complaint cases (Docket Nos. UT-053036 and UT-053039), Level 3 states: "In those orders, the Commission dismissed Qwest's counterclaims alleging the illegal and improper use of VNXX arrangements. The Commission advised Qwest that if it wished to pursue claims concerning the legality of FX-like network architectures, it could file a complaint addressing specific carriers' use of such arrangements *and related intercarrier compensation issues*."[6] Given Level 3's own acknowledgment that the compensation issues were specifically to be part of Qwest's Complaint, it is disingenuous for Level 3 to now claim otherwise.

10. As noted, the testimony of all parties is replete with extensive testimony on intercarrier compensation issues. Mr. Brotherson and Dr. Fitzsimmons addressed those issues at length in all of their pre-filed testimony. Mr. Williamson filed testimony that contains the Staff proposal for the treatment of VNXX traffic, including specific proposals for bill and keep and CLEC compensation for the transport of VNXX traffic. Mr. Neinast of TCG testified that, if the Commission decided to act before the FCC acts, "it should find that carriers in the state of

[6] Level 3 Petition ¶ 9, citing the February 2006 orders in the Pac-West/Level 3 complaint dockets; emphasis added.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Washington exchange VNXX traffic on a bill and keep basis until the FCC can resolve the issue in the pending proceeding."[7] The Level 3 and Pac-West witnesses addressed compensation issues as well. Yet, at no time did any party seek to strike any of this testimony, including specific recommendations for compensation for VNXX traffic that did not involve its complete ban. When the testimony of these witnesses was offered, neither Level 3 nor Pac-West sought to strike it on the ground that it was beyond the scope of the issues in the case.

11. The CLECs would no doubt have to concede that the *Initial Order* could have, within the scope of the Complaint, held that VNXX traffic was unlawful or contrary to the public policy of the state of Washington (see Qwest's complaint at ¶¶ 38-40 regarding public policy concerns). Such a ruling would have resulted in either an outright ban of VNXX, or a holding that VNXX was truly interexchange traffic for which access charges are due. Thus, it does not bear scrutiny to claim that the Commission could have banned VNXX outright, but is somehow prohibited in this docket from allowing VNXX with appropriate conditions.

12. In addition, during the course of this proceeding, the Verizon Access/Qwest agreement was consolidated into the docket, and, even though VNXX compensation issues had been raised previously, that Agreement again clearly raised the issues of terminating compensation for VNXX traffic and the transport obligations that a CLEC using VNXX should bear. Finally, the Commission must ultimately resolve the issues remanded to it by the Washington federal district court. The issue remanded, by definition, relates directly to the proper compensation for VNXX traffic. The issues resolved by the *Initial Order* are well within the scope of the issues properly before the Commission.

[7] Neinast Direct, at 3, lines 3-8 (Exhibit 541).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

B. The *Initial Order's* Approval of the Qwest/Verizon Access Agreement is Lawful

13. Level 3 raises several objections, including conclusory claims that the *Initial Order's* approval of the Verizon Access/Qwest agreement is inappropriate,[8] but provides no substantive support for its objections. The *Initial Order* contains an extensive discussion of the agreement and the reasons why it meets the requirements of the Act.[9] It is insufficient in a Petition to object to something in an *Initial Order* and then provide no substantive argument to support the objection.

14. Furthermore, it is important to note that the ICA amendment that was required in all fourteen Qwest states to implement the Verizon agreement has been filed and approved in those states. In most of those states, no party objected to the amendments. In all states, even in Minnesota and Colorado, where Level 3 objected to the agreement, the commissions have approved the new agreement.[10] The Minnesota commission approved the amendment, rejecting Level 3's discrimination claim and specifically noting that Level 3 had a right to opt in to that agreement.[11]

C. The *Initial Order* Clearly Made the Ruling Required by the *Qwest* Remand: It Ruled that for Calls to be Classified as Local, they Must Be Between Customers Located in the Same LCA.

15. Level 3 claims that the *Initial Order* fails to answer the question remanded to it by the court in *Qwest v. Washington State Util. & Transp. Comm'n* ("*Qwest*"),[12] and also complains that "the *Initial Order* appears to assume some kind of geographic-based definition."[13] The *Initial Order*

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[8] With no further explanation, Level 3 challenges Finding of Fact No. 9 (a finding that simply summarized the salient provision of the Verizon Access/Qwest Agreement). Level 3 Petition ¶ 15 (Contention 6). Later, Level 3 challenges the *Initial Order's* conclusions that the Verizon Access/Qwest Agreement is lawful, non-discriminatory, and that it is consistent with the public interest. *Id.* ¶ 15 (Contentions 8 and 9).

[9] *Initial Order* ¶¶ 108-17.

[10] Although Level 3 objected in Colorado, the amendment became effective by operation of law.

[11] Order Dismissing Level 3's Objection and Approving the Qwest-MCI Interconnection Agreement Amendment, *In the Matter of the Joint Application for Approval of the March 15, 2007 Amendment to the Interconnection Agreement Between MCImetro and Qwest*, Docket No. P-5321, 421/IC-07-321 (Minn. PUC, July 26, 2007. (A copy of this order is attached hereto as Exhibit A).

[12] 484 F.Supp.2d 1160 (W. D. Wa. 2007).

[13] Level 3 Petition ¶ 5.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

explicitly complies with *Qwest.* The *Initial Order's* conclusion that call classification in Washington is based on geographical LCAs is completely consistent with Washington law.

16. Applying unanimous circuit court precedent, the *Qwest* court ruled that the *ISP Remand Order* applies only to calls placed to an ISP located in the caller's LCA. "The Court concludes that the WUTC violated federal law by interpreting the *ISP Remand Order* to include ISP-bound VNXX calls *terminating outside a local calling area*."[14] The court also correctly noted that the question whether or not a VNXX call terminates outside a LCA had not been addressed by the Commission. Thus, the court ordered the Commission to "reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, *as within or outside a local calling area*, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion."[15] In other words, the court required the Commission to define the type of calls that are "local" under Washington law and those that are not.[16]

17. The *Initial Order* does what the court directed the Commission to do, which was to determine under Washington law what calls are local and what calls are interexchange, specifically identifying the need to do so in paragraphs 25 and 26 of the *Initial Order*. The *Initial Order* stated that the issue "is whether VNXX calls, which the CLECs bill as local calls, are actually toll or long distance calls in disguise."[17]

18. The *Initial Order* then answers that question, not once, but several times. For example, the *Initial Order* defines VNXX in these words:

> "VNXX calls are those where the NXX, or central office code, is assigned to a person or business outside the local calling area where the central

[14] *Qwest*, 484 F.Supp.2d at 1162; emphasis added.
[15] *Id.* at 1177.
[16] *Id.*
[17] *Id.* ¶ 27.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> office is located. In other words, a VNXX number appears to be a geographically local call *but will not **actually terminate** in the local calling area where the calling party is physically located*."[18]
>
> * * * *
>
> "When a VNXX call is placed in a Qwest local calling area, the call, because it is recognized as local, travels over Qwest Local Interconnection System (LIS) trunks, to the CLEC point of interconnection ("POI"), even though the call is not local in the sense that it ultimately *terminates beyond the boundaries of the Qwest local calling area*."[19]

19. The *Initial Order* also addressed the same issue from another perspective: "[T]he geographic distinction between local and long distance calls has not been abolished. A local call continues to be defined based on the *ILECs' geographic local calling areas*, not on the local calling areas that define the CLECs' networks."[20] The *Initial Order* returned to that theme later in the order:

> However, the CLECs ignore the fact that the Act established a distinction between local and long distance calls that is the present day basis for intercarrier compensation. Under this bifurcated compensation system, *a geographically-based local call requires different compensation than a long distance call*. When an ILEC's end-user customer makes a long distance call, even though the ILEC transports the call to the long distance carrier's point of interconnection over the ILEC's network, which is the same ILEC network used to complete a purely local call, the compensation system works differently. The interexchange carrier pays the ILEC for access to the ILEC's network. This system remains in place and cannot be ignored regardless of any cost evidence or lack thereof.[21]

20. It would be difficult to conceive of a more straightforward conclusion than the *Initial Order's* unequivocal conclusion that VNXX calls terminate *outside* or *beyond the boundaries* of the

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[18] *Id.* ¶ 30; emphasis added.

[19] *Id.*, footnote 37; emphasis added

[20] *Id.* ¶ 41; emphasis added.

[21] *Id.* ¶ 46; emphasis added. The *Initial Order's* description of the different compensation regimes for local and interexchange traffic is the same as the Second Circuit's 2006 description of the same compensation regimes in *Global NAPs v. Verizon New England*, 454 F.3d 91 (2nd Cir. 2006), which likewise held that these compensation regimes remain in effect. *Id.* at 95.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

LCA. VNXX calls are not local calls in Washington because they terminate outside of the local calling area.

D. Pac-West's and Level 3's Arguments that Section 251(b)(5) is the Default Compensation Method and that Section 251(g) Is Irrelevant Have no Merit

21. Pac-West and Level 3 argue that the *Initial Order* should have held that the default compensation mechanism for all ISP traffic is Section 251(b)(5) (and that all ISP traffic, including VNXX traffic, is therefore subject to terminating compensation at the $.0007 rate).[22]

22. Pac-West argues that the Act establishes two types of traffic: traffic subject to reciprocal compensation under Section 251(b)(5) and traffic defined by Section 251(g), specifically "information access" and "exchange access." Pac-West argues that a third type of traffic—"ISP-bound traffic"—was defined by the FCC in the *ISP Remand Order*.[23] Pac-West claims that the *Initial Order* errs because (1) ISP traffic, including VNXX ISP traffic, does not fall under Section 251(g) and therefore (2) the traffic must default to and be compensated pursuant to section 215(b)(5). Thus, Pac-West argues, terminating compensation at $.0007 must be paid, not just on local ISP traffic, but on all ISP traffic.[24] Level 3 also concludes that Section 251(b)(5) is the default compensation regime for all ISP traffic. Both arguments are deeply flawed.

23. The first flaw is the unsupported conclusion that VNXX traffic cannot fall under Section 251(g). The *ISP Remand Order* held that ISP traffic is "information access[25] a category of traffic specifically included in Section 251(g).[26] On this point, Level 3 argues that the D.C. Circuit, in

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[22] Pac-West Petition ¶¶ 11-18; Level 3 Petition ¶¶ 24-29.

[23] Pac-West Petition ¶ 11.

[24] *Id.* ¶ 18.

[25] *ISP Remand Order* ¶¶ 30, 36-42.

[26] Section 251(g) states: "On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide *exchange access, information access*, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

WorldCom v. FCC ("*WorldCom*"),[27] concluded that the FCC's rationale for excluding the traffic from Section 251(b)(5) under Section 251(g) was insufficient.[28] Level 3 ignores the critical fact that the D.C. Circuit remanded the case to the FCC, but specifically *did not vacate the order or any of the FCC rules* modified in the *ISP Remand Order*. The court refused to vacate the order because "[m]any 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))."[29] The Court was clear in holding that there were many grounds upon which the *ISP Remand Order's* result could potentially be justified, specifically identifying several of those potential grounds, but noting that it was not deciding them:

> *[W]e 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 . . . .*[30]

24. Every court that has addressed the status of the *ISP Remand Order* in light of the *WorldCom* decision has ruled unequivocally that the *ISP Remand Order*, in its entirety, remains fully in effect. The *Qwest* decision, the most important decision for this case, concluded that "the *ISP Remand Order* remains in force."[31] If that were not clear enough, *Qwest* stated that "the *WorldCom* did not vacate *any portion* of the *ISP Remand Order*."[32] No court has placed any

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prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission." 47 U.S.C. § 251(g); emphasis added.

[27] 288 F.3d 429 (D.C. Cir. 2002)

[28] Level 3 Petition ¶ 28.

[29] *Id.*

[30] 288 F.3d at 434, emphasis added.

[31] *Qwest*, 484 F.Supp.2d at 1166; citations omitted.

[32] *Id.* at 1166, n. 5 (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

qualification on its conclusion that the *ISP Remand Order*, in its entirety, remains in full effect.[33] Any claim by a CLEC in this case to the contrary directly contravenes the governing law for this case.

