

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS,)	
LLC,)	DOCKET NO. UT-053039
)	
Petitioner,)	ORDER NO. 03
)	
v.)	ORDER DENYING, IN PART,
)	AND GRANTING, IN PART,
)	LEVEL 3'S MOTION FOR
QWEST CORPORATION,)	SUMMARY DETERMINATION;
)	DENYING IN PART, AND
Respondent.)	GRANTING, IN PART, QWEST'S
)	MOTION FOR SUMMARY
)	DETERMINATION.

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1 **Synopsis.** *This Order grants Level 3's motion for summary determination only as to the issue of whether the FCC's ISP Remand Order requires compensation for all ISP-bound traffic, not just traffic originating and terminating in the same local calling area. The Order denies Level 3's motion for summary determination on all other issues, including the request for payment of compensation for ISP-bound traffic under the FCC's Core Forbearance Order dating back to the effective date of the FCC's Order.*

2 *This Order denies Qwest's motion for summary determination on the issue of the interpretation of the term "ISP-bound traffic" in the FCC's ISP Remand Order, and whether Level 3 violates state law and portions of the parties' interconnection agreement through its use of VNXX arrangements, but grants Qwest's motion on the issue of whether Qwest must pay amounts Level 3 has billed as a result of the FCC's Core Forbearance Order.*

PROCEDURAL BACKGROUND

- 3 **Nature Of Proceeding.** This proceeding involves a petition filed by Level 3 Communications, LLC (Level 3), seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs). Qwest filed counterclaims against Level 3 concerning compensation for ISP-bound traffic and the propriety of Level 3's use of Virtual NXX, or VNXX, traffic under the parties' interconnection agreement.
- 4 **Procedural History.** On June 21, 2005, Level 3 filed with the Commission a Petition for Enforcement of Interconnection Agreement with Qwest. On June 29, 2005, Qwest filed an Answer to Level 3's Petition for Enforcement of Interconnection Agreement, as well as Counterclaims against Level 3. Level 3 filed a response to Qwest's counterclaims on July 6, 2005.
- 5 The Commission held a prehearing conference on July 8, 2005, in Olympia, Washington, before Administrative Law Judge Ann E. Rendahl. Following the conference, Judge Rendahl entered Order No. 01 on July 11, 2005, establishing a procedural schedule for the proceeding. On July 14, 2005, the Commission entered Order No. 02, a protective order, in this proceeding.
- 6 After Judge Rendahl granted an extension of time to file motions for summary determination, Level 3 and Qwest filed simultaneous motions for summary determination with the Commission on August 15, 2005.
- 7 **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, represent Level 3. Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, and Alex M. Duarte, Corporate Counsel, Portland, Oregon, represent Qwest.

MEMORANDUM

8 **A. Background Information.** Level 3 is an international communications and information service company authorized to provide local exchange telecommunications services in Washington State.¹ Level 3 and Qwest began exchanging ISP-bound traffic in 1999 under the parties' original interconnection agreement.² The Commission approved a successor interconnection agreement in March 2003, in Docket No. UT-023042.³ The 2003 interconnection agreement expired on August 7, 2005, but remains in effect while the parties negotiate a successor agreement.⁴

9 Level 3 provides wholesale dial-up services to ISPs in Washington State, offering a tariffed local service called Direct Inward Dialing.⁵ Level 3 describes Direct Inward Dialing as a service allowing an ISP or other customer to receive inbound calls, to obtain numbers associated with certain local calling areas.⁶

10 Level 3 also provides service to ISP customers through VNXX arrangements, which allows Level 3 to serve customers in one or more LATAs or multiple states from a single server.⁷ A VNXX arrangement "converts what would otherwise be toll calls into local calls."⁸ Traditionally, whether a call is billed as a local call or toll call depends on the location, or local calling area, in which the telephone call originates and terminates.⁹ Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the central office or

¹ Affidavit of Mack Greene in Support of Level 3 Motion for Summary Determination, ¶ 6.

² *Id.*, ¶ 8.

³ *Id.*, ¶ 9

⁴ *Id.*, ¶ 10.

⁵ *Id.*, ¶ 6; Level 3 Motion for Summary Determination, ¶ 42.

⁶ Level 3 Motion, ¶ 42.

⁷ Greene Affidavit, ¶ 16.

⁸ *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004).

⁹ Qwest Motion for Summary Determination, ¶ 19.

local calling area code.¹⁰ The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers are telephone numbers that have the same NXX as the local calling area of an end-user customer.¹¹ The numbers are “virtual” as the dialing pattern tells callers that it is made within the callers’ local calling area, rather than the called party’s local calling area, when in fact the call may terminate in a different calling area, LATA, or state.¹²

11 The definition of ISP-bound traffic and proper compensation for ISP-bound traffic are two of the primary issues in this proceeding. The Federal Communications Commission (FCC) has entered several orders addressing these issues, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) “apply only to traffic that originates and terminates within a local area.”¹³ The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.¹⁴

12 The FCC first addressed the nature of and reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.¹⁵ The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not

¹⁰ *Id.*

¹¹ *Id.*, ¶ 4.

