BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant v. LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST TELECOM, INC.; NORTHWEST TELEPHONE INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE, INC.; ADVANCED TELECOM GROUP, INC. D/B/A ESCHELON TELECOM, INC.; FOCAL COMMUNICATIONS CORPORATION; GLOBAL CROSSING LOCAL SERVICES INC; AND, MCI WORLDCOM COMMUNICATIONS, INC. Respondents.	Docket No. UT-063038 LEVEL 3'S REPLY TO STAFF'S ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW

LEVEL 3 COMMUNICATIONS, LLC'S REPLY TO STAFF'S ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL COMMUNICATIONS COMMISSION DECISIONS

FEDERAL STATUTES AND REGULATIONS

WASHINGTON UTC DECISIONS

STATE STATUTES AND REGULATIONS

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LEVEL 3 COMMUNICATIONS, LLC'S REPLY TO STAFF'S PETITION FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1. Pursuant to WAC 480-07-825(5) and Order No. 7,[1] Level 3 Communications LLC ("Level 3") replies to Staff's Answer to Petitions For Administrative Review filed in the above-referenced proceeding ("*Staff's Answer to Petitions*").[2] As set forth below, Staff's Answer raises new challenges to the *Initial Order*.[3] Therefore, Level 3 is filing this reply by

[1] Order No. 7 extended the filing date for Replies to Nov. 30, 2007 and authorizes electronic filing of the Replies. *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 07 (Nov. 19, 2007).

[2] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Answer to Petitions for Administrative Review on Behalf of Commission Staff (filed Nov. 14, 2007) ("*Staff's Answer to Petitions*").

[3] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 05, Initial Order; *IMO MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corp. for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Docket No. UT-063055, Order No. 02, Initial Order (Oct. 5, 2007) ("*Initial Order*").

right pursuant to WAC 480-07-825(5), which states that parties have the right to file replies to new challenges to an order that are raised in answers to petitions for review.

II. ISP-BOUND TRAFFIC INCLUDING VNXX TRAFFIC IS GOVERNED BY SECTION 251(B)(5) OF THE ACT

A. Staff's Answer to Petitions Raises New Challenges By Seeking to "Correct" the *Initial Order*'s Interpretation of Section 251(b)(5) of the Act

2. Staff acknowledges that Level 3 and Pac-West have argued that "VNXX traffic is traffic to which Section 251(b)(5) of the Act[4] applies *as a mater of federal law*," and requests that the *Initial Order* "be corrected" because it "comes close to agreeing with this incorrect theory."[5] Staff maintains that state law alone determines whether a call "is subject to § 251(b)(5) and the FCC's reciprocal compensation rules," or "subject to the Commission's own determination of fair compensation policy."[6] Accordingly, Staff maintains the "initial order should be clarified to state that the Commission is *not* setting a reciprocal compensation rate (*i.e.*, a rate of zero) pursuant to the Act."[7] Rather, Staff urges the Commission to "unequivocally state that VNXX is interexchange traffic to which reciprocal compensation *does not apply* pursuant to federal law" because such traffic is subject to state regulation.[8]

3. Staff's proposed corrections and clarifications would substantively change the findings and conclusions reached in the *Initial Order* and are therefore new challenges raised in its *Answer to Petitions*.[9] Accordingly, pursuant to WAC 480-07-825(5), Level 3 replies by right to Staff's positions on these provisions of the Act and related matters.

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[4] Communications Act of 1934 as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("Act").

[5] *Staff's Answer to Petitions*, ¶¶ 26, 29.

[6] *Staff's Answer to Petitions*, ¶ 23.

[7] *Staff's Answer to Petitions*, ¶ 29.

[8] *Staff's Answer to Petitions*, ¶¶ 26, 29, 30-31.

[9] *Staff's Answer to Petitions*, ¶¶ 26, 29, 30-34 ("Again, the Commission should unequivocally find that VNXX traffic is interexchange traffic because it is not within a local calling area.").