25. Since no portion of the *ISP Remand Order* was vacated, it follows that, until the FCC says otherwise, ISP traffic is "information access" that falls within the terms of Section 251(g).[34] In the *ISP Remand Order*, the FCC specifically declined to decide whether ISP traffic also fell within the category "exchange access."[35]

26. Second, Pac-West's and Level 3's arguments ignore the impact of *Peevey*. The *Peevey* court made two critical conclusions on this issue. First, *Peevey* agreed with the California commission that "VNXX traffic is interexchange traffic that is *not* subject to the FCC's reciprocal compensation rules."[36] *Peevey* also agreed that VNXX traffic is "exchange access" and therefore is not "telecommunications traffic . . . ."[37] Exchange access traffic is one of the categories of traffic specifically included in Section 251(g)—and is a category of traffic that the *WorldCom* court specifically mentioned that could justify the compensation scheme of the *ISP Remand Order*.[38] Thus, *Peevey* clearly supports the conclusion that Section 251(g) remains a viable means of justifying the result of the *ISP Remand Order*.[39]

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[33] Accord, *Global Naps v. Verizon New England*, 444 F.3d 59, 65 (1st Cir. 2006)("*Global Naps I*") ("[*WorldCom*] chose not to vacate the FCC order, and so the *ISP Remand Order remains in force*."); *Verizon California v. Peevey*, 462 F.3d 1142, 1147, n.1 (9th Cir. 2006) ("On remand the FCC again concluded that ISP-bound calls are not subject to reciprocal compensation [citing *ISP Remand Order* ¶ 82]. Although the D.C. Circuit reversed [in] *WorldCom, . . . it left the rules set out in the ISP Remand Order in place*."); *Southwestern Bell Telephone v. Missouri Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1074 (E. D. Mo. 2006) ("the D.C. Circuit . . . chose not to 'make . . . further determinations' regarding the validity of the *ISP Remand Order and left the Order in place* . . . .") (Emphasis added).

[34] *ISP Remand Order* ¶¶ 30, 36-42.

[35] *Id.* ¶ 42 n. 76.

[36] *Id.* at 1158, emphasis in original.

[37] *Id*. at 1157-58.

[38] *WorldCom*, 288 F.3d at 434 ("[W]e do not decide whether handling calls to ISPs constitutes "telephone exchange service" or *"exchange access*" (as those terms are defined in the Act . . . .") (emphasis added).

[39] Level 3 takes an incorrect literalist approach to Section 251(b)(5), stating that this section applies to *all*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

27. Finally, Pac-West's argument is built on the false premise that the term "ISP-bound traffic" in the *ISP Remand Order* refers to *all* ISP traffic. We know that not to be true from the two *Global NAPs* decisions, the appeal decision of the *Core Forbearance Order*, from *Peevey*, and from *Qwest.* The *ISP Remand Order* does not govern intercarrier compensation for interexchange ISP traffic (*i.e.*, VNXX ISP traffic). Thus, the Commission lacks the authority to require Qwest to pay terminating compensation (either at the voice rate or at the $.0007 rate for local ISP traffic) on interexchange ISP traffic. The only logical conclusion that can be drawn from Pac-West's assertion that the Commission cannot impose a bill and keep compensation regime on VNXX ISP traffic, is that the Commission must, as the *Global NAPs I* decision does, require that access charges be applied to VNXX traffic because it is interexchange traffic. In other words, Pac-West's and Level 3's default argument actually works against them—if anything, VNXX traffic, given that it is interexchange, should default to the imposition of access charges.

28. Level 3 makes the unequivocal statement that "access charges apply to long distance traffic exchanged with an IXC, and have never applied to locally dialed traffic exchanged between two LECs such as the FX-like traffic that is at issue here."[40] This argument is incorrect and ignores, among other things, *Global NAPs I*, where the First Circuit specifically upheld a decision of the Massachusetts commission to impose access charges on VNXX ISP traffic.[41] It also ignores a recent Ohio order, where the commission ordered that access charges be applied to VNXX traffic.[42] If Pac-West's and Level 3's theory is correct, then *Global NAPs I*, *Peevey,* and *Qwest*

"telecommunications traffic" and not just to "local telecommunications traffic." Level 3 Petition ¶ 26. This argument conveniently ignores the fact that "telecommunications traffic" is not an all-encompassing category of traffic. Indeed, the FCC reciprocal compensation rules, 47 C.F.R. § 51.701(a) specifically conclude that neither "information access" nor "exchange access" is "telecommunications traffic" for purposes of applying reciprocal compensation. Thus, given that the *ISP Remand Order's* conclusion that ISP traffic is "information access" and *Peevey's* conclusion that VNXX traffic is "exchange access," Level 3's argument is unavailing.

[40] Level 3 Petition ¶ 27.

[41] *Global NAPs I*, 444 F.3d at 61.

[42] Arbitration Award*, In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration of an Interconnection Agreement with United Telephone Company of Ohio dba Embarq Under Section 252(b) of the*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

must all be wrong. Given that it is the Commission's duty, as the *Initial Order* does, to apply current federal law, then the holdings of these federal court decisions must prevail over Pac-West's and Level 3's unsupported theories.

29. The cases discussed above demonstrate that the Level 3/Pac-West theory that Section 251(g) is irrelevant cannot withstand scrutiny. A July 2007 FCC decision reinforces that conclusion. The FCC decision came in the second forbearance petition by Core Communications ("*Core II*"). In *Core II*, Core sought forbearance from the rate regulation preserved by section 251(g) related to access charges, specifically seeking a ruling that the carriers subject to forbearance would no longer be governed by section 251(g) but instead by "*section 251(b)(5). . . for rate setting purposes*."[43] The essence of Core's request was that "enforcing section 251(g) and its related price regulations is not necessary to ensure that the charges and practices of carriers are just and reasonable and not unreasonably discriminatory because maintaining section 251(g) creates regulatory arbitrage and provides a tool for regulatory price discrimination."[44]

30. The FCC rejected the petition, first, because section 251(g) "remains necessary to ensure that intercarrier charges and practices are just and reasonable . . . ."[45] Further, the FCC ruled directly on the issue raised by Pac-West and Level 3: the nature of the relationship between sections 251(g) and 251(b)(5). The FCC rejected the petition "[b]ecause section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks, *because the section*

Telecommunications Act of 1996, 2007 WL 1146552, at *4, *5 (April 18, 2007 ("*Ohio Embarq Arbitrator's Award*") (emphasis added), affd, 2007 WL 2141937 (starcites not available) (Ohio PUC, July 25, 2007) ("*Ohio Embarq Commission Decision*") (ruling that the CLEC "performs functions as if it were an IXC") (emphasis added).

[43] Memorandum Opinion and Order, *In the Matter of Petition of Core Communications, Inc., for Forbearance from Sections 215(g) and 254(g) of the Communications Act and Implementing Rules,* 22 FCC Rcd 14118, 2007 WL 2159638, ¶ 6 (FCC, July 16, 2007) (emphasis added).

[44] *Id.* ¶ 13.

[45] *Id.* ¶ 14.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g)."[46] Thus, the FCC has made is clear beyond reasonable dispute that the CLEC-created default relationship between sections 251(b)(5) and 251(g) is wishful thinking and not the law.

31. Level 3 argues that VNXX traffic is subject to Section 251(b)(5) by claiming that, prior to the Act, there was no preexisting compensation regime existed into which VNXX calls (calls that Level 3 euphemistically refers to as "FX-like") could fall.[47] This argument is based on three errors. The first is Level 3's erroneous conclusion that the *WorldCom* decision and the *ISP Remand Order* were dealing with *all* ISP traffic, a proposition that is discredited by unanimous federal case law to the contrary. The second error flows from the first. Given that *WorldCom* and the *ISP Remand Order* apply only to local traffic, the question then is whether, prior to the Act, there was a pre-existing compensation regime for interexchange ISP traffic. The answer to that question is clearly "yes." Access charges were created in the mid-1980s immediately after the divestiture of the old Bell System and have now been the governing compensation regime for interexchange traffic for well over twenty years. The third error relates to the status of an ISP. Under the ESP Exemption, an ISP is treated as an end user for purposes of imposing access charges. Thus, if pre-Act, an end user connected to an ISP located in a different LCA, the call would have been an interexchange call subject to access charges. Thus, Level 3's assertion that there was no pre-Act compensation regime to deal with VNXX ISP traffic is revisionist history—the traffic is interexchange and the long-standing access charge regime applied to such traffic.[48]

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[46] *Id.* Quoting the *ISP Remand Order*, the FCC stated that "section 251(g) serves as a limitation on the scope of 'telecommunications' embraced by section 251(b)(5). [citing *ISP Remand Order* ¶ 42]. Thus the 'telecommunications' traffic that falls within the scope of section 251(g) is not subject to section 251(b)(5)." *Core II*, n. 54.

[47] Level 3 Petition ¶¶ 25, 27-28

[48] Level 3 also argues that when it exchanges VNXX traffic with Qwest, Level 3 is acting as a LEC. But VNXX

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

E. Level 3's Arguments Opposing the *Initial Order's* Ruling on Call Classification Are Without Merit

32. Level 3 and Pac-West are also wrong in their other arguments relating to call classification. Level 3, for example, states that the *Initial Order* erroneously concludes that the *ISP Remand Order* applies only to traffic exchanged within ILEC-defined LCAs.[49] Level 3 apparently refers to the *Initial Order's* statement that "federal courts have interpreted the *ISP Remand Order's* conclusions as limited to ISP-bound traffic exchanged within an ILEC-defined local calling area."[50] Yet for that proposition, the *Initial Order* correctly relies on the *Qwest* decision.[51] The *Qwest* court stated: "[T]he WUTC interpreted the *ISP Remand Order* broadly, finding that the order was not limited in scope to ISPs physically located in the same local calling area as the calling party. . . . The defendants [Level 3 and Pac-West] embrace this interpretation . . . ."[52] But the *Qwest* court then focused on "what was *actually decided* by the FCC's *ISP Remand Order* . . . , [citing the two *Global NAPs* decisions for the proposition that] VNXX traffic is not mentioned, much less addressed, in the *ISP Remand Order*. . . . "[53] The *Qwest* court noted that the only question presented in the *ISP Remand Order* "was decidedly narrow: whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area* that is served by a competing LEC. . . . The scope of the *ISP Remand Order's* conclusions must therefore be confined to the context of that question."[54] Level 3 claims that the *Initial Order* erred in concluding that *ISP Remand Order*

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traffic does not involve LEC-to-LEC interconnection. CLECs using VNXX are acting as an IXC offering the equivalent of a 1-800 service—this is LEC to IXC traffic. *Ohio Embarq Commission Decision*, 2007 WL 2141937 (starcites not available) (ruling that the CLEC "performs functions as if it were an IXC").

[49] Level 3 Petition ¶ 23

[50] *Initial Order* ¶ 96.

[51] For that specific proposition, the *Initial Order* relied on *Qwest*, 484 F.Supp.2d at 1172.

[52] 484 F. Supp.2d at 1172.

[53] *Id.*

[54] *Id.*, quoting *ISP Remand Order* ¶ 13; emphasis in *ISP Remand Order*.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

was limited to ISP traffic exchanged within the same LCA. But that is precisely what the *Qwest* court concluded to be true, relying on the *Global NAPs* decisions.[55] The *Initial Order* applied *Qwest's* legal conclusions as directed by that court.[56]

33. Level 3 also argues incorrectly that the *Initial Order* did not contain sufficient support for its conclusion that call classification in Washington is based on the geographical location of the parties to a call.[57] Significantly, Level 3 does not argue that the *Initial Order's* conclusion is in error, but only that the *Initial Order* failed to analyze the issue at a level of detail satisfactory to Level 3. Without repeating the entire arguments that Qwest and Staff made on this issue, it is worth reiterating the key points that support the *Initial Order's* conclusion.

34. First, several state statutes (*e.g.,* RCW 80.36.080, 80.36.140, 80.36.160, and 80.36.170) require that rates be fair, just, and reasonable, and demonstrate that a practice such as VNXX is unjust and unreasonable when it requires Qwest to incur costs that should be passed on to a CLEC end

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[55] Qwest will not repeat its full analysis of the cases that have defined the scope of the *ISP Remand Order*, which it explored at length in its briefs and above. Qwest Opening Br. ¶¶ 52-71 Qwest Reply Br. ¶¶ 3, 35, 41. Suffice it to say that the *Initial Order's* conclusion on the scope of the *ISP Remand Order* is in line with governing federal authority.