¹² *Id.*, ¶ 23; Level 3 Motion, ¶ 45.

¹³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter “*First Report and Order*”].

¹⁴ *Id.*, ¶¶ 1034-35.

¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter “*Declaratory Ruling*”].

states.¹⁶ The FCC further determined that because ISP calls were interstate calls jurisdictionally, that they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).¹⁷ Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.¹⁸ On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding that the FCC had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were “local” for purposes of reciprocal compensation.¹⁹

13 In April 2001, the FCC released its *ISP Remand Order*.²⁰ In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.²¹ The FCC also modified its decision in the *First Report and Order* that only “transport and termination of local traffic” is subject to reciprocal, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.²² The FCC established a separate interim compensation regime for ISP-bound traffic until the FCC established a uniform intercarrier compensation system.²³ The FCC’s interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the

¹⁶ *Id.*, ¶¶ 12, 18.

¹⁷ *Id.*, ¶ 26.

¹⁸ *Id.*, ¶¶ 26-27.

¹⁹ *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) [Hereinafter “*ISP Remand Order*”].

²¹ *Id.*, ¶¶ 3, 35.

²² *Id.*, ¶ 46.

²³ *Id.*, ¶ 77.

same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.²⁴

14 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.²⁵ The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."²⁶

15 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*.²⁷

16 **B. Level 3 Petition and Motion.** Level 3 seeks enforcement of its interconnection agreement with Qwest, asserting that Qwest is in breach for not recognizing that the agreement is modified by the *Core Forbearance Order* and for failing to pay Level 3 compensation for ISP-bound traffic under the agreement as modified by the *Core Forbearance Order*.²⁸ Level 3 also asserts that Qwest is in breach of the agreement for failing to engage in good faith negotiations to modify the parties' agreement to include Level 3's proposed amendments relating to the *Core Forbearance Order*.²⁹ Level 3 requests the Commission accept Level 3's proposed amendment language, and order Qwest to pay the compensation Level 3 contends is due under the *Core Forbearance Order*.³⁰

²⁴ *Id.*, ¶¶ 78, 81, 89.

²⁵ *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

²⁶ *Id.*

²⁷ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, FCC 04-241 (rel. Oct. 18, 2004) [Hereinafter "*Core Forbearance Order*"].

²⁸ Level 3 Petition, ¶¶ 28-29.

²⁹ *Id.*, ¶¶ 30-31.

³⁰ *Id.*, ¶ 32.

- 17 Level 3 moves for summary determination on the issues raised in its petition, as well as all of Qwest's counterclaims.³¹ Level 3 asserts federal and state law requires that Qwest compensate Level 3 for *all* ISP-bound traffic, including VNXX ISP-bound traffic, not just traffic within the same local calling area. Level 3 asserts that its proposed amendment properly reflects the *Core Forbearance Order*. Level 3 asserts that it has not improperly assigned local telephone numbers to ISP servers, and has complied with Section 13.4 of the parties' interconnection agreement. Level 3 also asserts that it has properly routed VNXX ISP-bound traffic over local interconnection, or LIS, trunks.
- 18 **C. Qwest's Counterclaims and Motion.** Qwest agrees that the *Core Forbearance Order* results in a change in law requiring a modification of the parties' agreement and has engaged in negotiations over the change in law.³² Qwest disputes Level 3's interpretation of what constitutes ISP-bound traffic, asserting that only calls originating and terminating in a local calling area are subject to reciprocal compensation.³³ Qwest asserts that the interconnection agreement does not allow for reciprocal compensation for VNXX traffic, and that Level 3 has improperly billed Qwest for such traffic.³⁴
- 19 In its counterclaims, Qwest asserts that Level 3 violates federal and state law and the parties' interconnection agreements by using VNXX arrangements and billing Qwest for VNXX traffic.³⁵ Qwest also asserts that Level 3 violates the interconnection agreement by misassigning local telephone numbers to ISP servers located outside of the local area to which the number is assigned.³⁶ Qwest also asserts that Level 3 violates the interconnection agreement by improperly routing VNXX traffic over Local Interconnection Service, or LIS,

³¹ Level 3 Motion, ¶ 1.

³² See Qwest Answer and Counterclaims, ¶¶ 54, 62-63.

³³ *Id.*, ¶¶ 2-10.

³⁴ *Id.*, ¶ 62.

³⁵ *Id.*, ¶¶ 65-72.