B. State and Federal Law Govern Intercarrier Compensation for FX-Like Traffic

4. Staff maintains that "[s]tate law determines whether a call is 'local' and, therefore subject to § 251(b)(5) and the FCC's reciprocal compensation rules."[10] Staff misinterprets decisions by Courts of Appeals to support its position. As explained herein, although the Courts have found that the FCC did not preempt state commissions from determining the appropriate compensation for FX-like ISP-bound traffic, the state commission must apply both state and federal law in determining the appropriate form of intercarrier compensation.

5. The U.S. Court of Appeals for the Ninth Circuit has found that the FCC's rules are not clear with respect to the issue of what intercarrier compensation applies to the exchange of FX-like traffic.[11] Therefore, state commissions have jurisdiction to answer that question. As the *Initial Order* recognizes, state commissions have reached different conclusions.[12] However, the only intercarrier compensation mechanism that has been upheld by the Ninth Circuit is the one adopted by the California Commission. That mechanism provides that the CLEC is entitled to terminating compensation from the ILEC so long as the CLEC establishes a POI within the local calling area or pays the ILEC Total Element Long Run Incremental Cost ("TELRIC") transport charges for transporting the traffic from the local calling area to a POI outside of that local calling area. As explained below, requiring terminating compensation for FX-like traffic is the only mechanism that is consistent with the Act.

6. Staff misinterprets decisions by Court of Appeals for the First and Second Circuit

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[10] *Staff's Answer to Petitions*, ¶ 23.

[11] *Verizon California, Inc. v. Peevey et al.*, 462 F.3d 1142, 1158-59 (9th Cir. 2006).

[12] *See, e.g., Verizon North, Inc. et al. v. Telnet Worldwide, Inc.*, 440 F.Supp.2d 700, 711 (W.D. Mich. 2006) ("*Telnet Decision*") (finding that "state commissions have split over whether VNXX calls should be ... subject to reciprocal compensation" and affirming the Michigan PUC's determination that ISP-bound VNXX traffic is subject to reciprocal compensation); *In the Matter of Starpower Communications, LLC v. Verizon South, Inc.*, FCC 03-278, ¶ 17, n.56 (2003).

involving Global NAPs to support its hypothesis that State law *alone* determines whether a call is subject to Section 251(b)(5).[13] Staff also misconstrues the breadth of these decisions. Both courts decided only the question of whether the *ISP Remand Order* preempted state jurisdiction over certain ISP-bound traffic. Other matters addressed in these decisions are mere dicta. Neither decision holds, nor could they lawfully hold, that states may regulate intercarrier compensation solely on the basis of state law without regard to Sections 251(b)(5) and 251(g) of the Act.

7. In *GNAPs I*, the First Circuit noted that the "question before us is whether the FCC intended in the *ISP Remand Order* to exercise its jurisdiction over the precise issue here, *to the exclusion of state regulation.*"[14] The court concluded that the FCC did not occupy the entire field regarding ISP bound traffic because "a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic."[15] In its appeal, Global NAPs did not challenge the state commission's determination that a call is classified based on the geographic end points of the call.[16] Therefore, the Court did not reach that issue and anything included in *GNAPs I* concerning call classification is mere dicta.

8. Likewise, in *GNAPs II* the Second Circuit determined it was "unable to conclude that the [*ISP Remand Order*] strips state boards of their jurisdiction over ISP-bound traffic."[17] In its view, "a more reasoned interpretation of the [*ISP Remand Order*] is not that the FCC has preempted the field relating to ISPs, but only that it intended to reserve jurisdiction over

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[13] *Staff's Answer to Petitions*, ¶¶ 23, 24-26, n.18, n.22. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63 (1st Cir. 2006) ("*GNAPs I*"); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102 (2nd Cir. 2006) ("*GNAPs II*").

[14] *GNAPs I*, 444 F.3d 71 (emphasis added).