[56] In an apparent attempt to convince the Commission to ignore the *Qwest* court's conclusion that the scope of the *ISP Remand Order* is limited only to local ISP traffic, Level 3 asserts that the *Initial Order* gives too much deference to the FCC's Amicus Brief that it filed in the *Global NAPs I* case at the request of the First Circuit. Level 3 Petition ¶¶ 63-64. The Amicus Brief, among other things, made it clear that in the FCC's ISP traffic docket, the only issue the FCC was considering was the treatment of local ISP traffic. Level 3's complaint about over-reliance on the Amicus Brief should be taken up with the First Circuit and not with the Washington Commission, because it was the First Circuit that found the Brief to be highly pertinent to the question of the scope of the *ISP Remand Order*: "The FCC's helpful brief states that . . . 'the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area.'. . The FCC further notes that 'in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller.' According to the FCC, '[t]he Commission itself has not addressed application of the *ISP Remand Order* to ISP-bound calls outside a local calling area' or 'decided the implications of using VNXX numbers for intercarrier compensation more generally.'" 444 F.3d at 74. The Amicus Brief was one of the reasons the *Global NAPs I* court ruled that the *ISP Remand Order* applies only to local ISP traffic, a conclusion unanimously adopted by the other courts, including *Qwest*.

[57] Level 3 Petition ¶¶ 71-73.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

user, that VNXX results in unreasonable practices, and that it allows CLECs to offer services that avoid the proper payment of toll or access charges.[58]

35. Second, both Qwest and Staff cited Commission statutes, in particular RCW 80.36.230, which specifically empowers the Commission to prescribe exchange boundaries for telecommunications companies,[59] and several definitions in WAC 480-120-021 (*e.g.,* "exchange," "interexchange," and "interexchange company") all of which mandate a geographic test for call classification in Washington.[60]

36. Third, Qwest and Staff relied upon Qwest's own tariff definitions,[61] in particular the definitions of "local service," "local service area," and "toll service."[62] These tariffs could hardly be more clear that local calls are calls *within* an exchange. Indeed, the definition of "local service area" is "[e]xchange access service furnished *between customer premises* located within the same local calling area." The term "premises" is a temporal term referring to a house or building.[63] It would stand the definition of "premises" on its head to conclude, as some CLECs suggest, that having a telephone number associated with a particular LCA is sufficient to have premises within the calling party's LCA when the customer is actually located elsewhere (the so-called "NXX" or "locally-dialed call" theory). In fact, such an argument is so absurd that the CLECs have never attempted to respond in any substantive matter to Qwest's tariff definitions.

37. Fourth, just as illuminating as Qwest's tariffs are the tariffs (or price lists) that some of the parties filed with the Commission. Level 3's tariff adopted LCAs that are geographic in nature—in fact, Level 3 agreed to "match" both Qwest's and Verizon's local calling areas, which

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[58] Qwest Opening Br. ¶¶ 22-26

[59] Staff Opening Br. ¶ 45; Qwest Opening Br. ¶ 27.

[60] Qwest Opening Br. ¶ 27; Staff Opening Br. ¶ 45.

[61] Qwest also cited its own access tariff, from which CLECs must buy services pursuant to the terms of their ICAs with Qwest. Qwest Opening Br. ¶¶ 43-44.

[62] Qwest Opening Br. ¶¶ 37-42, especially ¶ 39; Staff Opening Br. ¶ 46.

[63] Qwest Opening Br. ¶ 40, citing Black's Law Dictionary (8th edition) (definition of "premises").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

it characterized as "[g]eographically-defined."[64] Pac-West filed a similar tariff that "concurs in" and "incorporates" "all current and effective service territory and local exchange boundary maps filed with the [Commission] by Verizon and Qwest." Pac-West also adopted several definitions that define local and interexchange calling in geographical terms.[65]

38. Fifth, although the language may vary somewhat, the ICAs between Qwest and the CLEC parties typically provide that local calls are defined for purposes of the individual ICAs in the same way they are defined under Qwest's tariffs.[66]

39. Finally, in the arbitration between AT&T and Qwest four years ago, AT&T proposed language that would classify local traffic based on traffic that is "originated and terminated within the same local calling area *as determined by calling and called NXXs*", while Qwest proposed language that defined local traffic as traffic "originated and terminated within the same local calling areas as determined for Qwest by the Commission."[67] The Arbitrator rejected AT&T's proposed language and adopted Qwest's language, and the Commission affirmed that decision.[68]

40. Thus, the *Initial Order's* conclusion that call classification in Washington is based on the geographical location of the parties to a call is directly supported by Washington statutes, Commission rules, Qwest tariffs, the tariffs of Level 3 and Pac-West, the language of the ICAs between Qwest and the CLECs in this case, and by prior Commission decision. The *Initial Order* is well-grounded in the multiple aspects of Washington law.

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[64] *Id.* ¶ 45.

[65] *Id.* ¶ 46.

[66] *Id.* ¶ and footnote 38.

[67] Arbitrator's Report, Order No. 04, *Re AT&T Communication of the Pacific Northwest and TCG Seattle*, 2003 WL 23341214, at *7 (WUTC December 31, 2003)

[68] Final Order Affirming Arbitrator's Report; Approving Interconnection Agreement, Order No. 04, *Re AT&T Communication of the Pacific Northwest and TCG Seattle*, Docket No. UT-033035, ¶ 16 (WUTC February 6, 2004).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

41. Level 3 also argues erroneously that *Peevey* supports the position that locally-dialed traffic is subject to terminating compensation.[69] The most significant error made by Level 3 is its belief that because *Peevey* upheld the California commission's ruling that call classification in California is based on telephone numbers, the same rule automatically applies in Washington. The California commission made its decision on call rating on the basis of California law and unique Pacific Bell tariffs. *Peevey* does not purport to create no general rule that call rating is based on telephone numbers in all states. That determination is left to each state commission. As *Global NAPs II* held, the establishment of LCAs has not been preempted by the FCC, and thus that issue is one for the state commissions.[70] That is why the federal district court in the *Qwest* case remanded that issue to the Commission.

42. Furthermore, Level 3 ignores other aspects of *Peevey* that undercut Level 3's theory. After affirming the California commission's decision on call rating based on Pacific telephone tariffs in Section V of the decision, *Peevey*, in section VI turned to a forward-looking discussion of call rating and VNXX. Here, the court could not have been more clear that the NXX theory is not viable. Among other things, in Section VI of the decision, the Ninth Circuit reached the following conclusions as a matter of federal law:

- The compensation regime of the *ISP Remand Order* applies only to "local ISP-bound traffic" and does "not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic."[71] Thus, as a matter of federal law, the *ISP Remand Order's* compensation scheme applies only to "local ISP-bound traffic."

- For purposes of determining whether traffic is VNXX traffic, the relevant end point is where the CLEC's "'network ends' and the call is picked up by the customer. Since that is the end of [the CLEC's] responsibility for the call, it should also be the

[69] Level 3 Opening Br. ¶¶ 29, 61.

[70] *Global NAPs II,* 454 F.3d at 97-99. See also First Report and Order*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1035 (August 8, 1996) ("*Local Competition Order*"), ("[S]tate commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. . . .")

[71] 462 F.3d at 1159.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

relevant end point for purposes of determining whether the call is local or VNXX."[72] In light of these clear holdings, and particularly in light of the overwhelming law of Washington that call classification is based on the geographic location of the parties to a call, Level 3's reliance on *Peevey* is without merit.

F. The *Initial Order* Correctly Rules that the Distinction Between Local and Interexchange Traffic is Relevant for Compensation Purposes

43. Level 3 asserts that the *Initial Order* erred in concluding that intercarrier compensation is based on a distinction between local and long distance traffic. Level 3 bases this conclusion on its assertion that the FCC repudiated the distinction between local and long distance calls.[73] This claim too is incorrect.

44. Level 3 asserts that the *Initial Order* erred in concluding that "the Act established a distinction between local and long distance calls that is the present day basis for intercarrier compensation."[74] The basis for this assertion is the fact that, in its *ISP Remand Order*, the FCC decided to use statutory terms instead of the term "local." From this, Level 3 makes the quantum leap to the conclusion that the local/long distance distinction no longer exists as a basis for the application of intercarrier compensation rules.[75] This argument ignores the FCC's reasons for not using the term "local." The FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' *not being a statutorily defined category*, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."[76] Nothing in the FCC's decision to rely on statutory language

[72] *Id.* at 1159.
[73] Level 3 Petition ¶¶ 23, 32-37.
[74] Level 3 Petition ¶ 23, quoting *Initial Order* ¶ 46.
[75] Level 3 Petition ¶ 33.
[76] *ISP Remand Order* ¶ 34 (emphasis added.)

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

suggests that the FCC intended to eliminate the distinction between local and long distance calls. Other facts make that even clearer.

45. First, the Act itself retains the concept of local traffic. The term "telephone exchange service,"[77] a statutorily-defined term, clearly refers to what is commonly called "local" service. So the concept of local service has not, as Level 3 suggests, been excised from the Act.

46. Second, in the *ISP Remand Order*, the FCC ruled that it did not intend to interfere with either interstate or intrastate charges. Of course, the concept of access charges is meaningless if there is no distinction between local and interexchange traffic: "[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about the effects on analogous intrastate mechanisms.'"[78] By retaining access charges, the FCC, by definition, retained the local/interexchange distinction.

47. Third, if, as Level 3 contends, the FCC eliminated the local/interexchange traffic distinction in the *ISP Remand Order*, the FCC would not have asked for comments, as it did in its contemporaneous *Intercarrier Compensation NPRM*,[79] on how it should address that precise issue.

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[77] 47 U.S.C. § 153(47): "The term 'telephone exchange service' means (A) *service within a telephone exchange,* or within a connected system of telephone exchanges *within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange, and which is covered by the exchange service charge*, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." (*emphasis added*). See also *North Carolina Util. Comm'n v. FCC,* 552 F.2d 1036, 1044 (4th Cir. 1976).

[78] *ISP Remand Order*, n. 66 (*emphasis added*), quoting *Local Competition Order* ¶ 732. Level 3 also ignores a similar statement in the *ISP Remand Order*: "Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g). These services remain subject to [FCC] jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions). *This analysis properly applies to the access services that incumbent LECs provide . . . to connect subscribers with the ISPs for Internet-bound traffic*." *ISP Remand Order* ¶ 39 (*emphasis added*).

[79] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 ¶ 115 (2001) ("*Intercarrier Compensation NPRM*").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

48. Finally, the two *Global NAPs* decisions, *Peevey*, and, most pertinently, *Qwest* put to rest any claim that the FCC abandoned the local/interexchange distinction. In *Global NAPs I,* the First Circuit upheld a decision of the Massachusetts commission to impose access charges on VNXX traffic, concluding that there is no language in the *ISP Remand Order* "that explicitly preempts state regulation of access charges for the *non-local ISP traffic* at issue.[80] If the term "local" no longer has any meaning, the First Circuit would surely not have continually referred to the distinction between local and long distance calls. Indeed, its holding is that "the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local* ISP-bound calls.[81]

49. In *Global NAPs II*, the Second Circuit affirmed a Vermont Board decision to ban VNXX-routing. Like *Global NAPs I*, the case is comprehensible only if a distinction between local and interexchange calls continues to exist. In fact, the Second Circuit in *Global NAPs II* explained in detail the current, not historical, difference between the reciprocal compensation and access charges regimes.[82] Nothing in the *Global NAPs II* description of the current compensation regime suggests that the local/interexchange distinction is no longer relevant—indeed, it is that distinction that determines which compensation regime applies. The final paragraph of *Global NAPs II* reinforces the distinction between local calls not subject to access charges, and interexchange calls that are: "[The CLEC's] desired use of virtual NXX simply disguises traffic subject to access charges as something else and would force Verizon to subsidize [the CLEC's] services."[83] Without a distinction between interexchange calls (the calls that are "disguised") and true local calls, which are not subject to access charges, the conclusion of *Global NAPs II* would make no sense. Furthermore, the Second Circuit also notes that whether a call is subject to access charges does not depend upon whether there is a separate charge for the call.

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[80] 454 F.3d at 72 (*emphasis added*).

[81] *Id.* at 61 (*emphasis added*).

[82] This language is quoted in section 1.H, *infra*.

[83] *Id.* at 103.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

50. *Peevey* ruled that "VNXX traffic is *interexchange traffic*,"[84] a conclusion that has meaning only if non-interexchange (i.e., local) traffic still exists. Level 3's inference that the local/interexchange distinction is dead is unsupported and makes no sense.