³⁶ *Id.*, ¶¶ 73-74.

trunks.³⁷ Qwest requests the Commission deny Level 3's petition, invalidate Level 3's bills, require Level 3 to follow change in law procedures to amend the agreement, and prohibit Level 3 from using VNXX arrangements.³⁸

20 Similar to Level 3, Qwest moves for summary determination on Level 3's claims, as well as its own counterclaims. Qwest asserts that Level 3 is providing only information services, and is not entitled to use interconnection arrangements for information services.³⁹ Qwest asserts that the FCC's *ISP Remand Order* only requires compensation for local traffic, where the ISP is physically located in the same calling area as the customer placing the call.⁴⁰ Qwest also asserts that Level 3's VNXX arrangements are improper under industry guidelines, Qwest has not agreed to exchange this type of traffic, and denies Qwest the opportunity to recover transport costs.⁴¹ Qwest asserts that the Commission's decisions are consistent with these positions.⁴²

21 **D. Issues for Consideration.** Level 3 and Qwest agree that the primary issues for consideration in this proceeding are (1) whether the FCC's *ISP Remand Order* interprets ISP-bound traffic as solely local traffic, and (2) whether ISP-bound traffic includes VNXX traffic. The parties also dispute the propriety of Level 3's use of VNXX arrangements for ISP-bound traffic. Finally, the parties dispute the effect of changes in law under the FCC's *Core Forbearance Order*, and the effective date of the changes in law. These issues are addressed below.

³⁷ *Id.*, ¶¶ 75-78.

³⁸ *Id.*, ¶ 79.

³⁹ Qwest Motion, ¶¶ 3-4.

⁴⁰ *Id.*, ¶ 36.

⁴¹ *Id.*, ¶¶ 57, 59, 65-71.

⁴² *Id.*, ¶¶ 42-47, 77-81.

1. Standard of Review.

22 Under WAC 480-07-380(2), the Commission's rules governing motions for summary determination, the Commission will consider the standards applicable to motions for summary judgment made under the civil rules. Under CR 56, a party may move for summary determination if the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Summary judgment is properly entered if there is no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law.⁴³ In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.⁴⁴

23 The fact that the parties have filed motions for summary determination in the context of a petition for enforcement of interconnection agreement under WAC 480-07-650 does not change the standard of review for motions for summary determination.

2. Is Level 3 Offering Only Information Services?

24 Qwest asserts that Level 3 provides service solely to ISP customers, such that the flow of traffic is only one way, rather than two-way local exchange traffic.⁴⁵ Qwest asserts that this one way traffic allows Level 3 to unfairly benefit under the reciprocal compensation provisions in the Act and the parties' interconnection agreement.⁴⁶ Qwest further asserts that Level 3 is not entitled to

⁴³ *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668 (1996).

⁴⁴ *Id.*

⁴⁵ Qwest Motion, ¶ 9; see also Confidential Exhibit A-2 to Qwest's Motion, Level 3's Response to Qwest Data Request No. 7.

⁴⁶ *Id.*

interconnection with Qwest, nor may it enforce its interconnection agreement.⁴⁷ Qwest asserts that carriers may interconnect under Section 251 of the Act to provide information services only if the carrier also offers telecommunications services through the same interconnection arrangement.⁴⁸ Qwest asserts that Level 3's traffic is 100% ISP traffic, or information services, such that Level 3 is providing private carrier service, not telecommunications service to the public.⁴⁹

25 Level 3 does not include a response to these allegations in its petition or motion, as the parties agreed to file simultaneous motions, with no opportunity for response.

26 ***Discussion and Decision.*** Under WAC 480-07-380(2), a party is entitled to summary determination if the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Qwest relies solely on Level 3's Confidential Response to Qwest's Data Request No. 7 as support for its argument that Level 3 provides solely an information service, without providing any telecommunications services.

27 In addition Qwest relies on an FCC regulation, 47 C.F.R. § 100(b), which establishes the general duties of carriers for interconnection. The states, not the FCC, are responsible for approving interconnection agreements between carriers, and determining whether the agreements are consistent with the Section 251 of the Act. States have authority to determine if a carrier is properly certified as a competitive local exchange carrier, or CLEC, if it serves only ISPs.⁵⁰ The Commission approved an interconnection agreement between the parties in March 2003 finding the parties' agreement consistent with Section 251 of the Act

⁴⁷ *Id.*, ¶ 12.

⁴⁸ *Id.*, citing 47 C.F.R. § 51.100(b).

⁴⁹ *Id.*, ¶ 12.

⁵⁰ *Declaratory Ruling*, ¶ 24.

and consistent with the public interest. The Commission approved the agreement with the knowledge that “Level 3 provides local exchange service exclusively to ISPs and will originate no traffic on its side of the network to be terminated on Qwest’s side of the network.”⁵¹ Qwest has not demonstrated that this decision was in error, or sought reconsideration or review of the Commission’s decision. Qwest may not do so now in a motion for summary determination. Qwest’s motion for summary determination on this issue is denied.

3. Is the Term “ISP-Bound Traffic,” as Used in the FCC’s *ISP Remand Order*, Limited to Local Traffic and Does the Term Exclude VNXX Traffic?