[15] *GNAPs I*, 444 F.3d at 73.

[16] *GNAPs I*, 444 F.3d at 72.

[17] *GNAPs II*, 454 F.3d 91, 99.

intercarrier compensation issues with respect to ISP-bound traffic on matters that would conflict with the FCC's specific directives about reciprocal compensation," and the Act.[18] Although the Second Circuit also commented on other issues in dicta, the decision did not reach the substance of the underlying compensation issues, noting that whether state commissions "have authority to impose access fees on ISP-bound traffic is for another day and for clarification by the FCC."[19]

9. The Second Circuit recognized that any state commission regulation of FX-like ISP-bound traffic may not be "inconsistent" with the provisions of the federal Act.[20] Although federal law does not occupy the entire field, any interstitial state regulation must not be "inconsistent" with Sections 251(b)(5), 251(g), 253(a) and the other provisions of the Act.[21] Thus, in determining whether reciprocal compensation applies to the FX-like and ISP-bound traffic that is the subject of this proceeding, this Commission must apply Sections 251(b)(5) and 251(g) and determine whether its prospective rules comport with these federal statutory provisions.

C. The Fundamental Flaw In Staff's Argument Is That There Were No Pre-Act Rules Imposing Intrastate Access Charges on FX-like Traffic

10. Notwithstanding the plain language of the Act, Commissions and even courts make the same mistake in legal analysis time and again. A state commission's jurisdiction over

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[18] *GNAPs II*, 454 F.3d 91, 100. The Second Circuit concluded that the FCC's "classification of ISP-bound traffic as interstate dose not in itself remove ISP-bound traffic from the jurisdiction of state commissions." However, it did not conclude that federal law does not apply to ISP-bound traffic as maintained by Staff. *Id.*, 101.

[19] *GNAPs II*, 454 F.3d 91, 99.

[20] *GNAPs II*, 454 F.3d 91, 99; *see, e.g.*, 47 U.S.C. § 261(c) ("nothing in this part precludes a State from imposing requirements on a telecommunications carrier for *intrastate* services that are necessary to further competition in the provision of telephone exchange or exchange access, as long as the State's requirements *are not inconsistent* with this part or the Commission's regulations to implement this part.") (emphasis added); 47 U.S.C. §§ 261(a)-(b), 252(c) and (e).

[21] Sections 252(c) and (e) and Section 261 require that all state regulation be consistent with the Act. 47 U.S.C. §§ 251, 253(a), 261. As discussed in Level 3's prior briefs, Section 253(a) precludes discriminatory state regulation and the creation of barriers to competitive entry. Section 253(a) provides: "No state or local statute or regulation ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253; Level 3 Initial Brief, ¶¶ 47-48.

intrastate exchange access is preserved under Section 251(g). The appropriate starting point is in the analysis is not whether a particular call is local, but whether the local exchange carrier is providing intrastate exchange access to an interexchange carrier and, if so, does it otherwise meet the criteria of Section 251(g)? Both of these questions must be answered in the affirmative before a state commission may determine that Section 251(g) exempts a call from Section 251(b)(5) compensation.

11. As Level 3 has repeatedly argued, Section 251(b)(5) governs intercarrier compensation for "all telecommunications" not excluded under Section 251(g).[22] Level 3 does not contend that the Act abolished access charges or the distinction between local and long distance calls. Rather, Level 3 contends that the FCC's current interpretation of the Act,[23] which was not questioned or vacated by *WorldCom*, preserves only those access charges that qualify under Section 251(g) for an exemption from Section 251(b)(5) compensation. *WorldCom* held that Section 251(g) is merely "a transitional device, preserving various LEC *duties that antedated* the 1996 Act until such time as the [FCC or state regulator] should adopt new rules pursuant to the Act."[24] Thus, Section 251(g) excepts only forms of traffic that existed and were regulated prior to enactment of the 1996 Act.