51. The most pertinent case to this proceeding, *Qwest*, not only rejected to claim that the local/interexchange distinction was dead, but it devoted an extensive analysis to pointing out the error of that position. The court noted that the Commission had read the *ISP Remand Order* "as completely eliminating the distinction between "local" and "non-local" traffic," and that [t]he Court disagrees." The court, instead, ruled:

> Although the FCC did reevaluate its use of the term "local" in the *ISP Remand Order, it did not eliminate the distinction between "local" and "interexchange" traffic and the compensation regimes that apply to each-namely, reciprocal compensation and access charges. See Global NAPS I,* 444 F.3d at 73. Indeed, as the First Circuit recently explained, the *ISP Remand Order* itself "reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the [Act], did not intend to disrupt the pre-[Act] access charge regime, under which 'LECs provided access services ... in order to connect calls that travel to points-both interstate and intrastate-*beyond the local exchange.'"*[85]

G. The *Initial Order's* Adoption of a Bill and Keep Approach for VNXX Traffic is Lawful

52. Several CLECs complain in various ways that the *Initial Order's* adoption of a bill and keep regime for VNXX traffic is unlawful. For example, Level 3 and ELI/ATI claim that bill and keep is unreasonable because it denies CLECs the ability to recover termination costs.[86] Pac-West claims that traffic imbalance and arbitrage are not sufficient grounds to impose a bill and keep regime.[87]

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[84] *Id.* at 1158 (*emphasis added*).

[85] *Qwest,* 484 F.Supp.2d at 1170 (emphasis added; some citations omitted).

[86] Level 3 Petition ¶¶ 48-55, 65-66; ELI/ATI Petition, at 8-16

[87] Pac West Petition ¶¶ 24-28.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

53. Before addressing these and other specific claims made by petitioners who oppose bill and keep, it is critical that the ruling of the *Initial Order* be placed into context. First, the *Initial Order* does not mandate a bill and keep regime for local ISP traffic, even though such a conclusion would be entirely lawful under the *ISP Remand Order*. Level 3 will continue to receive $.0007 per minute of use for calls placed to ISPs located in the caller's LCA. Thus, for local ISP traffic—the only traffic governed by the *ISP Remand Order*—nothing changes, and such traffic will receive terminating compensation.

54. The bill and keep regime adopted in the *Initial Order* is only for VNXX traffic. Given that, it is curious to see the level of complaint from the CLECs about bill and keep because, if bill and keep is not adopted, the proper compensation regime should be access charges or a complete a ban of VNXX-routing. Judge Mace was faced with four basic alternatives: (1) ban VNXX in Washington, (2) allow VNXX, but impose access charges on VNXX traffic, (3) allow VNXX, but formalize a bill and keep regime for its exchange, or (4) require the payment of terminating compensation on VNXX traffic under the *ISP Remand Order* or some other theory. The *Initial Order*, based on governing law, concluded that alternative four was unlawful and inappropriate. Given the three other alternatives, the *Initial Order* adopted a compromise position (alternative three) that is far more advantageous to CLECs than alternatives one or two, either of which would have been completely lawful under federal law: *Global NAPs I* upheld the imposition of access charges on VNXX traffic, while *Global NAPs II* upheld a complete ban of VNXX traffic. In other words, given federal and state law, the *Initial Order's* bill and keep approach represents the most advantageous position that the CLECs could reasonably expect in this case.

55. Level 3 erroneously argues that bill and keep for VNXX traffic is unlawful. This argument is wrong for two reasons. First, as the Washington Federal Court held, the *ISP Remand Order* does not prescribe intercarrier compensation for VNXX ISP traffic and consequently, under existing law, the CLECs are not entitled to receive compensation from Qwest for terminating this traffic.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Thus, from a compensation perspective, bill and keep leaves the CLECs in the same position they would be in if bill and keep were not ordered. Indeed, if intercarrier compensation is to be paid on VNXX traffic, it would be from the CLECs to Qwest. That is because the CLECs use VNXX to offer a service that is functionally equivalent to an interexchange 1-800 service. In offering their interexchange service, the CLECs obtain origination and transport from Qwest and thus should arguably be required to pay Qwest originating access. Second, bill and keep does not deprive the CLECs of compensation because they can still recover the cost of terminating VNXX traffic from their ISP customers. Nor does it matter whether traffic is in balance. The bill and keep ordered in the *Initial Order* is not a substitute for reciprocal compensation and thus there is no state law or federal law requirement that traffic be in balance. The FCC has ruled that reciprocal compensation does not apply to traffic that qualifies as "exchange access, information access or exchange services for such access." The VNXX traffic at issue here falls within one or more of these categories.

56. The Oregon commission, like the *Initial Order*, adopted a bill and keep approach for VNXX traffic, but unlike the *Initial* Order, limited the lawful use of VNXX in Oregon only to ISP traffic and it required that the CLEC pay for transport, not at TELRIC rate required by the *Initial Order*, but at the higher Qwest private line transport rates.[88] Despite the fact that the Oregon ICA went into effect in June 2007, Level 3 has not appealed the decision of the Oregon commission.

57. Bill and keep is certainly nothing new to other states in Qwest's operating territory, which have adopted bill and keep for the exchange of local traffic. For example, the Colorado commission, several years ago, adopted a bill and keep regime for local ISP traffic and the Iowa commission has followed a bill and keep regime for all local traffic for many years. Those rulings were

[88] *Oregon Level 3 Order*, 2007 WL 978413, at *2, *5.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

reaffirmed in the recent orders by the Colorado and Iowa commissions in the recent Level 3/Qwest arbitrations.[89] Level 3 did not appeal those decisions either.

58. In Washington, we have at least two other examples of bill and keep. First, Qwest has exchanged local traffic with TCG for many years on bill and keep basis. Second, the recent Qwest/Verizon Access agreement allows the exchange of VNXX traffic, but on a bill and keep basis.

59. The *ISP Remand Order*, while adopting an interim regime that called for the phase-down of compensation for *local* ISP traffic, was clear that the ultimate goal of the FCC was to move to a bill and keep regime. Further, the FCC was absolutely clear that the interim regime it was establishing was a set of *rate caps*; thus, the individual state commissions could move to bill and keep at any time they chose. In *AT&T Communications v. Qwest Corporation,* (an unpublished 2005 opinion of a Colorado federal district court attached hereto as Exhibit B), the CLEC argued that the Colorado commission had erred in ordering bill and keep for ISP traffic, instead of the $.0007 rate. Relying on several paragraphs of the *ISP Remand Order*,[90] the court ruled that the rates set forth in the interim regime of the *ISP Remand Order* are rate caps, which set an "upper limit" on compensation,[91] and that the Colorado commission "acted within its authority in adopting a bill and keep mechanism structure for ISP-bound traffic."[92]

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[89] Initial Commission Decision, *In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Action of 1996, and the Applicable State Laws for Rates, and Conditions of Interconnection with Qwest Corporation*, 2007 WL 1814461, ¶¶ 49-50 (Colo. PUC, February 22, 2007) ("The arguments presented by Level 3 on the rate at which ISP-bound traffic should be exchanged are insufficient to convince us that we should alter our position from previous decisions mandating a bill and keep mechanism, or a zero rate, for the exchange of this traffic. We find that Level 3's legal interpretation of the ISP Remand Order is flawed. The FCC's interim compensation regime sets rate caps with the goal of eliminating arbitrage altogether by moving to bill and keep") *affirmed* 2007 WL 2163000 (Colo. PUC, April 24, 2007); Order on Reconsideration, *In Re Level 3 Communications, LLC, vs. Qwest Corporation*, 2006 WL 2067855 (Iowa Util. Bd. July 19, 2006)) ("*Iowa Level 3 Order*") (adopting all of Qwest's proposed language).

[90] Specifically paragraphs 78, 80, 82, and footnote 152.

[91] See Exhibit B, at 11-16.

[92] *Id.*at 16.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

60. Thus, the assertion of several of the CLECs that the *Initial Order* is unlawful because it will result in unrecovered termination costs[93] is wrong: (1) the plan adopted in the *Initial Order* continues to allow CLECs to receive compensation at $.0007 for local ISP traffic, just as the *ISP Remand Order* provides for (even though, under the rationale of the Colorado case, the Commission could have required a bill and keep regime even on that traffic), and (2) for VNXX traffic, which is the only traffic to which the bill and keep regime applies, none of the CLECs has identified costs for which Qwest bears any legal responsibility. Indeed, if the CLECs discontinued the use of VNXX and the calls were routed through an IXC (as interexchange traffic should be), then Qwest would receive originating access charges. But VNXX, by its nature, is specifically designed by the CLEC to "disguise" interexchange calls as local calls so that the CLECs can avoid paying originating access to Qwest.

61. VNXX-routing results from a conscious CLEC decision and does not create termination costs for which Qwest is responsible. *Global NAPs II* could not have been more clear in pointing out the underlying falsity of CLECs who make a conscious decision to employ VNXX:

> Global wants to use virtual NXX to *disguise the nature of its calls*—that is, to offer its customers local telephone numbers that cross Verizon's exchanges instead of the traditional long-distance numbers attached to such calls. . .
>
> ****
>
> Global's desired use of virtual NXX *simply disguises traffic subject to access charges* as something else and would force Verizon to subsidize Global's services. This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to *game the system* and take advantage of the ILECs in a purported quest to compete.[94]

[93] Level 3 Petition ¶¶ 65-66; ELI/ATI Petition, at 8-16.

[94] 454 F.3d at 102, 103; emphasis added. In a recent order in Oregon, an Oregon ALJ recognized that VNXX is an artificial CLEC-designed effort to avoid the proper intercarrier compensation for long distance calls: "[T]he VNXX

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

62. The Pac-West claim that there is insufficient cost evidence to support bill and keep[95] misses the point. The issue here is not a cost issue, but is a question of the intercarrier compensation regime that applies to the traffic in question. VNXX traffic is not local traffic. It is interexchange traffic that Qwest delivers to a CLEC POI. Since the traffic is interexchange in nature, it is not Qwest's responsibility as the originating LEC to pay compensation to cover CLECs' alleged costs. The costs are incurred by the CLECs to offer an interexchange toll-free service and they should recover their costs from their ISP customers. Because Qwest bears no responsibility for the termination costs of Pac-West or any other CLEC to deliver interexchange traffic to their customers the *Initial Order's* recommendation of a bill and keep regime is not deficient for lack of a detailed cost study. Finally, as noted above, the *Initial Order's* bill and keep recommendation is actually generous to the CLECs because the only other lawful and realistic alternatives available to the Commission is either the imposition of access charges or the outright ban of VNXX-routed traffic.

63. Pac-West argues that Washington statutes do not require bill and keep for VNXX service.[96] Once again, its argument misses the mark. No party has said there is a statute mandating bill and keep for VNXX traffic, nor does the *Initial Order*. But, then, nothing suggests that the Commission can impose a bill and keep regime only if specific statutory authority to do so exists. The more relevant question is whether there is any Washington statute that prohibits a bill and keep regime for VNXX traffic. While Level 3's petition contains a heading that says

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dilemma *is a product of [the CLEC's] intentional design.* Universal requests and obtains blocks of numbers from the NANPA for specific local calling areas and assigns them without interference, or even influence, from Qwest. . . . Thanks to Universal's number assignment policies, Qwest is denied the access charges to which it is entitled under its tariff." Order, *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, 2006 WL 1517163, at *16 (Or. PUC, April 19, 2006).

[95] Pac-West Petition ¶¶ 35-37.

[96] PacWest Petition ¶¶ 29-31.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

that bill and keep violates a Washington statute,[97] there is no reference to a Washington statute in that section of its petition. Indeed, Level 3's petition contains only a single citation to a Washington statute; it is in another section of its petition and it merely says that settlements approved by the Commission must be in the public interest.[98]

H. The *Initial Order's* Requirement that CLECs Pay Qwest to Transport VNXX Traffic is Lawful

64. The *Initial Order* recommends the adoption[99] of Staff's proposal that Qwest be allowed "to recover from the CLEC the costs of the proportion of trunk capacity that is used by the CLEC to send traffic that will terminate on Qwest's network as well as the proportion of that trunk capacity that is used by the CLEC for VNXX (interexchange) traffic."[100] Level 3 carries the primary arguments against this decision. None of the arguments is valid.

65. Level 3's first argues incorrectly that requiring CLECs to pay for the transport related to VNXX violates federal and Washington precedent.[101] Level 3 makes this argument by attempting to extend rules to interexchange traffic that, under existing law, apply only to local traffic. Level 3's position that Qwest is responsible for the cost of transporting traffic to the POI *for all traffic types* has never been the law. The FCC's rules prohibiting charges for traffic origination (Rule 51.703(b)) and charges for dedicated facilities used to originate traffic (Rule 51.709(b)) have always been limited to local calls, and have never applied to interexchange calls. Indeed, the authorities cited in earlier sections of this brief support Qwest's position on this very point.