28 The primary dispute between the parties is an issue of law: The interpretation of the term “ISP-bound traffic” in the FCC’s *ISP Remand Order*. The parties’ interconnection agreement provides that the parties “agree to exchange all [Exchange Access or Extended Area Service] EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order.”⁵² While the agreement includes compensation for ISP-bound traffic under Section 7.3, which governs Reciprocal Compensation, the agreement is clear that the parties will exchange ISP-bound traffic under the compensation regime in the *ISP Remand Order*.⁵³

⁵¹ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Fourth Supplemental Order, WUTC Docket No. UT-023042, ¶ 18 (Feb. 5, 2003) [Hereinafter “Qwest/Level 3 Arbitration”].

⁵² March 4, 2003, Interconnection Agreement between Qwest and Level 3, § 7.3.4.3 (emphasis added). Qwest interprets the FCC ISP Order referenced in the agreement to be the FCC’s *ISP Remand Order*. See Qwest Motion, ¶ 73.

⁵³ March 4, 2003, Interconnection Agreement between Qwest and Level 3, §§ 7.3.4.3, 7.3.6.1, 7.3.6.2.3.

29 Level 3 asserts that the *ISP Remand Order* intends that ISP-bound traffic includes all traffic destined for an ISP server, whereas Qwest asserts that the FCC intends the term to include only local traffic, *i.e.*, traffic terminating at an ISP server located in the same local calling area as the originating caller. Qwest asserts that the FCC described ISP-bound traffic in the *Declaratory Ruling* as local, in which the ISP customer calls an ISP server in the same local calling area to access the internet. Qwest asserts that the FCC did not change its description of ISP-bound traffic in the *ISP-Remand Order*, and disputes that all traffic bound for the internet is subject to compensation under the *ISP Remand Order*.

30 Under Level 3's interpretation, Qwest must compensate Level 3 for all ISP-bound traffic under the FCC's intercarrier compensation regime, including VNXX traffic. Under Qwest's interpretation, their obligation to pay Level 3 for ISP-bound traffic is limited to local calls, excluding VNXX traffic.

31 **Discussion and Decision.** In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that ISP-bound traffic is jurisdictionally interstate, as the call terminating to the internet could terminate in a different state or country.⁵⁴ In describing how ISP customers access the internet, the FCC noted that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."⁵⁵ The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhance Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.⁵⁶ Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its

⁵⁴ *Declaratory Ruling*, ¶¶ 13, 18.

⁵⁵ *Id.*, ¶ 4; see also ¶ 7.

⁵⁶ *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.

argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

32 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,⁵⁷ the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis in the *First Report and Order* of reciprocal compensation. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to “local” traffic.⁵⁸ Although the D.C. Circuit rejected the FCC’s findings concerning Section 251(g), the court did not vacate the decision or rules adopted in the *ISP Remand Order*.⁵⁹ These rules, including the compensation regime for ISP-bound traffic, remain in effect.

33 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature of ISP-bound traffic,⁶⁰ this discussion does not represent the FCC’s decision in the *ISP Remand Order*. In that Order, the FCC described ISP-bound traffic as “traffic destined for an information service provider,” and as “information access” traffic.⁶¹ The FCC defines “‘information access’ ... to include all access traffic that was routed by a LEC ‘to or from’ providers or information services, of which ISPs are a subset.”⁶² The FCC further held that “the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.”⁶³

⁵⁷ *Bell Atlantic*, 206 F.3d 1.

⁵⁸ *ISP Remand Order*, ¶ 46.

⁵⁹ *WorldCom*, 288 F.3d at 430.

⁶⁰ *ISP Remand Order*, ¶¶ 9-13.

⁶¹ *Id.*, ¶ 44.

⁶² *Id.*

⁶³ *Id.*, n.82.

- 34 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.⁶⁴ Thus, Qwest's interpretation of the *ISP Remand Order* is rejected. This decision is consistent with this Commission's decision in arbitrating a recent agreement between CenturyTel and Level 3,⁶⁵ and recent decisions by the District Courts of Connecticut and Vermont.⁶⁶ These decisions all find that the *ISP Remand Order* addresses *all* ISP-bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."⁶⁷
- 35 In particular, the Vermont and Connecticut decisions identify that the FCC has preempted state commissions from determining the jurisdiction and compensation of ISP-bound traffic.⁶⁸ The FCC has established an interim compensation regime for ISP-bound traffic until it determines an appropriate uniform intercarrier compensation regime. States and carriers must abide by the FCC's compensation regime for ISP-bound traffic until the FCC adopts different

⁶⁴ *Id.*, ¶ 58; *see also* ¶ 61.

⁶⁵ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter "*CenturyTel-Level 3 Arbitration*"], *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).

⁶⁶ *Global Naps*, 327 F.Supp.2d 290, 300 (D. Vermont, 2004); *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], *recons. denied*, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

⁶⁷ *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

⁶⁸ *Global Naps*, 327 F.Supp.2d, 300; *SNET v. MCI*, 353 F.Supp.2d, 295, 299; *SNET v. MCI*, 359 F.Supp.2d, 231.

rules. Thus, despite Qwest protestations, Qwest must compensate Level 3 for all ISP-bound traffic under the *ISP Remand Order*, including VNXX traffic. This Order discusses below that the Commission requires additional information before determining whether and how the Commission may prohibit the use of VNXX arrangements or exclude VNXX traffic from compensation for ISP-bound traffic.