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[22] *See, e.g.,* Level 3 Initial Brief at 19-21; Level 3 Reply Brief at 15-18; Level 3 Petition for Administrative Review at 11-16 ("the unambiguous text of the Act ... establishes *Section 251(b)(5) reciprocal compensation as the default intercarrier compensation* absent a temporary transitional exemption pursuant to Section 251(g).") (emphasis in original).

[23] "Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of all telecommunications traffic, -- i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier. ... [W]e interpret subsection (g) as a carve-out provision [to 251(b)(5)]." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9166-67 (2001) ("*ISP Remand Order*").

[24] *WorldCom v. FCC*, 288 F.3d 429, 430-33 (D.C. Cir. 2002) (emphasis added); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407, ¶ 47 (1999) (Section 251(g) "is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree").

12. Traffic that falls within the Section 251(g) exception must first qualify as information access or exchange access. It must also be traffic that: (1) existed and was regulated prior to the passage of the Act; (2) is exchanged with an interexchange carrier ("IXC") (not another LEC); and (3) was subject to equal access obligations resulting from an FCC decision or court order prior to enactment of the Act.[25]

13. The FX-like and ISP-bound traffic at issue here does not qualify as information access. *WorldCom* unequivocally held that the FCC could not classify ISP-bound traffic as information access that meets all three of the prongs of the test for Section 251(g) traffic. Although the D.C. Circuit did not vacate the *ISP Remand Order*, it clearly determined that the FCC could not apply the *information access* definition and Section 251(g)'s three-prong test to exclude ISP-bound traffic from Section 251(b)(5) compensation obligations. Thus, the FCC's original determination in the *ISP Remand Order* that ISP-bound traffic was information access was decisively reversed and this aspect of the Order, as well as others, no longer remains in force.

14. Staff urges the Commission to hold that "VNXX traffic is interexchange and not local" and thereby not subject to Section 251(b)(5).[26] Staff relies on *Peevey* for the proposition that VNXX traffic is interexchange. However, Staff fails to disclose that the court upheld the California Commission's view that VNXX traffic should be considered "interexchange" only

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[25] Section 251(g) provides that on and after enactment of the Act, each LEC: "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 non-discriminatory interconnection restrictions and obligations (including receipt of compensation) *that apply to such carrier on the date immediately preceding the date of enactment* of the Telecommunications Act of 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 prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment 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).

[26] *Staff's Answer to Petitions*, ¶¶ 23, 30.

with respect to "transport charges," and not for the purposes of intercarrier compensation.[27] Staff also argues that "Washington law distinguishes local traffic from interexchange traffic on the basis of the geographic endpoints of the call."[28] Yet at the same time, Staff undermines its argument by admitting that the Washington statutes relied on by the ILECs in this proceeding do not "mandate a particular form of compensation for interexchange traffic."[29] This is precisely the same error committed by the FCC in its initial Declaratory Ruling on ISP-bound traffic. As *Bell Atlantic* held, a regulator cannot rely on an end-to-end jurisdictional classification to determine the applicable intercarrier compensation under federal law.[30] Rather, the regulator must decide whether a call constitutes telephone exchange service, which is subject to Section 251(b)(5) intercarrier compensation, or exchange access that meets the three-prong test of Section 251(g).[31]

15. As explained above, interexchange traffic is not a traffic category that falls within Section 251(g). Presumably Staff meant to equate FX-like services with the exchange access services provided by LECs to interexchange carriers. Assuming this is the argument that Staff intended to make, the traffic at issue would fail the three prong test of Section 251(g). In the *ISP Declaratory Ruling*, the FCC stated unambiguously that "[t]he Commission *has no rule* governing intercarrier compensation for ISP-bound traffic."[32] The D.C. Circuit also noted that "it seems uncontested - and the [FCC] declared in the [*ISP Declaratory Ruling*] - that there had

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27 *Peevey*, 462 F.3d 1142, 1155-56.

28 *Staff's Answer to Petitions*, ¶ 32.