66. Under the current version of these rules, the prohibition upon charges for delivering traffic to the POI with the other carrier is limited to "telecommunications traffic." Rule 51.701(a) provides

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[97] Level 3 Petition, at 26, Heading VI.
[98] *Id.* ¶ 67 and footnote 121.
[99] *Initial Order* ¶ 98.
[100] *Id.* ¶ 87.
[101] Level 3 Petition ¶¶ 38-41.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

that "the provisions of this subpart apply to reciprocal compensation for transport and termination of *telecommunications traffic*." (Emphasis added). Rule 51.701(b)(1) defines "telecommunications traffic" for the purposes of subpart H (the FCC's Reciprocal Compensation rules) to exclude "interstate or intrastate *exchange access*, *information access*, or exchange services for such access." (Emphasis added). Rule 51.703(b) states: "A LEC may not assess charges on any other telecommunications carrier for *telecommunications traffic* that originates on the LEC's network." (Emphasis added). Therefore, the prohibition contained in Rules 51.703(b) and 51.709(b) do not apply to either ISP traffic, which is "information access," or to VNXX traffic, which is "exchange access."[102]

67. In the *ISP Remand* Order, the FCC held that ISP traffic is "information access."[103] In *Peevey*, the Ninth Circuit determined as a matter of federal law that VNXX traffic (both ISP-bound and non-ISP bound) is interexchange traffic that is carved out of Rule 51.703(b) pursuant to Rule 51.701(b).[104] Although *Peevey* mentions only FCC Rule 51.703(b), it is clear that its analysis applies to Rule 51.709(b) as well. Rules 51.703(b) and 51.709(b) are both contained in the FCC's reciprocal compensation rules and those rules apply only to the "transport and termination of *telecommunications* traffic."[105] In *Level 3 Communications v. Colorado PUC*,[106] the court held that it was appropriate to make the terminating carrier responsible for ISP traffic because Rules 51.703(b) and 51.709(b) do not apply to traffic that is "interstate or intrastate exchange access, information access, or exchange access services for such access."[107] Since ISP traffic is "information access" traffic, the Colorado federal court held that Rules 51.703(b) and 51.709(b)

[102] In the *Local Competition Order*, the FCC determined that interexchange traffic was not subject to reciprocal compensation, a ruling that remains the law today. *Local Competition Order* ¶ 1034; *Peevey*, 462 F.3d 1157-59.
[103] *ISP Remand Order* ¶¶ 30, 36-42.
[104] 462 F.3d at 1157-58.
[105] 47 C.F.R. § 51.701(a); emphasis added.
[106] 300 F.Supp.2d 1069, 1075-81 (D. Colo. December 8, 2003) ("*Colorado Level 3*").
[107] *Id*. at 1075-76.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

did not apply and the Colorado commission's decision to require Level 3 to pay for transport of ISP traffic was valid.[108] Level 3 did not appeal that decision. Two years later, AT&T appealed the same issue in Colorado and the court's ruling was the same: the Colorado commission's imposition of transport charges on the CLEC for ISP traffic was held to be lawful.[109]

68. In its petition, Level 3 (in the section dealing with bill and keep) erroneously relies upon the FCC's *TSR Wireless* decision.[110] In *TSR Wireless*, a group of wireless carriers (specifically paging companies) brought complaints that ILECs were charging for the origination of intraMTA wireless traffic.[111] Under the FCC's rules at the time, wireless calls that originate and terminate within the same Major Trading Area ("MTA") were defined to be "local telecommunications traffic." In ruling on the complaints, the FCC determined that "[d]efendants cannot charge for the delivery of LEC-originated, *intraMTA* traffic to the paging carrier's point of interconnection."[112] Level 3 fails to disclose the conclusion of the D. C. Circuit in the appeal of the FCC's decision (the "*TSR Wireless Appeal*").[113] In the *TSR Wireless Appeal*, the D.C. Circuit recognized that the wireless carriers would be required to compensate ILECs for origination of traffic that originated and terminated in different wireless LCAs. According to the Court, the wireless carriers were required to pay for the use of the ILEC facilities "for delivering

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[108] *Id*. at 1077-79.

[109] See slip opinion attached as Exhibit B, at 21-26. During the past two years, the issue of whether a CLEC may be required to pay to transport *all ISP traffic* (local and VNXX) has been litigated in several states in the current round of Level 3/Qwest arbitrations and the six state commissions. The five states (excluding Washington) that have entered orders on this issue have all adopted language proposed by Qwest that requires Level 3 to pay all transport costs related to VNXX traffic. Decision No. 68817, *In the Matter of Level 3 Communications,* 2006 WL 2078565, at *39 (Arizona Corp. Comm'n, June 29, 2006) ("*Arizona Level 3 Order*"); *Colorado Level 3 Order* ¶¶ 21-22; *Iowa Level 3 Order*" at *10; *Oregon Level 3 Order* at *26) (requiring that Level 3 pay for transport of VNXX traffic private line rates); Memorandum Opinion, *In the Matter of the Petition of Level 3 Communications LL, for Arbitration of an Interconnection Agreement with Qwest Corporation*, 2007 WL 2580557 at *3 (Wyo. PSC, April 30, 2007) ("*Wyoming Level 3 Order*").

[110] Level 3 Petition ¶ 52 and footnote 88, citing Memorandum Opinion and Order, *In the Matter of TSR Wireless, LLC v. U S WEST Communications, Inc.,* 15 FCC Rcd. 11166 (June 21, 2000) ("*TSR Wireless*").

[111] *TSR Wireless* ¶ 5.

[112] *Id*. ¶ 18 (*emphasis added*).

[113] *Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. June 15, 2001)("*TSR Wireless Appeal*").

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Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

traffic that originates or terminates outside the MTA (essentially the local calling area)."[114] Thus, the prohibition against origination charges for traffic and/or facilities did not apply to inter-MTA (wireless interexchange) calls.

69. In its *TSR Wireless* decision, the FCC specifically recognized that Rule 51.709(b) applied only to local telecommunications traffic. While the D.C. Circuit, in the appeal of the *TSR Wireless* decision, did not opine on the scope of Rule 51.709, it did note that the FCC reads Rule 51.709(b) "as *entirely congruent with § 51.703(b)*, confirming the ban on charges, whether labeled as for traffic or for facilities, for LEC-originated *local calls*."[115] Thus, *TSR Wireless* is distinguishable on two grounds. First, the traffic at issue was "telecommunications traffic," thus bringing it within Rule 703(b). Second, the traffic was local telecommunications traffic, thus bringing it within the ambit of the FCC's reciprocal compensation rules—the traffic at issue here, however, is interexchange VNXX traffic that does not fall in any way under the reciprocal compensation rules—indeed, under the logic of the *TSR Wireless Appeal*, charging the CLECs for transport is entirely lawful. The *Initial Order's* ruling on this issue is lawful.[116]

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[114] *TSR Wireless Appeal*, 252 F.3d at 468.

[115] *TSR Wireless Appeal*, 252 F.3d at 468.; emphasis added.

[116] In another attempt challenge the *Initial Order* and avoid paying for the transport of VNXX, Level 3 cites what it refers to as the "calling party's network pays ("CPNP") regime." Level 3 Petition ¶ 52. That regime does not apply to 1-800-like services such as VNXX, where the called party typically pays intercarrier compensation. The evidence was essentially undisputed that VNXX and 1-800 are functionally equivalent. Fitzsimmons Direct, Exhibit 101 T at pp. 5-8; Linse Rebuttal, Exhibit172T, at pp. 9-13; Exhibit 173; see also Cross Examination of Glenn Blackmon, Tr.743:6-745:15. The comparison of VNXX to 1-800 service has been recognized by state commissions. For example, the Vermont commission stated: "In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service and instead relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says the call is 'local.'" *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England, Docket No. 6742*, 2002 Vt. PUC LEXIS 272, at *41-*42 (Vt. PSB 2002). The South Carolina Commission, in a more recent order, reached the same conclusion: "The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for Virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls." Order Ruling on Arbitration, *In re Petition of MCI Metro Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, at *35 (S.C. PUC, January 11, 2006). With 1-800 service, the party receiving the traffic pays, and it is therefore a prominent exception to any so-called "rule" that imposes charges on the calling party or the calling

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

70. Level 3's asserts that Qwest incurs no additional cost to the POI for a local call or for a VNXX call.[117] Level 3 then argues erroneously that, unless concrete cost evidence exists to show that it costs Qwest more to deliver a VNXX call than a local call, the *Initial Order's* requirement that CLEC's pay TELRIC-priced transport for VNXX traffic cannot be sustained.[118] This argument is wrong because it reverses the direction of intercarrier compensation for interexchange calls. When Qwest originates an interexchange call, it receives rather than pays intercarrier compensation. This is true even if the cost of originating the interexchange call is the same as the cost of originating a local call. By focusing on the amount of the cost, Level 3 diverts attention from the real issue which is the direction of payments.

71. When a customer places a VNXX ISP call, three types of costs are incurred – origination, transport costs, and termination costs. The question is who should bear those costs—the ISPs and their dial-up ISP customer, or ratepayers generally.[119] A comparison of the "local call model" and the "long distance model" provides a clear answer to that question. The theory behind having the originating carrier compensate the terminating carrier for terminating *local* traffic is that it has performed a service (delivering, or terminating, the call *to the called party*) for which the originating carrier has received compensation (specifically through flat-rated local service charges). But that theory does not apply to interexchange calls because the flat monthly rate paid by a customer to place an unlimited number of local calls does not include calls placed outside of the customer's LCA. *Global NAPs II* provides a clear description of the differences between the local reciprocal compensation model and the interexchange access charges model:

> Reciprocal compensation arrangements are structured so that the carrier whose infrastructure is used in making and terminating (or completing) a

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party's network.

[117] Level 3 Petition ¶¶ 42-47.

[118] *Id.* ¶¶ 43-44.

[119] This analysis applies equally to non-ISP VNXX calls. Because ISP calls constitute the vast bulk of VNXX traffic, it is used as the example in this section.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> call receives compensation from another carrier that is using its network. That is, when a CLEC's customer calls an ILEC's customer *located in the same local calling area*, the CLEC pays the ILEC for terminating the local call. Likewise, when an ILEC's customer calls a CLEC's customer located *in the same local calling area*, the ILEC pays the CLEC for terminating the local call. Reciprocal compensation is based on minutes of use and is expressly limited to transportation and termination of *local traffic*. . . .
>
> Long-distance calls . . . are subject, in using local infrastructure, to access charges—not reciprocal compensation. . . . Thus, access charges are charges that long-distance companies are required to pay local-exchange carriers for the use of local network facilities.[120]

72. Thus, as *Global NAPs II* illustrates, interexchange calls are governed by the access charge compensation model. Under that model, the IXC charges the customer placing the call and pays originating access to the originating LEC and terminating access to the terminating LEC. When Qwest originates a long distance call, Qwest receives rather than pays compensation.

73. In offering VNXX, a CLEC is actually operating under the long distance model and is functioning as an IXC. In the ISP traffic context, the CLEC offers its ISP customers a service that allows dial-up callers to place interexchange calls for free. Further, a CLEC's use of VNXX (because it disguises long distance calls as local calls) prevents passing these costs on directly to the dial-up callers.[121] The economic principle of cost causation requires the cost-causer—the dial-up customer—to bear the cost of providing dial-up service. The long distance model, which applies here, would have the CLEC (the provider offering the equivalent of 1-800 service)[122] pay compensation to Qwest for the origination costs Qwest incurs and then seek compensation from

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[120] 454 F.3d at 95 (*emphasis added*).

[121] *Global NAPs II*, 454 F.3d at 102-03.

[122] *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, pp. *41-*42 (Vt. PSB 2002) ("In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service . . . ."); Order Ruling on Arbitration, *In re Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, p. *35 (S.C. PUC, January 11, 2006) ("Virtual NXX calls . . . are no different from standard dialed long distance toll or 1-800 calls"). *See also Ohio Embarq Commission Order*, 2007 WL 2141937 (starcites not available).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the ISP in an amount sufficient to cover what the CLEC pays Qwest plus the costs the CLEC incurs to transport and deliver the call to the ISP. The ISP could then pass its costs on to the dial-up customer so that the dial-up customer bears the costs that Qwest, the CLEC, and the ISP incur to make dial-up service possible. Level 3's position, however, would improperly reverse the compensation flow that should apply to interexchange ISP traffic.

74. Level 3 is essentially asking the Commission to allow it to unilaterally pick and choose which regulatory rules apply to it. The applicable rules mandate that the long distance model applies to VNXX traffic. The long distance compensation model for VNXX traffic is clearly the right answer from both a regulatory and an economic perspective. Just as Qwest's cost to deliver an ISP or a local voice call to POI is no different, it also costs Qwest no more to deliver a "1+" call to an IXC POP in Seattle. But that does not mean the IXC need not pay originating access charges. Qwest, along with everyone else in the industry, agrees that rational intercarrier compensation reform is necessary, but until those changes are made for the *entire industry*, it would be extremely shortsighted policy to allow one carrier, as Level 3 and other CLECs proposes for themselves, to operate under its own set of highly advantageous rules.