4. Does Level 3's Use of VNXX Arrangements Violate State Law and the Parties' Interconnection Agreement?

36 In Counts 2, 4, and 5 of its Counterclaims, Qwest asserts that Level 3 violates state law, and various provisions of the parties' interconnection agreement through Level 3's use of VNXX arrangements to transport and terminate ISP-bound traffic. Specifically, Qwest asserts that Level 3's attempts to bill Qwest for VNXX traffic is a violation of state law, specifically WAC 480-120-021, which defines local calling areas, and the Commission's decision in the AT&T/Qwest arbitration in Docket UT-033035.⁶⁹ Qwest also asserts that Level 3 violates Section 13.1 of the parties' interconnection agreement, which provides that the parties are "responsible for administering NXX codes assigned to it," and Section 7.2.1.2 of the agreement, which allows parties to exchange certain categories of traffic over LIS trunks.⁷⁰

37 Level 3 denies it is in violation of state law in establishing VNXX arrangements. Level 3 agrees with Qwest that the Commission rejected AT&T's proposed definition of a "local" call, which definition would have allowed AT&T to use VNXX arrangements.⁷¹ Level 3 asserts, however, that the Commission was considering the proper definition for "Exchange Service" or "Extended Area Service (EAS)/Local Traffic," not the definition of ISP-bound traffic in the

⁶⁹ Qwest Answer and Counterclaims, ¶¶ 30-32.

⁷⁰ *Id.*, ¶¶ 13-15, 36-44, 73-78.

⁷¹ Level 3 Motion, ¶ 58.

arbitration proceeding.⁷² Level 3 also asserts that the Commission stated that its discussion and the Arbitrator's comments about the appropriate compensation mechanism for VNXX traffic were dicta and did not bind the parties or the Commission.⁷³

38 Level 3 asserts that it is no more in violation of Section 13.4 of the interconnection agreement than Qwest is in offering wholesale dial-up and Foreign Exchange, or FX, service.⁷⁴ Level 3 asserts that Qwest does not provide any facts to identify how Level 3 has violated the provision of the agreement, and asserts that Level 3 is entitled to summary judgment as a matter of law.⁷⁵

39 Level 3 asserts that it has properly routed VNXX traffic over LIS trunks and has not violated the parties' interconnection agreement. Level 3 asserts that the agreement allows the parties to exchange ISP-bound traffic over LIS trunks, and that such traffic includes VNXX service.⁷⁶

40 ***Discussion and Decision.*** The issue in Qwest's Counts 2, 4, and 5 of its Counterclaims is whether Level 3 may appropriately use VNXX arrangements under state law and the parties' interconnection agreement. As discussed above, a VNXX arrangement allows a carrier such as Level 3 to obtain phone numbers with a certain NXX or central office code, to be used by a customer in a different local calling area. A person calling the number would not know that the number is not a local call. The person initiating the call will only pay charges for a local call, rather than toll charges for a non-local call. A number of other states have rejected the use of VNXX arrangements, including states in Qwest's territory.⁷⁷

⁷² *Id.*

⁷³ *Id.*, ¶ 59.

⁷⁴ *Id.*, ¶ 65.

⁷⁵ *Id.*, ¶ 66.

⁷⁶ *Id.*, ¶¶ 67-68.

⁷⁷ See Exhibit C to Qwest's Motion for Summary Determination.

- 41 State commissions retain authority under the Act to address intrastate service, including identifying and establishing geographic areas for designating local and toll calls.⁷⁸ This Commission has established definitions of local calling areas and exchange access areas in WAC 480-120-021. The Commission's definitions of EAS/Local Traffic and Exchange Access, or IntraLATA Toll, are included in the parties' interconnection agreement in Sections 4.22 and 4.24. EAS or Local Traffic service is traffic originating and terminating within the local calling area determined by the Commission.⁷⁹ VNXX arrangements do not fall within the definition of EAS/Local Traffic, but do appear to fall within the category of interexchange or IntraLATA calls, subject to toll charges.
- 42 Despite Level 3's and Qwest's assertions, this Commission has *not* approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state. In the Commission's final order in the AT&T/Qwest arbitration in Docket No. UT-033035, the Commission did not approve AT&T's definition of Exchange Service of EAS/Local Traffic, which would have allowed for the use of VNXX arrangements, but stated that the Arbitrator's comments were dicta.⁸⁰ Further, the Commission noted that it did not seek to discourage the parties' ability to negotiate the use of services equivalent to Qwest's FX service.⁸¹
- 43 As to Count 2 of Qwest's Counterclaims, it would be a stretch to say that Level 3 has violated state law in establishing VNXX arrangements. While the parties appear to agree that Level 3 uses VNXX arrangements, the nature of those arrangements, and the compensation for the arrangements under the parties'

⁷⁸ *ISP Remand Order*, ¶ 39; see also *Global Naps*, 327 F.Supp.2d, 299.