29 *Staff's Answer to Petitions*, ¶ 27.

30 *Bell Atlantic Tel. Cos. v. Federal Comms. Comm'n*, 2006 F.3d 1, 5, 8 (DC Cir. 2000).

31 *Id.* at 8.

32 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96-98, 14 FCC Rcd 3689, 3695, ¶ 9 (1999) ("*ISP Declaratory Ruling*").

been *no* pre-[1996] Act obligation relating to intercarrier compensation for ISP-bound traffic."[33] The Court then emphasized that the FCC did not "point to any pre-[1996] Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."[34] The D.C. Circuit held that because Section 251(g) authorized only "continued enforcement" of pre-1996 Act requirements, and there was *no such pre-1996 requirement* as to intercarrier compensation for ISP-bound calls, the FCC could not rely on Section 251(g) to exempt ISP-bound traffic from Section 251(b)(5).[35]

16. Similarly, the *Initial Order* recognizes the historical fact that non-voice FX-like traffic bound for ISPs "has never been subject to access charges - the original (non VNXX) dial-up ISP service was not available when the access charge system was established and VNXX dial-up ISP service has not been included in determining access charges because it is locally-dialed and has been billed as local."[36] Staff has also admitted that Washington law does not dictate the type of intercarrier compensation that applies to "interexchange" calls.[37] Voice calls and other services provisioned via FX-like services, being more recent innovations, were not provided when the access charge regimes were established and therefore could not possibly meet the pre-1996 Act prong of Section 251(g).

17. Staff has also argued that FX-like traffic exchanged between ILECs and CLECs cannot be equated with the exchange of traditional FX traffic between ILECs.[38] Assuming,

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[33] *WorldCom*, 288 F.3d at 433 (emphasis in original).

[34] *Id.*

[35] *WorldCom* at 433; *see also Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039, ¶¶ 266, 288 (2002) ("*VA Arbitration Order*").

[36] *Initial Order*, ¶ 72.

[37] *Staff Answer*, ¶ 27.

[38] *Staff Answer*, ¶ 32.

arguendo, that Staff is correct, this merely confirms that there was no pre-1996 Act compensation mechanism for the exchange of FX-like traffic that can be preserved under Section 251(g). But Staff's assumption contradicts Commission precedent that holds FX-like and FX services are functional equivalents.[39] Further, unrebutted record evidence established that competing ILECs exchanging FX calls did not assess access charges on the LEC that terminated the FX call in a distant local calling area.[40] Although the access charge system was established in the 1980s and access charges applied to some types of interexchange calls, that system has never applied to the "VNXX" and ISP-bound calls at issue here. Any arguments to the contrary are simply revisionist history and ILEC wishful thinking.

18. In sum, the FX-like and ISP-bound traffic at issue in this dispute is neither exchange access or information access and does not meet the three-prong test for Section 251(g). Staff attempts to side step an analysis of Section 251(g) entirely by relying on dicta in *GNAPs I* and *GNAPS II*. These cases decided only whether federal law had occupied the field and preempted concurrent state jurisdiction. Staff cannot rely on dicta in these cases to avoid applying the applicable statutory provisions to the traffic at issue - Sections 251(b)(5) and 251(g) - and the interpretation of these provisions established in *WorldCom* and *Bell Atlantic*.

D. The FCC's Core Forbearance Decision Does Not Alter The Reality That Traffic Is Subject To Section 251(b)(5) Unless Temporarily Excepted by Section 251(g)

19. On July 26, 2007, the FCC denied a Petition filed by Core Communications, Inc.

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[39] The *Initial Order* correctly concludes that "the Commission's finding in the AT&T Arbitration Order that FX and VNXX are functionally equivalent remains persuasive." *Initial Order*, ¶¶ 34, 38; *see In re AT&T Communications of the Pacific Northwest and TCG Seattle*, Docket No. UT-033035, Order No. 04, Arbitrator's Report, ¶ 33 (Dec. 1, 2003) ("AT&T Arbitration Order").