75. The issue is graphically framed by the FCC's comment in the *ISP Remand Order* that "ILECs might recover these costs from all of their local customers, including those who do not call ISPs," but then rejected that idea with the following unequivocal statement of policy: "There is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access."[123]

[123] *ISP Remand Order* ¶ 87.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

I. The *Initial Order* Properly Applies Current Federal Law; Level 3's Argument that the Commission Should Apply *CenturyTel, the 2003 Level 3 Order*, or the *Pac-West* and *Level 3* Orders Would Violate Federal Law

76. Level 3 advances an argument that the "fundamental debate" in this docket is the same as the issues in *CenturyTel*,[124] the *2003 Level 3 Arbitration*,[125] and the recent *Level 3*[126] and *Pac-West*[127] orders. Stating that these are the same issues that have been raised again and again before the Commission, Level 3 says they are "untimely" and that the *Initial Order* failed to "cite changed facts or law to justify a departure from the Commission's compensation precedents."[128]

77. The primary problem with this argument is that it would the Commission in the position of violating federal law. Federal law has been clarified on the scope of the *ISP Remand Order* and other policy issues related to ISP traffic. The decisions Level 3 wants the Commission to follow were issued in 2002, 2003, and the final two in 2005, and are no longer good law on this issue. Several circuit court decisions (*e.g.,* the two *Global NAPs* decisions, the *Peevey* decision, and, most importantly, the *Qwest* decision, were decided in 2006 and 2007) that bear directly on the issues in this docket all were issued after the earlier Commission decisions. The Commission cannot simply follow or apply its prior decisions on these issues, because the two most recent decisions have been vacated, and the earlier ones cannot withstand scrutiny under the *Qwest* ruling. It is the Commission's duty to apply current federal law, and current federal law produces dramatically different results than were produced in those earlier decisions. Perhaps the most egregious of Level 3's suggestions is that is the Commission need not depart from the 2005 decisions related to Pac-West and Level 3. By making this argument, Level 3 is essentially

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[124] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level3 Communications, LLC and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043.

[125] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level3 Communications, LLC and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023042.

[126] *Level 3 v. Qwest,* Docket No. UT-053039.

[127] *Pac-West Telecomm v. Qwest Corporation,* Docket No. UT-053036.

[128] Level 3 Petition ¶ 21.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

asking the Commission to flout the binding pronouncements of the *Qwest* decision. Unlike Level 3, the *Initial Order* bases itself on the correct premise: that it should follow current law, specifically the *Qwest* decision.

78. One other point should also be mentioned in connection with this issue, and that is the claim that Level 3 made earlier in this proceeding that the Commission, prior to the *ISP Remand Order*, had determined that all ISP traffic should be subject to a uniform compensation regime regardless of whether it is "local, toll, long distance, or via VNXX."[129] This position is plainly wrong. In *U S WEST Communications v. MFS Intelnet,*[130] a federal district court upheld the imposition of reciprocal compensation on ISP traffic, but made it clear that, under *Local Competition* Order, "the reciprocal compensation arrangements applied only to 'local telecommunications traffic.'"[131] This is further clarified by the court's description of how a typical ISP calls is set up: "Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."[132]

79. The Commission has always maintained the local/long distance distinction. In an arbitration decision in a GTE/ELI case,[133] for example, the Commission described how ISP customers dial-up to the Internet: "Generally, individuals contract with an ISP for a flat monthly fee to gain access to the Internet. ISPs pay their own local exchange carrier for the telecommunications services that allow its customers to call it. *If an ISP is located in the same 'local' calling area as a customer, the customer may dial a seven-digit number using the public switched telephone network to connect to the ISP facility.*"[134] In discussing the scope of section 251(b)(5), the

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[129] Level 3 Response to Qwest's Petition for Review, at 2.

[130] 193 F.3d 1112 (9th Cir.1999).

[131] *Id.* at 1122, citing *Local Competition Order* ¶ 1412.

[132] *Id.,* footnote 9.

[133] Order Approving Negotiated and Arbitrated Interconnection Agreement, *Re Electric Lightwave Co.,* 1999 WL 983851 (WUTC, March 22, 1999)

[134] *Id.* ¶ 24; emphasis added.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Commission noted that "*reciprocal compensation obligations of section 251(b)(5) should apply only to traffic that originates and terminates within a local area as defined by state commissions.*" The Commission ruled for ELI. In so doing it said: "Although the Declaratory Ruling concludes that ISP-bound local-interstate traffic does not terminate at the ISP's local server, it does not necessarily terminate at a local-carrier's end-office switch in some other state either. However, a cost of 'terminating the call' occurs at the *end-user ISP's local server (where the traffic is routed onto a packet-switched network),* and the applicable rate should be determined by the state where the terminating carrier's end office switch is located. ISPs are end-users, not telecommunication carriers."[135] It is obvious that the Commission was operating from the perspective that calls from a dial-up end user were being delivered to the ISP in the same LCA.

80. Finally, in a WorldCom/GTE arbitration[136] (the WorldCom decision was issued only two months after the GTE/ELI decision), the Commission described a WorldCom argument in these terms: *"*notwithstanding any jurisdictional determination that calls to ISPs might be interstate, for regulatory purposes those calls always have been treated as local*, (if made within the local calling area)*."[137] Staff took a similar position: "Staff maintains that calls which are made from one customer in the local calling area and terminated to another customer in the same local calling area—even if that customer happens to be an Internet service provider—are clearly local calls."[138]

81. Thus, to the extent any party asserts that the Commission previously resolved the VNXX issue in favor of requiring reciprocal compensation on all ISP traffic, the Commission's decisions simply

[135] *Id.* ¶ 31, emphasis added.

[136] Third Supplemental Order, *Worldcom f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest Incorporated*, 1999 WL 983858 (May 12, 1999).

[137] 1999 WL 983858, at 10 (starcites not available).

[138] *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

do not support such a conclusion. In any event, the law is now clear that terminating compensation may be required only on local ISP traffic.

J. The CLECs' Claims that There is No Practical Means of Distinguishing VNXX from Local Traffic is False and is Not Supported by Record Evidence.

82. In one way or another, Level 3, ELI/ATI, and Pac-West argue that the *Initial Order* should be reversed by the Commission because they claim there is no practical way to distinguish VNXX from other local traffic,[139] that the order fails to identify VNXX traffic or what constitutes transport,[140] and that the plan is needlessly complex.[141]

83. In the aggregate, these arguments are simply efforts by the CLECs that have chosen to use VNXX-routing to argue that they should not be required to comply with the fair and reasonable approach set forth in the *Initial Order* because it is complicated and may present some compliance difficulties. Of course, their solution is self-serving. It would: (1) allow VNXX and require Qwest to pay terminating compensation on all VNXX minutes and (2) require Qwest to pay for transporting all VNXX traffic for the CLECs. It is certainly understandable why the CLECs believe this approach should be adopted. It requires nothing of them except to bill Qwest for terminating compensation and excuses them from paying for transport. However, if simplicity is the primary goal of the CLECs, Qwest would suggest two alternatives, both of which have been expressly validated by federal circuit court decisions: either impose access charges on VNXX traffic (*Global NAPs I*) or ban all VNXX-routed calls (*Global NAPs II*). These simple solutions, unlike the CLECs'preferred solution, have the advantage of being completely lawful. Another even more simple solution is the Iowa plan, which imposes a bill

[139] Level 3 Petition ¶¶ 59-33; ELI/ATI Petition, at 16-19.

[140] ELI/ATI Petition, at 16-19.

[141] Pac-West Petition ¶¶ 41-45.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and keep plan on all local traffic, though that would be beyond the scope of this docket and is not Qwest's proposal.

84. In fact, however, none of the CLECs that are now complaining of the inordinate complexity of the *Initial Order's* recommendation raised any meaningful objection on that ground in testimony or during the hearing, despite the fact that Staff's proposal was before them, which is essentially the plan recommended in the *Initial Order*.

85. On its face, the complexity argument is not credible. To accept it, one would have to accept that a CLEC has no idea where its customers are located, a claim that strains credulity. Modern telecommunications equipment, properly programmed, can certainly distinguish between a call between two customers located in the same LCA from two customers located in different LCAs. Even if the two customers have numbers associated with the same LCA, surely a CLEC knows or can reasonably determine if it has given local telephone numbers to customers who are not actually located in the originating LCA. If they do not know that or claim they cannot determine it, then they have the option to discontinue use of VNXX.

86. This is not a new issue. In a Massachusetts commission decision (the case that ultimately was appealed and became the *Global NAPs I* decision), the commission had little patience with a similar complexity argument raised by the CLEC:

> "[A]n initial difficulty in implementation is not sufficient reason to forfeit any hope of the eventual proper rating of these calls. Indeed, when a carrier seeks to offer a service that complicates enforcement of the existing access regime, it is appropriate to require that carrier to work cooperatively with other carriers involved to ensure that the other carriers are duly compensated for their roles in carrying the traffic generated as a result of that service. To do otherwise would be to permit a de facto alteration of Verizon's local calling areas, which the Department has already determined to be an inappropriate topic for a two-party arbitration."[142]

[142] Opinion, *Petition of Global NAPs, Inc. . . .for Arbitration to Establish an Interconnection Agreement with*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

87. The same issue came up in *Peevey.* In response to the CLEC's claim that it could not distinguish local from VNXX traffic, the court stated:

> The CPUC's conclusion that Pac-West is able to distinguish VNXX traffic from local traffic that is first transported long-distance to a Pac-West switch and then back to the original calling area rests on statements by Pac-West witnesses that "Pac-West knows where its network ends" and the call is picked up by the customer. Since that is the end of Pac-West's responsibility for the call, it should also be the relevant end point of the call for purposes of determining whether the call is local or VNXX. The record indicates that traffic studies are common in the industry and that Pac-West could conduct such studies to separate the calls that are not subject to reciprocal compensation but are subject to access charges. Other state commissions have reached similar conclusions, so we cannot say that the CPUC's determination is without support.[143]

88. CLECs should not be allowed to receive all of the benefits of VNXX routing, while at the same time hiding behind technical arguments. Any technical complexity problems that the CLECs will experience in complying with the Commission's order, assuming it adopts the *Initial Order*, are purely self-inflicted wounds that have resulted from their conscious decision to use VNXX.

K. Level 3's Claim that the *Initial Order* Discriminates Against CLECs on the Basis of The CLEC's Network Architecture is False

89. Level 3 claims that the *Initial Order* is unlawful because it allows Qwest to discriminate against a CLEC based on their network architectures and suggests that the resolution of the problem would be to require compensation for all ISP traffic, including VNXX traffic.[144]

90. Level 3's argument has nothing to do with network design, but everything to do with compensation. Despite having built a highly centralized network (*i.e.,* only one switch in Washington, limited transport facilities in Washington, and no local exchange facilities in

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Version New England, D.T.E. 02-45, 2000 Mass. PUC LEXIS 65, *54 (Mass. DTE, December 12, 2002).

[143] 462 F.3d at 1159.

[144] Level 3 Petition ¶ 70.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Washington), Level 3 wants to receive intercarrier compensation as though it had built a ubiquitous, decentralized network in Washington. Level 3 and any other CLEC may build their networks as they choose, but their network design decisions have intercarrier compensation implications. Qwest does not require nor suggest that Level 3 must build a network just like Qwest's network. But if Level 3 chooses to centralize what little network it may actually build, it should not be allowed to pretend for compensation purposes that it has built an extensive, decentralized network. If Level 3 were allowed to receive compensation or avoid paying for transport based on such a pretense, the result would be a subsidy from Qwest to Level 3. The Second Circuit was clear that this result was not what the drafters of the Federal Act envisioned:

> But where a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. *Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business*.[145]

L. The Arbitrage Concerns Expressed in the *Initial Order* Are Valid

91. Level 3 claims that the arbitrage concerns expressed in the *Initial Order* are "overblown" and are no longer relevant.[146] Level 3 attempts to draw support from the original *Core Forbearance Order*, where the FCC eliminated the growth caps and new market limitations on local ISP traffic. There are several problems with Level 3's argument.

92. First, and most importantly, the *Core Forbearance Order* is irrelevant because it amended the *ISP Remand Order*, which dealt only with local ISP traffic. Yet nothing in the *Initial Order* purports to alter Qwest's obligation to pay $.0007 for local ISP traffic.

93. Second, the issue here is how to treat VNXX traffic (which is primarily ISP traffic). The arbitrage concerns, while similar to the concerns related to local ISP traffic, include added

[145] *Global NAPs II*, 454 F.3d at 103 (*emphasis added*).