⁷⁹ See March 4, 2003, Interconnection Agreement between Level 3 and Qwest, § 4.22.

⁸⁰ *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b)*, Order No. 05, Final Order Affirming Arbitrator's Report and Decision, Approving Interconnection Agreement, WUTC Docket No. UT-033035, ¶¶ 15-16 (Feb. 6, 2004).

⁸¹ *Id.*

agreement is not fully understood. While this Commission has the authority to prohibit the use of VNXX arrangements, it should not do so without a full record on the issue. The issues raised in Qwest's Counts 2 are better addressed after the parties have an opportunity to develop a complete record on the issues. Level 3 and Qwest's motions for summary determination on this issue are denied.

44 Section 13.4 of the interconnection agreement provides that:

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

Qwest alleges that Level 3 violates this section by misassigning local telephone numbers to ISP servers physically located outside the local areas in which the telephone number is assigned. As Level 3 asserts, Qwest does not offer any specific facts to identify how Level 3 violates this section other than requesting local numbers to terminate calls in a different local area. Without more information, there appears to be a genuine issue of material fact as to whether Level 3 has violated this section of the agreement. Similar to the issues raised in Qwest's Count 2, the parties should have an opportunity to develop a complete record as to Count 4 before the Commission enters a decision on the issue. Qwest's and Level 3's motions for summary judgment on Count 4 of Qwest's Counterclaims are denied.

45 In Counterclaim 5, Qwest asserts that Level 3 has improperly routed VNXX ISP-bound traffic over LIS trunks, and that the issue is whether the Interconnection Agreement permits this exchange of traffic.⁸² Level 3 asserts that the

⁸² Level 3 Motion, ¶ 67.

Commission has approved the exchange of ISP-bound traffic under the interconnection provisions of the agreement, *i.e.*, Section 7.2.1.2, and has found that *ISP-Remand Order* includes VNXX traffic in ISP-bound traffic.⁸³

46 Section 7.2.1.2 governs the types of traffic that the parties will exchange, including ISP-bound traffic.⁸⁴ As noted above, the Commission approved the parties' agreement knowing that Level 3 would exchange only ISP-bound traffic under the agreement. The Commission did not, however, understand that Level 3 intended to establish VNXX arrangements. Given the discussion above governing the interpretation of ISP-bound traffic under the *ISP Remand Order*, VNXX traffic is included in ISP-bound traffic. Until the Commission enters a decision to the contrary, it appears that Level 3 may exchange ISP-bound traffic, including VNXX traffic, on Qwest's LIS trunks under the agreement. Qwest's motion for summary judgment on Count 5 of Qwest's Counterclaims is denied, and Level 3's motion for summary determination on this issue is granted. Similar to the issues raised in Qwest's Count 2 and 4, however, the parties should have an opportunity to develop a complete record as to Count 5 before the Commission enters a decision as to whether Level 3 may exchange VNXX traffic over LIS trunks.

47 This Order denies Qwest's motion for summary judgment on Counts 2, 4, and 5 of its Counterclaims, denies Level 3's motion for summary determination as to Counts 2 and 4, and grants summary determination as to Count 5 of Qwest's Counterclaims. The Order also recommends that the issues of fact and law be developed more fully in this proceeding. These issues are deferred for hearing, scheduled to be held on September 15, 2005.

⁸³ Level 3 Motion, ¶ 68.

⁸⁴ March 4, 2003, Interconnection Agreement between Level 3 and Qwest, §§ 7.2.1.2, 7.2.1.2.6.

5. When Are Changes in Law under the *Core Forbearance Order* Effective?

48 After the effective date of the FCC's *Core Forbearance Order*, Level 3 began billing Qwest for compensation it believes is due under the Order.⁸⁵ In December 2004, Level 3 requested that the parties negotiate an amendment to the parties' interconnection agreement to implement the *Core Forbearance Order*.⁸⁶ In March 2005, Level 3 proposed an amendment to the parties' interconnection agreement to reflect the change in law under the *Core Forbearance Order*.⁸⁷ Level 3 asserts that Qwest is in breach of the agreement for not paying Level 3 compensation due under the *Core Forbearance Order* and for failing to negotiate in good faith to amend the parties' agreement. Level 3 requests the Commission approve Level 3's proposed amendment language, and require Qwest to pay all past-due compensation charges, late payment charges on all past-due amounts, and true-up all billing related to exchange of ISP-bound traffic back to the effective date of the *Core Forbearance Order*.⁸⁸

49 Qwest responded to Level 3's request in January 2005, opening the dispute resolution timelines.⁸⁹ Qwest proposed amendment language in April 2005 in response to Level 3's proposed language.⁹⁰ Qwest has refused to pay the amounts Level 3 has billed, objecting to Level 3's use of VNXX arrangements as well as Level 3's efforts to implement the *Core Forbearance Order* before the Commission approved an amendment to the parties' interconnection agreement. The billed amount in dispute is alleged to be \$1,586,552.⁹¹ In Count 3 of its counterclaims, Qwest asserts that Level 3 has violated the change in law

⁸⁵ Level 3 Petition, ¶ 19.