[40] Level 3 Answer to WITA Petition, ¶ 9.

("Core") requesting the FCC forbear under Section 10[41] of the Act from applying the rate regulation preserved by Section 251(g), and other FCC policies for all telecommunications carriers.[42] Core requested that the FCC forbear from "[a]ny limitation, by FCC rule or otherwise, on the scope of section 251(b)(5) *that is implied from section 251(g) preserving switched access charges*."[43] Thus, Core's Petition sought to eliminate the entire switched access charge regime and replace it with a unified single rate for termination of traffic that would apply to all forms of traffic including wireless, internet, and wireline. Core's Petition did not focus on ISP-bound traffic or VNXX and did not determine the scope of Section 251(b)(5). Rather, it was decided largely on procedural grounds.

20. In denying Core's Petition, the FCC reached the unremarkable conclusion that if it "were to forbear from applying the rate regulation preserved by section 251(g), *there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime*," until the FCC conducted a rulemaking.[44] The FCC noted that "Section 251(g) preserves *pre-Act compensation obligations and restrictions* for 'exchange access , information access, and exchange services for such access ... until such restrictions and obligations are explicitly

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[41] Section 10(a) of the Act provides three forbearance criteria: "The Commission shall forbear from applying any regulation or any provisions of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of their geographic markets, if the Commission determines that - (1) enforcement of such regulation or provision is not necessary to ensure that charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S.C. § 160.

[42] *In the Matter of Petition of Core Communications for Forbearance From Sections 251(g) And 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 14118, ¶ 1 (July 26, 2007) ("Core Forbearance Order").

[43] *In the Matter of Petition of Core Communications for Forbearance From Sections 251(g) And 254(g) of the Communications Act and Implementing Rules*, Docket No. 06-100, at 2 (2006).

[44] Core Forbearance Order, ¶ 14 (emphasis added).

superseded *by regulations prescribed by the Commission.*'"[45] Thus, in the FCC's view of its own procedures and administrative law, if it had granted Core's forbearance request to remove all traffic from the confines of section 251(g) including the traffic presently subject to access charges, no regulations would govern this former 251(g) traffic until the FCC implemented new rules. This point of administrative law is unremarkable and does not alter the reality that on its face the structure of the Act as interpreted by the FCC in the *ISP Remand Order* and by the court in *WorldCom*, establishes that Section 251(b)(5) is the governing intercarrier compensation regime for all traffic that was not temporarily excepted by Section 251(g) prior to enactment of the Act. In fact, the FCC notes in the Core Forbearance Order that it "could decide to subject all traffic [including *all traffic* presently subject to interstate and intrastate access charges] to the reciprocal compensation regime in section 251(b)(5) through new regulation; [pointing out only that] such action would have to be occur in the context of a rulemaking proceeding."[46]

21. Further, the Core Forbearance Order is irrelevant to the present dispute because as Level 3 has demonstrated, the FX-like and ISP-bound traffic that are the subject of this dispute did not exist and was not subject to equal access obligations prior to enactment of the Act, such traffic is not exchanged with an IXC, and it has never been within the scope of Section 251(g). Because it does not fall within Section 251(g), FX-like traffic is governed by the Section 251(b)(5) regime.

III. THE COMMISSION SHOULD REJECT STAFF'S NEW CHALLENGES ADVOCATING RETROACTIVE RATEMAKING

22. *In its Answer*, Staff challenges the *Initial Order* by arguing that "if VNXX was not authorized by existing interconnection agreements, then access charges would arguably apply

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[45] Core Forbearance Order, ¶ 14 (emphasis added).

[46] Core Forbearance Order, ¶ 14, n.55.

to such traffic."[47] Staff is apparently seeking to relitigate the issue of access charges, since neither the Findings of Fact nor Conclusions of Law impose access charges on VNXX traffic. In fact, the *Initial Order* does not even suggest that access charges might be appropriate for VNXX traffic. It is particularly curious that Staff is challenging this decision at all, since it was on Staff's recommendation that the *Initial Order* adopted Bill-and-Keep for this traffic in the first instance.[48] Having obtained the proposed decision that it asked for, Staff should not be permitted to reopen the argument in a quest for further relief. In response to Staff's challenge, the Commission should revise the *Initial Order* to firmly emphasize that access charges do not apply to this type of traffic.

23. In advancing its access charge challenge, Staff also made two erroneous assertions regarding the *Initial Order* that must be corrected. First, Staff is incorrect that the *Initial Order* found that "VNXX is not presently authorized by interconnection agreements."[49] In fact, not only does the *Initial Order* find that the interconnection agreements "contain no language specifically banning VNXX,"[50] it also found that "several actually allow for the flow of VNXX traffic in some circumstances."[51] Staff is also incorrect that the *Initial Order* "addresses the retrospective compensation question."[52] The *Initial Order* did not "address" the retrospective compensation question at all – it simply sprung it on the parties without any justification.

24. As Broadwing explained in its Petition, the Commission cannot apply its compensation plan retroactively and eliminate Broadwing's claims to legitimate charges under

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47 *Staff's Answer to Petitions*, ¶ 14.

48 *Initial Order*, ¶ 85-87.

49 *Staff's Answer to Petitions*, ¶ 14.

50 *Initial Order*, ¶ 53.

51 *Initial Order*, ¶ 53.

52 *Staff's Answer to Petitions*, ¶ 14.

its interconnection agreement with Qwest.[53] This is contrary to principles of contract law and administrative policy regarding the retroactive application of a new standard. Moreover, it is manifestly unfair. Qwest would receive the economic relief that it sought, retroactively and prospectively, while Broadwing receives the consolation prize of "legitimized VNXX" – only without compensation, past or future.

25. In good faith, Broadwing and Level 3 relied on relevant Commission decisions and the terms of their interconnection agreements with Qwest that ISP-Bound traffic was compensable. Therefore, retroactive application of the proposed new rule is not appropriate.

IV. CONCLUSION AND RECOMMENDATIONS

26. For these and the other reasons stated herein, Level 3 respectfully requests that the Commission review the *Initial Order*, reject Staff's positions in its Answer to Petitions and adopt the Findings of Fact and Conclusions of Law set forth in Level 3's Petition for Administrative Review which are consistent with the Commission's prior precedent, the Ninth Circuit's *Peevey* decision, and the Washington District Court.[54]

Respectfully submitted,

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Greg Rogers

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[53] Level 3 Petition for Administrative Review, ¶ 35.

[54] *See*, Level 3 Petition for Administrative Review, ¶¶ 19-37; *Peevey*, 462 F.3d 1142, 1158-59; *Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, at *26 (W.D. Wash. 2007); *see, e.g.,* Reply Brief of Level 3, ¶¶ 58-59, Level 3 Petition for Administrative Review, ¶¶ 21-22; CenturyTel-Level 3 Arbitration, Docket No. UT-023043, Seventh Supplemental Order, ¶¶ 1, 35 (Feb. 28, 2003) ("ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for the purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."); *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.,* WUTC Docket No. UT-023042, Final Order at 10 (Feb. 5, 2003) ("when calculating the use of the facility, even ISP-bound traffic is to be included as part of the originating carrier's usage"); *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order 05 (Feb. 10, 2006); AT&T Arbitration Order, ¶ 33.

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Dated: November 30, 2007

CERTIFICATE OF SERVICE

I, Kimberly A. Lacey, hereby certify that on the day of November 30, 2007, true and correct copies of Level 3 Communications, LLC's Reply to Staff's Answer to Petitions for Administrative Review was served on all parties of record in this proceeding listed below via electronic mail and first class mail. In addition, the original plus nine (9) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Rendahl.

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Dated this 30th day of November, 2007