[146] Level 3 Petition ¶¶ 56-58.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

dimensions for VNXX ISP traffic, the most serious being the fact that VNXX is a means of gaming the system to avoid access charges. The *Core Forbearance* decision did not alleviate the arbitrage concerns related to this issue, as the 2006 *Global NAPs II* decision makes clear:

> But where a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.
>
> * * * *
>
> Global's desired use of virtual NXX simply disguises traffic subject to access charges as something else and would force Verizon to subsidize Global's services. This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILECs in a purported quest to compete.[147]

94. Finally, Level 3 says all of this should not matter because dial-up minutes are diminishing. While that may be true in the aggregate, dial-up is still alive and well and generates billions of minutes of use,[148] which results in potentially millions of dollars in terminating compensation payments and similar amounts in foregone revenues to Qwest for transporting ISP traffic. Put in different terms, Level 3's argument is basically that the Commission should not worry about this because the amount that it improperly extracts from Qwest is decreasing over time. That still does not make it fair or lawful.

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[147] *Global NAPs II*, 454 F.3d at 103.

[148] Mr. Greene, the Level 3 witness, testified that Level 3 exchanges over one billion minutes of use of dial-up traffic per day in the United States. Tr. 545-46.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

M. Qwest's FX, MEL, and One-Flex Services All Comply with All Relevant Compensation Obligations

95. Pac-West asserts that the *Initial Order* is anti-competitive and discriminatory because it does take into account Qwest's FX service,[149] Qwest's Market Expansion Line ("MEL"),[150] and, although it does not mention it by name, QCC's On-Flex VoIP service.[151] All of these issues were addressed in Qwest's Reply Brief.[152]

96. Pac-West suggests that Qwest's FX service is discriminatory and anticompetitive—though it never explains why this is the case—and that the *Initial Order* is therefore deficient because it did not consider the impact of FX for intercarrier compensation purposes.[153] Aside from the absence of a coherent argument as to why Qwest's FX service is unlawful, Pac-West's assertion that the *Initial Order* did not give due consideration to Qwest's FX service is simply untrue.

97. The *Initial Order* correctly concluded that FX service and VNXX service are functionally similar in that they allow an end-user customer located in one LCA to dial a local number but then be connected to an end-user located in another LCA, but Pac-West ignores how the *Initial Order* deals with the whole story: "[E]ven though Qwest's FX service and the CLECs' VNXX services are functionally equivalent, and may qualify as exceptions to the geographical basis for the COCAG numbering guidelines, mere functional equivalence does not resolve the compensation issues that are at the heart of Qwest's complaint."[154]

98. The *Initial Order* was careful to describe, for example, how Qwest provides and prices its FX service, noting that "[a]n ILEC FX customer must purchase local service in the foreign exchange

[149] Pac-West Petition ¶¶ 19-20.
[150] *Id.* ¶ 21.
[151] *Id.* ¶ 22.
[152] Qwest Reply Br. ¶¶ 75-80, 83-85.
[153] *Id.* ¶¶ 19-20.
[154] *Initial Order* ¶ 38.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and must also purchase a retail private line to transport the non-local calls to the FX customer's home or business phone."[155] In other words, the *Initial Order* properly notes that an FX customer, unlike a CLEC providing VNXX, pays full retail for local service in the originating LCA and then pays for transport to the distant LCA from a retail private line tariff. Most of the CLECs in this case deny any responsibility to pay anything for the cost Qwest incurs to originate traffic (including the local loop and distribution plant and the local switch) and further deny responsibility to pay for transport on VNXX (even at TELRIC rates that are far lower than private line rates). And, while an FX customer has no right to charge Qwest terminating compensation, most CLECs demand that Qwest pay them to terminate their VNXX traffic. The *Initial Order* saw the issues clearly – while acknowledging that FX and VNXX do the same thing, it was adamant on the point that the real issue is compensation, in this case assuring that VNXX users pay some reasonable portion of the costs their customers cause and denying them the windfall of receiving terminating compensation on traffic that benefits only the CLECs, their ISP customers, and the end-users of those ISP customers. Pac-West's suggestion that the *Initial Order* fails to properly address Qwest's FX traffic is untrue. In fact, the *Initial Order* demonstrates a keen understanding of the issues relating to FX and VNXX.

99. Pac-West's raising of the MEL issue is extremely perplexing. The undisputed evidence is that MEL is simply a call forwarding service that allows a customer to forward calls to other telephone numbers, even to telephone numbers located in a different LCA. But the catch is that while, to the end user, this appears to be the completion of a local call, the MEL customer pays Qwest retail toll rates to forward the call to another LCA. To put it in terms relevant to the *Initial Order*, the MEL customers pays full retail toll prices to forward its service to another LCA, the VNXX customer wants Qwest to do it free. If anyone is being discriminated against, it

[155] *Id.* ¶ 12.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

certainly not a VNXX user, even if it pays TELRIC-rated transport (which is far lower than retail toll rates).

100. Little more needs to be said about QCC's OneFlex service. Qwest's opening brief demonstrated how this service honors LCAs.[156] Staff's brief provides an accurate description of One-Flex.[157] While criticizing OneFlex,[158] no CLEC challenged in briefing the manner in which OneFlex assures that LCAs are honored and how it differs from VNXX, and Pac-West, while raising a red flag, provides no substantive argument to suggest that there anything whatsoever amiss in the manner in which QCC provides One-Flex or in the manner in which Qwest provides the underlying network services to QCC. The Iowa Board recently addressed the differences between OneFlex and VNXX:

> [T]he Board offers the following analysis and findings: OneFlex is not VNXX. Qwest's offering of OneFlex service is fundamentally different from Level 3's VNXX proposal in at least one way: Level 3 has not cited any evidence in this record that Qwest's system uses another carrier's network in Iowa to carry interexchange calls without compensation to that other carrier. This has been the Board's primary concern with VNXX service from the time it was first presented to the Board; Level 3's proposal does not offer an answer to this problem, while Qwest's service avoids it altogether. There may be other features that distinguish OneFlex from VNXX, but this one, by itself, appears to be sufficient.
>
> Moreover, as Qwest points out, a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. According to Qwest, when structured this way the service has no impact on the public switched telephone network (PSTN). This also differentiates OneFlex from VNXX.[159]

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[156] Qwest Opening Br. ¶¶ 99-100.

[157] Staff Br. ¶¶ 88-89.

[158] Level 3 Br. ¶ 73, ELI Br. pp. 20-21; Jt. CLEC Br. ¶¶ 38-39.

[159] *Iowa Level 3 Order,* 2006 WL 2067855, at *18.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

101. Pac-West has provided nothing to suggest that the *Initial Order* is deficient in any manner on these issues

N. The CLEC's Procedural Concerns are All Without Merit

102. Level 3 and ELI/ATI raise three procedural issues that are easily disposed of.

103. Level 3 claims that the *Initial Order* is discriminatory because all CLECs in Washington that provide VNXX service are not named as parties.[160] Qwest filed its complaint against the named CLECs who, based on information available to Qwest, appeared to be using VNXX routing. It would certainly raise serious concerns if Qwest were to bring a complaint against a CLEC where no evidence existed of the use of VNXX. Level 3's argument also ignores the fact that, even if an unnamed CLEC is later determined to be using VNXX, Qwest will be bound by the Commission's decision and would then need to address the CLEC's use of VNXX if it did so in a manner inconsistent with the final order. If the CLEC and Qwest could not agree on how to handle the traffic, then Qwest would be in a position where it would need to seek relief from the Commission. Finally, there was nothing that prevented Level 3 or any other party from moving to join additional parties to this docket if it had information that another CLEC was using VNXX. The fact that some unknown, and unnamed, CLEC *might* be using VNXX now or in the future is not a valid ground to allow CLECs who are using VNXX to be freed from compliance with federal and state law.

104. ELI/ATI claim that the *Initial Order* improperly creates a rule under the Washington Administrative Procedures Act ("APA"), but that the Commission failed to follow the procedures in the APA.[161] In fact, however, this case was a specific complaint against several named CLECs, the evidence was focused on the actions of those specific CLECs, and the relief

[160] Level 3 Petition ¶ 8.

[161] ELI/ATI Petition, at 2-6.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

sought related to those specific CLECs. All due process requirements for a complaint proceeding were followed. Evidence was, for the most part, received without objection. The *Initial Order*, just as an initial order any other complaint would do, examined the facts in light of prevailing law and proposed an order consistent with those two variables. The *Initial Order* merely opines on the validity or invalidity of specific legal arguments made by parties and recommends a resolution of the "complaints" in the context of the law and facts - this is precisely what commissions do in complaint cases. The fact that the legal conclusions may be relied on in another proceeding does not turn the decision into a rule—if ELI/ATI's theory were adopted, every decision in a complaint proceeding would, by definition, be a rule. Surely that is not what the APA was meant to accomplish.

105. Finally, ELI/ATI claim that the *Initial Order* is not based on substantial evidence, emphasizing particularly the limited cost evidence.[162] As Qwest pointed out above and in its briefs, this is merely an effort to distract the Commission from the real issues. This is not a cost case, but is a case focused on the proper intercarrier compensation regime that applies to various traffic, as the *Qwest* remand makes clear. Likewise, whether a traffic imbalance does or does not exist is irrelevant, though the evidence showed some striking imbalances. Even if traffic were perfectly in balance, that would not justify payment of terminating compensation on interexchange traffic. None of the alleged factual errors or "failures" to rely on substantial evidence are relevant to the issues in this case. This argument should be rejected.

O. The *Initial Order's* Rulings on Broadwing's Counterclaims are Lawful and Reasonable

106. Broadwing sought review of the *Initial Order's* dismissal of the portion of Broadwing's counterclaim for compensation for ISP traffic. Qwest addressed these issues extensively in its

[162] *Id.* at 6-8.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

briefs,[163] and the *Initial Order* is correct in all respects on Broadwing's counterclaims on these issues. Broadwing failed to establish that the traffic claimed is compensable under the parties' ICA or under state or federal law. No evidence supports Broadwing's contention that under the ICA "intercarrier compensation is required for *all* traffic transported by a carrier to the Receiving Party and then delivered by the Receiving Party to an Internet service provider . . . . "[164] The ICA's definition of ISP-bound traffic, and, by extension, the 3:1 presumption, incorporate a "local" restriction, which the *Initial Order* properly recognized.

107. Broadwing supports Level 3's request that the Commission maintain the status quo – however, Level 3 and Broadwing are both wrong about the "status quo". Under the clear language of the *Qwest* decision, there is, and never has been, a current contractual obligation requiring Qwest to pay compensation on non-local traffic. Thus, the "status quo" is that VNXX is not compensable, and the law fully supports that outcome. Thus, Broadwing and others are wrong when they claim that the *Initial Order* created and retroactively applied a "new compensation regime for VNXX traffic."

108. There is no "retroactivity" issue in connection with the interpretation and enforcement of the ICA. The *Initial Order* renders a proper decision of what the *ISP Remand* Order has always meant, not some new retroactive interpretation. In light of that interpretation, the *Initial Order* adjudicates the parties' rights under state law and the ICA. Thus, Broadwing cannot defeat Qwest's defenses to Broadwing's improper billing by claiming that the ICA can only be enforced prospectively. To do so would be to allow Broadwing to collect on invoices which Qwest has no legal obligation to pay, and would be contrary to the Commission's authority under the Telecom Act to enforce the ICA – the Commission has held that it may grant relief in enforcing an ICA

[163] Qwest's Opening Brief ¶¶ 124-157; Qwest's Reply Brief ¶¶ 101-110.

[164] Broadwing Petition ¶ 4.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

that covers a period of time before and during the enforcement proceeding.[165] Broadwing (now owned by Level 3) ignores that the fact that the earlier Pac-West and Level 3 enforcement proceedings, both asked for and were granted relief for a period of time that predated their enforcement petitions.[166] While Qwest disagreed with the substance of the Commission's orders, Qwest made no claim that granting such relief was impermissibly retroactive. Contrary to Broadwing's allegations, the *Initial Order* does not retroactively apply a new standard adopted through adjudication, but merely adjudicates the parties' rights under the ICA on an issue that the Commission and federal courts have now explicitly decided. Indeed, if anything, *granting* a request to compensate VNXX would result in the retroactive application of a new, unlawful standard, since compensation for VNXX has never been required.

109. Broadwing states that the ALJ erred in concluding that "Broadwing has not shown that any of the local VNXX calls for which it is billing Qwest are local in the geographical sense of the word."[167] Broadwing claims that the "geographic-based local distinction adopted in the *Initial Decision* is irrelevant under the parties' contract and should be struck from the *Initial Order*." In other words, Broadwing claims that the ICA requires compensation for *all* ISP traffic. That claim is refuted by the language of the ICA itself, as well as applicable state and federal law.

110. Remarkably, many of Broadwing's arguments are raised for the first time on administrative review. Broadwing claims in its petition that the Amendment to the parties' ICA governs and

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[165] *Eschelon v. Qwest*, Docket No. UT-033039, Order No. 04, ¶ 24. This case was a request by Eschelon to opt in to an ICA Amendment, and Eschelon requested that the rates under the Amendment be applied from the date of the opt in, a request that Qwest opposed. The Commission granted the relief, stating that the Commission "has the power to resolve interconnection disputes under the Act. That power would be incomplete if a carrier could extend the time to resolve an interconnection dispute and then enjoy with impurity the benefit of any unlawful rates it collected during the alleged dispute." Likewise, enforcement powers would be nullified if a carrier was obligated to pay all invoices rendered prior to the date of the final order, even if those invoices are unlawful.

[166] *Level 3 v. Qwest*, Docket No. UT-053039, Order No. 05, ¶ "[W]e require Qwest to compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order. We reject the argument that payment back to the effective date is a **retroactive** application of rates: We are simply implementing the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order."

[167] *See Initial Order* ¶ 125.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

that it requires that *all* traffic to an ISP be compensated. Besides the fact that Broadwing is wrong, Broadwing cannot fairly raise, and the Commission cannot fairly consider, an argument and a position that was not previously raised in either testimony or briefing. What Broadwing raises in this argument is an allegation that the parties somehow specifically agreed to a compensation scheme other than that imposed by the *ISP Remand Order*.

111. Any reasonable reading of the Amendment shows the fallacy of that argument. However, had Broadwing raised that issue in a timely manner, Qwest would have conducted discovery and cross examination of this issue, something it did not do because Broadwing did not raise this issue. Nevertheless, as the Amendment contains evidence of the parties' intent on its face, and that intent was to institute a compensation scheme that implemented the *ISP Remand Order*, no more. Thus, Broadwing's argument is reduced to what it has always been – a claim that the *ISP Remand Order* included all ISP traffic. That argument has already been considered and rejected by the federal courts, including *Qwest.*

112. Broadwing contends that the ALJ erred in concluding that the *ISP Remand Order* addressed only geographically local ISP-bound calls in establishing the interim compensation regime and growth caps, and that interexchange (VNXX) ISP calls, were excluded from reciprocal compensation requirements under the terms of that order."[168] Broadwing claims that "this conclusion is without sufficient analysis, and should be struck from the *Initial Order*."

113. However, when one compares this conclusion with the holding of *Qwest,* it is obvious that the *Initial Order* is exactly in line with the holding of *Qwest* and the conclusions contained in the *Initial Order* are amply supported.[169]

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[168] *See Initial Order* ¶ 128.

[169] The Qwest court concluded: "Because the ISP Remand Order does not require Qwest to pay intercarrier compensation on calls placed to ISPs located outside the caller's local calling area-such as VNXX calls (unless the WUTC decides to define this traffic as within a local calling area)-Qwest is not, under the WUTC's present analysis, contractually obligated to pay Pac-West or Level 3 the interim compensation rates established by the FCC." Qwest,

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

114. The relevant ICA Amendment (Exhibit 243) was executed to implement the *ISP Remand Order*, as is clear from the "Whereas" clauses on pages 1 and 2, and from the statement in footnote 1 that "the rate-affecting provisions" of the Amendment become effective on the effective date of the *ISP Remand Order*.[170] The Amendment clearly evidences the intent to reflect the rates and rate structure found in the *ISP Remand Order* (p. 2). Thus, the meaning of the Amendment must be interpreted consistent with the expressed intent of the parties. As such, the definition of ISP traffic in the Amendment can only be read in such a way that is consistent with the definition in the *ISP Remand Order*.

115. It is indisputably clear that the *ISP Remand Order* does not, in the words of the federal district court, "require Qwest to pay intercarrier compensation on calls placed to ISPs located outside the caller's local calling area-such as VNXX calls." When one reads the entire Amendment, as opposed to taking selective quotes out of context as Broadwing does, there is no basis upon which to conclude that the Amendment did anything more than implement the *ISP Remand Order*, with all of the rights and limitations inherent in that Order.

116. As noted, the Amendment must be read as a whole and must be interpreted to give effect to the intent of the parties. That intent is to implement the terms of the *ISP Remand Order*. It is not, as Broadwing claims by relying on selected excerpts taken out of context, intended to create an entirely new scheme for intercarrier compensation requiring terminating compensation for all ISP traffic regardless of jurisdictional boundaries. The Amendment states that: "Qwest has elected to adopt the federal intercarrier compensation regime for ISP-Bound traffic, and has

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484 F.Supp. 2d at 1176-77.

[170] "WHEREAS, Qwest has elected to adopt the federal intercarrier compensation regime for ISP-Bound traffic, and has offered to terminate all Section 251(b)(5) and ISP-Bound traffic in Washington with all carriers in Washington at the rates for ISP-Bound traffic described in the ISP Order; and WHEREAS, *the Parties desire to amend the Interconnection Agreement to reflect the interim rates and structure for ISP-Bound traffic described in the ISP Order*." (Exhibit 243, page 2, emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

offered to terminate all Section 251(b)(5) and ISP-Bound traffic in Washington with all carriers in Washington at the rates for ISP-Bound traffic described in the ISP Order;".[171] Contrary to Broadwing's assertions, the Amendment does not set up two different intercarrier compensation schemes, one for "ISP-Bound traffic" and one for "other traffic" – rather, the Amendment memorialized the intercarrier compensation scheme established by the *ISP Remand Order*, and specifically preserved the compensation schemes for other types of traffic, and refers to the tariff for those types of traffic not addressed in the agreement.[172] In context, it is clear that the definition of ISP-Bound Traffic is limited to ISP traffic as defined by the *ISP Remand Order*, and not all traffic destined for an ISP.

117. While the *Initial Order* could have ordered Broadwing to pay access charges for VNXX traffic, the *Order* did not do so. Instead, it reached a conclusion consistent with the federal court's mandate, consistent with the *ISP Remand Order*, and consistent with Qwest's agreement with Verizon Access – that if VNXX is to be allowed at all, it must be on a bill and keep basis. Considering the alternatives, that conclusion is beneficial to Broadwing.

118. The *Initial Order* properly interpreted the Amendment as addressing only ISP-bound traffic under the *ISP Remand Order*. That traffic is limited to local traffic as defined by state law. As discussed above, that means traffic that originates and terminates in the same LCA. It is not traffic that ignores LCAs and uses VNXX dialing to transport calls outside the LCA – those calls are interexchange and not subject to ISP-bound compensation. Nothing in the Amendment suggests that Qwest intended to enter into an agreement that broadened the scope of compensable traffic beyond that defined by the *ISP Remand Order*. Qwest is not challenging the legality of the Amendment, only the interpretation given to it by Broadwing.[173]

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[171] Exhibit 243, p. 2

[172] Id, p. 4, Section 5.2. Other types of traffic identified but not altered in terms of compensation are switched exchange access and interLATA toll.

[173] Broadwing suggests, at ¶ 26 of it petition, that Qwest is precluded from challenging the legality of the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

119. The *Initial Order* properly rejected all of Broadwing's claims, except those for access charges, because those claims all relate to non-compensable VNXX traffic. Qwest supports the *Initial Order* on this point. With regard to the growth caps issue, which is moot because of the holding on VNXX, Qwest refers the Commission to its opening (¶¶ 137-146) and reply (¶¶ 72, 107) briefs. There, Qwest describes at length why the growth caps continue to apply, even if VNXX were ultimately determined to be compensable, and why Broadwing's claim for $318,000 on this issue should be denied.

120. Broadwing spends many pages of its petition arguing that the Initial Order improperly imposed a "retroactive" requirement on the parties' ICA. As explained above, this argument has no merit. The cases that have clarified the scope of the *ISP Remand Order* have not imposed a new interpretation of the *ISP Remand Order*—to the contrary, they have simply made it clear that the *ISP Remand Order* never applied to VNXX ISP traffic, and that the access charge regime has, since the passage of the Act, continued to apply to interexchange traffic. In other words, the *Initial Order's* application of this unanimous federal case law is not, in any sense, a retroactive application of the law.

121. Given the clear holding that the *ISP Remand Order* has always been limited to local ISP traffic, the requirement that non-local ISP traffic be excluded from "ISP-bound compensation" dates at least from that time. Thus, non-local ISP bound traffic should, from the date of the *ISP Remand Order,* be subject to either access charges or bill and keep. Broadwing cannot point to any governing authority that demonstrates that VNXX traffic was previously compensable and that the *Initial Order* has be impermissibly changing the established rules. Yet Broadwing's argument to that effect is based entirely on Broadwing's insistent misinterpretation of the *ISP Remand Order* and the Amendment, and cannot be sustained.

Amendment, but Broadwing misinterprets Qwest's arguments on this point.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

122. As noted, principles of contract law, including those cited by Broadwing, support the conclusion that the parties intended only to implement the *ISP Remand Order*, not to create a different compensation scheme. Enforcing that agreement does not produce a retroactive result, it simply results in appropriate interpretation and enforcement of the ICA under the proper interpretation of the scope of the *ISP Remand Order*. Accepting Broadwing's argument would allow a party to make a claim for billed amounts based on disputed terms, and then claim that all billed amounts must be paid up to the date of the Commission order on the basis if this "retroactivity" argument, even if the Commission order rejected the claims. The fallacy of Broadwing's argument is illustrated by Broadwing's argument that the new proposed "bill and keep" regime for VNXX traffic is fundamentally different from the intercarrier compensation scheme established by the Amendment for ISP-Bound traffic. But Broadwing interprets the Amendment in a way that is fundamentally inconsistent with its language and with the intent of the parties when they entered into it. The Amendment itself creates no compensation scheme.. Indeed, Broadwing cannot possibly believe that it does in light of this Commission's repeated pronouncements that it has not previously determined whether VNXX is lawful, or what intercarrier compensation should apply. Thus, the *Initial Order* did not, "invent new rules and then apply them retroactively to the detriment of Broadwing." The whole point of this case was to bring clarity to VNXX that the Commission itself acknowledged did not previously exist. The *Initial Order*, in a manner consistent with all relevant authorities, does exactly that.

123. Even if Broadwing were correct that an analysis regarding retroactivity should be conducted, such an analysis would not result in conclusions that support Broadwing. The Ninth Circuit standard requires examination of the following points: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."[174] Each point results in a conclusion that is contrary to Broadwing's advocacy.

124. Broadwing's claims that the question whether the termination of ISP traffic is eligible for compensation is not a matter of first impression and any decision to adopt bill and keep would be an abrupt departure from Commission precedent, Broadwing is clearly wrong because the Commission has clearly stated that it has never decided the issue of VNXX. Further, the courts have clearly ruled that the compensation scheme of the *ISP Remand Order* is limited to local traffic, however local is defined. Thus, the first two factors do not support Broadwing. Whether Broadwing relied on prior Commission decisions in other cases, decisions that have since been held to be in violation of federal law, is really immaterial to the analysis – Broadwing had no basis to believe that VNXX was compensable. Nor does the fourth factor support Broadwing's argument. Whether Broadwing is paid or not relates to the nature of the traffic exchanged – the fact that Broadwing's invoice is large does not mean that it necessarily must be paid, and in fact it would work a significant injustice to Qwest to require payment on an invoice which Broadwing has no basis in federal law or contract law to render. Finally, since there is no "old standard" upon which any party could have relied, the fifth point also fails to support Broadwing.

125. The *Initial Order* denied two of Broadwing's counterclaims because Broadwing failed to meet its burden of proof – particularly that "Broadwing has not shown that any of the local VNXX calls for which it is billing Qwest are local in the geographical sense of the word."[175] This is absolutely the correct holding. Based on Qwest's complaint and the defenses raised against Broadwing's counterclaim, Broadwing failed to present evidence about the jurisdictional nature

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[174] *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) , quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

[175] *Initial Order* ¶ 125.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

of the traffic at its peril. Indeed, it is not so much that Broadwing failed to present evidence, but that the evidence it did present leads inexorably to the conclusion that much of the traffic for which compensation is claimed is not local, and therefore not compensable. The *Initial Order* got this issue exactly right and should be upheld on review.

III. CONCLUSION/RECOMMENDATIONS

126. Qwest asks the Commission to affirm the *Initial Order.*

DATED this 14th day of November, 2007.

QWEST

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500