⁸⁶ Exhibit B to Level 3 Petition.

⁸⁷ Exhibit D to Level 3 Petition.

⁸⁸ Level 3 Petition at 16.

⁸⁹ *Id.*, ¶ 21; Exhibit C to Level 3 Petition.

⁹⁰ See Exhibit D to Greene Affidavit.

⁹¹ Exhibit E to Level 3 Petition.

provisions of the parties' interconnection agreement by billing Qwest for compensation for ISP-bound traffic based on the *Core Forbearance Order*.⁹²

50 ***Discussion and Decision.*** The interconnection agreement between Level 3 and Qwest includes provisions governing how the parties will implement changes in law. Section 2.2 of the agreement provides that the parties must amend the agreement if any laws, rules, regulations or interpretations of law governing the agreement are "changed, vacated, dismissed, stayed or modified." Section 2.2 provides that if the parties cannot reach agreement on an amendment "within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement."

51 Section 5.18 of the agreement governs dispute resolution, and provides that if the parties cannot resolve dispute within the ordinary course of business, that disputes will be escalated to resolution by vice-presidential level representatives.⁹³ If the vice-presidential level representatives cannot resolve the dispute within 30 days then either party may request resolution through private arbitration.⁹⁴ Sections 5.18.1 and 5.18.6 of the agreement make clear that the parties are not precluded from bringing a dispute before the Commission.

52 The parties agree that the *Core Forbearance Order* modified the provisions of the *ISP Remand Order* imposing growth caps and imposing bill and keep compensation for carriers entering new markets after the effective date of the ISP Remand Order.⁹⁵ Under Section 2.2 of the parties' agreement, the parties must amend their agreement before the change of law is effective. Thus, Level 3 may not seek to implement the changes under the *Core Forbearance Order* until the

⁹² Qwest Motion, ¶¶ 69-72.

⁹³ March 4, 2003, Interconnection Agreement between Level 3 and Qwest, §§ 5.18.1, 5.18.2.

⁹⁴ *Id.*, §§ 5.18.3.

⁹⁵ See Exhibit B to Level 3 Petition; Exhibit D to Greene Affidavit.

Commission approves an amendment to the parties' interconnection agreement. Level 3 may not bill Qwest for additional compensation for ISP-bound traffic due under the *Core Forbearance Order* until the Commission approves an amendment implementing the change in law.

53 There is no dispute of material fact on the issue of whether there is a change in law under the *Core Forbearance Order*. Level 3's motion for summary determination on Count 1 of its petition is denied as a matter of law, given the change of law provisions in the parties' interconnection agreement.

54 Similarly, there is no dispute of material fact as to whether Qwest has complied with the dispute resolution provisions of the agreement. The facts presented by Level 3 demonstrate only that the parties do not yet agree on amendatory language to implement the *Core Forbearance Order*. The facts do not demonstrate that Qwest is in breach of the agreement for failing to negotiate in good faith. As discussed above, Qwest's concern over Level 3's use of VNXX traffic is valid. Failing to agree to an amendment does not demonstrate a failure to negotiate in good faith. Level 3's motion for summary determination on Count 2 of its petition is denied.

55 The relief Level 3 requests in its petition and motion are similarly denied, while Qwest's motion for summary determination on Count 3 of its Counterclaims is granted. Level 3 is not entitled to additional compensation under the *Core Forbearance Order* until the Commission approves an amendment to the parties' agreement. This is not an arbitration proceeding, and the Order does not recommend any particular amendatory language. The decisions reached in this Order should provide the parties guidance in negotiating an amendment to the parties' interconnection agreement to implement the *Core Forbearance Order*.

FINDINGS OF FACT

56 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 57 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 58 (2) Level 3 Communications, LLC is authorized to operate in the state of Washington as a competitive local exchange carrier.
- 59 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 60 (4) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003, allowing Level 3 to exchange ISP-bound traffic with Qwest.

- 61 (5) Level 3 provides a tariffed local service called Direct Inward Dialing and also provides service to ISP customers in Washington State through VNXX arrangements.
- 62 (6) The Interconnection Agreement between Qwest and Level 3 provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.
- 63 (7) The FCC entered its *Core Forbearance Order* in October 2004, which changed the effect of certain provisions of the *ISP Remand Order*.
- 64 (8) Because Qwest does not offer any specific facts to identify how Level 3 violates Section 13.1 of the Interconnection Agreement other than requesting local numbers to terminate calls in a different local area, there appears to be a genuine issue of material fact as to whether Level 3 has violated this section of the agreement.
- 65 (9) Level 3 began charging Qwest compensation for ISP-bound traffic pursuant to the *Core Forbearance Order* prior to the Commission approving an amendment to the parties' interconnection agreement.
- 66 (10) Level 3 and Qwest have engaged in dispute resolution under the parties' interconnection agreement and have exchanged amendment language to implement the *Core Forbearance Order*, but have not reached agreement.
- 67 (11) Qwest has complied with the dispute resolution provisions of the parties' interconnection agreement.

CONCLUSIONS OF LAW

68 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the
following summary conclusions of law. Those portions of the preceding detailed
discussion that state conclusions pertaining to the ultimate decisions of the
Commission are incorporated by this reference.

- 69 (1) The Commission has jurisdiction over the subject matter of this
proceeding and the parties to the proceeding.
- 70 (2) Under WAC 480-07-380(2), a party may move for summary determination
if the pleadings, together with any properly admissible evidentiary
support, show that there is no genuine issue as to any material fact and
the party is entitled to judgment as a matter of law.
- 71 (3) Summary judgment is properly entered if there is no genuine issue as to
any material fact, that reasonable persons could reach only one
conclusion, and that the moving party is entitled to judgment as a matter
of law. *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d
656, 668 (1996).
- 72 (4) Qwest has not demonstrated that the Commission's decision to approve
the March 2003 Interconnection Agreement between Qwest and Level 3
was in error, nor did Qwest seek reconsideration or review of the
Commission's decision. Qwest may not seek review of that decision in a
motion for summary determination in a separate proceeding.
- 73 (5) The FCC did not limit ISP-bound traffic in its *ISP Remand Order* to traffic
originating and terminating in the same local calling area where the ISP
server is located, but includes all ISP-bound traffic.

- 74 (6) The FCC has established an interim compensation regime for all ISP-bound traffic until the FCC determines an appropriate uniform intercarrier compensation regime.
- 75 (7) State commissions retain authority under the Act to address intrastate service, including identifying and establishing geographic areas for designating local and toll calls. *ISP Remand Order*, ¶ 39; see also *Global Naps*, 327 F.Supp.2d, 299.
- 76 (8) The Commission has not approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state.
- 77 (9) Given that the nature of Level 3's VNXX arrangements and the compensation for the arrangements under the parties' agreement are not fully understood, the issues raised in Qwest's Counts 2, 4, and 5 of its Counterclaims are better addressed after the parties have an opportunity to develop a complete record on the issues.
- 78 (10) Section 7.2.1.2 of the parties' interconnection agreement allows Level 3 to exchange ISP-bound traffic, including VNXX traffic, on Qwest's LIS trunks.
- 79 (11) Section 2.2 of the parties' interconnection agreement requires the parties to amend their agreement to reflect changes in law.
- 80 (12) Level 3 may not implement the changes in law under the *Core Forbearance Order* by billing Qwest for additional ISP-bound traffic before the Commission approves an amendment implementing the *Core Forbearance Order*.

ORDER

THE COMMISSION ORDERS:

- 81 (1) Qwest Corporation's Motion for Summary Determination seeking to
invalidate Level 3's Petition for Enforcement is denied.
- 82 (2) Level 3 Communications, LLC's, Motion for Summary Determination as
to Counts 1 and 2 of its Petition for Enforcement is denied.
- 83 (3) Qwest Corporation's Motion for Summary Determination as to Count 1 of
its Counterclaims, which asserts that Level 3's attempt to bill Qwest the
ISP Remand Order rate for VNXX traffic is a violation of federal law, is
denied.
- 84 (4) Level 3 Communications, LLC's, Motion for Summary Determination as
to Count 1 of Qwest Corporation's Counterclaims is granted.
- 85 (5) Qwest Corporation's Motion for Summary Determination as to Counts 2,
4, and 5 of its Counterclaims, which concern violations of the parties'
interconnection agreement due to Level 3's use of VNXX arrangements, is
denied.
- 86 (6) Level 3 Communications, LLC's, Motion for Summary Determination as
to Counts 2, 4, and 5 of Qwest Corporation's Counterclaims is denied.
- 87 (7) Qwest Corporation's Motion for Summary Determination as to Count 3 of
its Counterclaims, which asserts a violation of the change in law
provisions of the parties' interconnection agreement, is granted.

88 (8) Level 3 Communications, LLC's, Motion for Summary Determination as
to Count 3 of Qwest Corporation's Counterclaims is denied.

89 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Pursuant to WAC 480-07-810, interlocutory review may be available through a petition for review, filed within 10 days of the service of this Order. This proceeding, however, involves a petition for enforcement pursuant to WAC 480-07-650, which establishes an abbreviated schedule for consideration. The procedural schedule established in Order No. 01 in this proceeding does not include an opportunity for interlocutory review of motions for summary determination. The parties may propose modifications to the procedural schedule, if necessary, after reviewing this Order.**

Dated at Olympia, Washington, and effective this 26th day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge