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 QWEST'S RESPONSE TO PETITIONS FOR ADMINISTRATIVE REVIEW

LEVEL 3 COMMUNICATIONS, LLC'S REPLY TO QWEST'S RESPONSE TO PETITIONS FOR ADMINISTRATIVE REVIEW

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LEVEL 3 COMMUNICATIONS, LLC'S REPLY TO QWEST'S RESPONSE TO PETITIONS FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1. Pursuant to WAC 480-07-825(5) and Order No. 8,[1] Level 3 Communications LLC ("Level 3") replies to Qwest Corporation's ("Qwest") Response to Petitions For Review filed in the above-referenced proceeding ("*Qwest's Response to Petitions*") on November 14, 2007.[2] As set forth in Level 3's and Broadwing Communications, LLC's ("Broadwing" and together "Petitioners") *Joint Petition for Leave to Reply*,[3] Qwest's *Response to Petitions* raises new matters. In *Order No. 08*, the Commission granted the Petitioners leave to reply on the

[1] *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 08 (Dec. 28, 2007) ("*Order No. 08*").

[2] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest Corporation's Response to Petitions for Review of Level 3, Broadwing, Pac-West, ELI/Advanced Telcom, and WITA (filed Nov. 14, 2007) ("*Qwest's Response to Petitions*").

[3] *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Level 3 Communications LLC's and Broadwing Communications LLC's Joint Petition for Leave to Reply to Qwest Corporation's Response to Petitions (filed Nov. 30, 2007) ("*Joint Petition for Leave to Reply*").

"issue of how the District Court's remand decision should be applied in this case."[4] Accordingly, Level 3 submits this Reply in response to Qwest's Response to Petitions For Review as authorized by *Order No. 08*.

2. The simple answer to the question posed by Order No. 8 is that the District Court's Remand Order[5] should have no impact on the present case. (For purposes of distinguishing the two cases, Level 3 will hereinafter refer to Docket UT-063038 as the "VNXX Ban Proceeding" or "this case" and Dockets UT-053036 and 053039 as the "Remand Proceeding.") It should have no impact because the Complaint and Initial Procedural Memo that initiated this case were limited to a prospective ban on "VNXX services" and the Initial Order determined that state law does not ban VNXX services. Notwithstanding this determination, Qwest has been allowed to use this case to get yet another "bite at the apple" with respect to VNXX intercarrier compensation issues. Despite its initial claims and despite the fact that the Washington Utilities and Transportation Commission ("Commission" or "WUTC") has long since settled the issue of intercarrier compensation for all ISP-Bound traffic, Qwest convinced the Administrative Law Judge to propose a new VNXX compensation policy that would reverse established WUTC precedent and change the status quo—from compensation for transport and termination to bill-and-keep.[6] Qwest's penchant for continuously re-litigating this issue has put the WUTC and the parties in the difficult position of having to sort out the issue of compensation for VNXX traffic in two separate dockets, with different factual records, questions presented, and underlying context, but with some parties in common, namely Qwest, Level 3,

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[4] *Order No. 8*, at ¶ 19.

[5] *Qwest Corp. v. WUTC*, 484 F.Supp.2d 1160 (W.D. Wash. 2007) ("District Court's Remand Order").

[6] Although Qwest denies that compensation is the "status quo," Qwest nevertheless paid Level 3 compensation for VNXX traffic pursuant to the Commission's Order in Docket No. UT-053039 until the District Court issued its remand order. Qwest has since ceased making those payments.

and Pac-West. An important reason that the outcome of this case does not control the Remand Proceeding is that the Remand Proceeding is a retrospective proceeding that involves retrospective contract interpretation while this proceeding is strictly forward-looking.

3. Qwest's claim in *Qwest's Response to Petitions* that the Initial Order also resolves the issues in the Remand Proceeding is blatantly opportunistic.[7] Had Qwest truly believed that the two matters fundamentally concerned the same facts and legal issues, it could have taken any number of procedural steps along the way to consolidate the dockets or to stay one of the proceedings while the other was resolved. However, Qwest never took such steps over the course of either proceeding until it saw an opportunity to retroactively escape from an established contract and controlling law. In hindsight, the issue of how the two dockets are related (or not), likely should have been briefed at the time the District Court remanded the complaint cases. Nevertheless, the Initial Order does not answer the question posed by the District Court. As such, Level 3 agrees with Pac-West that the Commission should expressly decline, in this case, to determine whether VNXX traffic is within or outside the local calling area for compensation purposes under the parties' current interconnection agreements ("ICAs").

II. PROCEDURAL BACKGROUND

4. In this section, Level 3 summarizes the procedural history of the VNXX Ban Proceeding and the Remand Proceeding to show how they differ, even though the question of intercarrier compensation for VNXX traffic exists in both dockets.

5. The proper interpretation of the *Core Forbearance Order* has been one of the prominent issues before the Commission since Level 3 initiated Docket No. UT-053039.[8] After

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[7] *Qwest's Response to Petitions*, ¶¶ 107-108, 120, 122-124.

[8] *Level 3 Communications v. Qwest Corp.*, Docket No. UT- 053039, Level 3 Petition for Enforcement, at 2 (June 21, 2005).

the FCC lifted the new market and growth cap restrictions from the reciprocal compensation regime it had previously established in the *ISP Remand Order*[9] in its *Core Forbearance Order*,[10] Level 3 and Pac-West were forced to file complaints against Qwest for enforcement of their interconnection agreements and payment of past due compensation for termination of Qwest originated traffic.[11] The focus of these complaints was *retrospective*, whether Qwest owed reciprocal compensation under the terms of the parties' approved interconnection agreements as interpreted at the time the parties entered into these agreements. On February 10, 2006, the Commission entered final orders in Docket Nos. UT-053036 and UT-053039 determining, consistent with the Commission's prior precedent, that reciprocal compensation was due for ISP-Bound VNXX traffic.[12] The Commission dismissed Qwest's counter claims alleging that the use of VNXX traffic should be prohibited. In the course of dismissing Qwest's counter claims the Commission noted that it has previously addressed and approved reciprocal compensation for VNXX arrangements, but that it had never explicitly considered whether such arrangements

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[9] *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, at ¶¶ 78, 81(2001) ("*ISP Remand Order*").

[10] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, ¶¶ 1, 7, 9, 20-21, 26 (Oct. 18, 2004).

[11] *Level 3 Communications v. Qwest Corp.*, Docket No. UT- 053039 Order No. 5, ¶ 2. ("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)."). *Pac-West Telecomm, Inc. v. Qwest Corp.*, Docket No. UT-053036, Order No. 5, ¶ 2 ("The dispute centers on whether Pac-West is entitled to compensation for 'VNXX' ISP-bound traffic.") (collectively, "Pac-West and Level 3 Complaint Orders").

[12] *Pac-West Telecomm, Inc. v. Qwest Corp.*, Docket No. UT-053036, Order No. 5 ¶ 30 (*"Pac-West"*) ("We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic . . . . [I]t is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements."); *Level 3 Communications v. Qwest Corp.*, Docket No. UT- 053039 Order No. 5 ¶¶ 10, 35. (*"Level 3"*) ("Order No. 03 in this proceeding interpreted the FCC's *ISP-Remand Order* to allow compensation for ISP-bound VNXX traffic. . . . We do not find the finding reached . . . in Order No. 03 in error.").

were appropriate and whether they should be banned.[13] The Commission suggested that if Qwest wished to pursue a prospective prohibition on the use of VNXX arrangements, "it may file its own complaint about specific carriers."[14]

6. On May 22, 2006, Qwest followed the Commission's suggestion and filed its Complaint initiating this case. Qwest's Complaint requested the Commission to find that "VNXX is contrary to the public interest for the same reasons as EAS bridging is contrary to the public interest, and should be prohibited for the same reasons."[15] Further, Qwest requested that the Commission enter an order: "prohibiting [CLECs] from using VNXX numbering by assigning NPA/NXXs in local calling areas other than the local calling area where the customer is physically located or has a physical presence;" requiring CLECs to "cease their misuse of such telephone numbering resources"; and requiring that CLECs "properly assign telephone numbers based on the actual physical location of its customer."[16] Nowhere in its Complaint does Qwest request that the Commission interpret the Level 3 interconnection agreement, reverse the intercarrier compensation determination made in the Pac-West and Level 3 Complaint Orders, or determine the classification of VNXX traffic for compensation purposes.[17] Further, Qwest's Complaint is focused on a *forward-looking* ban on VNXX as the Commission had no extant rule banning the use of VNXX codes. As Qwest states in its Complaint, the Commission "had previously addressed and approved compensation for VNXX

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[13] "In our prior decisions approving arbitrated agreements . . . , we have not considered the propriety of VNXX arrangements, but instead focused specifically on compensation for these arrangements." *Level 3*, Order No. 5, ¶ 35.

[14] *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order No. 5, at ¶ 40; *Pac-West v. Qwest Corporation*, Docket No. UT-053036, Order No. 5, at ¶ 43.

[15] *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest's Complaint, ¶¶ 40-46 (May 22, 2006) ("Qwest's Complaint").

[16] *Id.*

[17] Qwest Complaint ¶¶ 40-46.

arrangements, but has not considered the proprietary of these arrangements" (*i.e.*, whether they should be banned).[18]

7. In sum, from the beginning this case has been an inquiry into the legality of "VNXX" under Washington law and has never been, a generic inquiry into intercarrier compensation issues or the interpretation of the parties' ICAs with Qwest. This case concerns whether defendants should be prohibited from offering FX-like services in competition with Qwest's FX services by adoption of a prospective ban on the use of VNXX numbering arrangements. Qwest summarized the allegations in its complaint as follows:

> In this complaint, Qwest contends that VNXX numbering arrangements for routing traffic are unlawful and contrary to the public interest and public policy of the state. Qwest asks the Commission for a ruling that carriers engaged in or using such numbering arrangements, including Respondents, are in violation of state law, Qwest's tariffs, and prior Commission orders. Qwest *asks the Commission to order that such arrangements are prohibited* in the state of Washington, and that Respondents *must cease and desist such arrangements immediately* .....[19]

8. Again, Qwest's requested relief is *forward looking* because the Commission has no extant rule or policy banning the use of VNXX. Qwest did not request retrospective damages, nor could it have, given the Commission's findings in the Pac-West and Level 3 Complaint Orders. In its first procedural Order, the Commission described the scope of this case -- no more, no less -- as "a formal complaint for an order prohibiting the use of virtual

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[18] Qwest Complaint ¶ 11.

[19] Qwest Complaint ¶ 12. Qwest's Complaint requests the Commission to require CLECs to purchase 800 or Feature Group A *services* out of Qwest's access tariff, which is not the same as intercarrier compensation where the CLEC assigns its own number to the customer. In effect, Qwest's alternative to prohibiting VNXX was to require CLECs to purchase a service from Qwest, rather than obtain numbers from NANPA, and Qwest has dropped that claim in any event. Qwest Complaint, ¶ 22 (CLECs "may lawfully offer their end users the ability to receive calls from throughout the state of Washington such that the calling party would not be charged a toll charge. In order to do so, [CLECs] could purchase one of two services from Qwest's access tariff.").

NXX or VNXX numbering arrangements" that "alleges that the Respondents are in violation of state law, Qwest's tariffs, and prior Commission orders."[20]

9. At approximately the same time it initiated this case, Qwest also appealed the Commission's Pac-West and Level 3 Complaint Orders. On appeal, the District Court held that "while the WUTC likely had the authority to require interim rate compensation for VNXX traffic, the route it took to arrive at that conclusion violated federal law" finding that the WUTC interpretation of the *ISP Remand Order* was overly broad. Accordingly, the District Court directed the Commission to identify a different legal basis for its decision to require compensation at the FCC's interim rates for VNXX ISP-Bound traffic.[21]

10. The District Court left the Commission free on remand to determine that: (1) ISP-Bound VNXX traffic is "local" based solely on a comparison of the called party and calling party NXX codes[22] under state law and falls within the *ISP Remand Order's* interim regime because it is "local"; and/or (2) under the Commission's prior precedent and state law such

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[20] Notice of Prehearing Conference (July 3, 2006). *See also 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 ¶ 2 (Oct. 5, 2007) ("*Initial Order*") ("Qwest Corporation (Qwest) filed a complaint in Docket UT-063038 against nine competitive local exchange carriers or CLECs, alleging that the carriers' use of virtual NXX or VNXX numbering arrangements violates Qwest's access tariffs, prescribed exchange areas and state law, and is contrary to public policy.").

[21] *Qwest v. WUTC*, 484 F.Supp.2d 1160, 1176.

[22] The FCC concluded in *Starpower* that "at all relevant times the industry practice" has been to rate calls by comparing the NPA-NXXs and not the physical location of the customer. It rejected Verizon's arguments that VNXX traffic was not subject to reciprocal compensation based on the geographic termination point, and ordered Verizon to pay $12,059,149 in reciprocal compensation for VNXX and other ISP-bound traffic. The WUTC is free to reach the same result in the Remand Case. *Starpower Communications, LLC v. Verizon South, Inc.*, FCC No. 03-278, 18 FCC Rcd 23625, Memorandum Opinion and Order, ¶¶ 6, 16-17, 22 (2003) ("*Starpower*") ("Indeed, Verizon South apparently lacks the technical capability to identify Virtual NXX calls as non-local based on the physical end points of the call."). Moreover, the Ninth Circuit reached the same conclusion and upheld the California Commission's determinations that (1) reciprocal compensation applies to VNXX traffic, and (2) determining whether reciprocal compensation applies to a call "depends solely upon the NPA-NXX of the calling and called parties ... and *does not depend on the routing of the call, even if it is outside the local calling area.*" *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1155 (9th Cir. 2006).

traffic is subject to reciprocal compensation.[23] The Court recognized that the Ninth Circuit in *Peevey* allowed the California commission to reach a "similar" conclusion as the WUTC and "treat certain VNXX traffic as 'local' traffic (i.e., locally rated and billed based upon the assignment of the telephone numbers) subject to reciprocal compensation, notwithstanding the physical routing of the calls."[24]

11. The Court's Remand Order was issued April 9, 2007. As of that date, initial and rebuttal testimony had been filed in this case, but the hearing had not been held and no briefs had been filed. Initial briefs were filed on June 1st, and, pursuant to Judge Mace's request, followed an outline submitted jointly by the parties. The joint outline did not include as an issue the impact of the Court's Remand on this case, nor did Judge Mace direct the parties to brief that issue.[25]

12. At no time did Qwest move to consolidate the VNXX Ban Proceeding with the Remand Proceeding in order for the Commission to address any alleged common issues. The Commission has consistently treated these proceedings as separate and distinct, involving different administrative records, facts, context and issues.

13. On October 5, 2007, the Judge released the Initial Order in this case concluding that Qwest's Complaint should be dismissed.[26] The Initial Order correctly concludes that

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[23] *Qwest v. WUTC*, 484 F.Supp.2d 1160, 1177 ("On remand, the WUTC is simply directed to reinterpret the *ISP Remand Order* as *applied to the parties' interconnection agreements,* and classify the instant VNXX calls as, 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.*") (emphasis added). The WUTC can also determine that the parties voluntarily agreed to provide reciprocal compensation for termination of ISP-Bound VNXX traffic in their interconnection agreement. 47 U.S.C. § 252(a)(1) (The parties "may negotiate and enter into a binding agreement .... without regard to the standards set forth in [sections 251(a)-(b).").

[24] *Qwest v. WUTC*, 484 F.Supp.2d 1173, n.10, 1176-77, and n.12.

[25] *See, e.g.*, Outline for Opening Briefs, email from Anderl to ALJ Mace *et al.* (May 10, 2007).

[26] *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 05, Initial Order; ¶¶ 155, 160.

"Qwest has not met its burden to show that VNXX service per se is illegal" under existing state law.[27] The Commission, therefore, should dismiss Qwest's Complaint and take no further action.

14. The Initial Order eschews this approach and instead proposes a new state law policy with respect to compensation for VNXX traffic. It bases that policy on findings concerning the hybrid nature of VNXX traffic, overblown and unfounded arbitrage concerns,[28] and speculative and inconsistent concerns about cost recovery. The Initial Order does not answer the question posed by the District Court.

15. As discussed in Section I above, on December 28, 2008, the Commission granted Level 3 leave to reply to on the "issue of how the District Court's remand decision should be applied in this case."[29]

III. THE INSTANT CASE IS DISTINGUISHABLE FROM THE REMAND CASE AND EACH ONE MUST BE DECIDED ON THE BASIS OF ITS INDIVIDUAL RECORD, FACTS, AND CONTEXT

16. In *Qwest's Response to Petitions*, Qwest suggests for the first time that this case is the appropriate proceeding to address the issue remanded by the Western District of Washington ("District Court") in the separate and distinct Remand Proceeding.[30] As Qwest belatedly admits,

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[27] *Initial Order*, ¶ 55.

[28] As explained in Level 3's Petition for Review, although the Initial Order expressed concern that "significant opportunity for arbitrage exists under the current intercarrier compensation system related to ISP-bound calls," (*Initial Order*, ¶¶ 64, 96) the FCC rejected these same concerns in the *Core Forbearance Order*. In that Order, the FCC *expanded* the ISP-bound traffic subject to intercarrier compensation by forbearing from applying the growth caps and new markets rules of the *ISP Remand Order*, determining that both were no longer necessary or in the public interest because "arbitrage concerns have decreased" and "are now outweighed by the public interest in creating a uniform compensation regime." *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, ¶¶ 1, 7, 9, 20-21 (Oct. 18, 2004) ("*Core Forbearance Order*").

[29] *Order No. 8*, at ¶ 19.

[30] *Qwest's Response to Petitions*, ¶¶ 17-20, 107-108, 120, 122-124. *See, e.g., Qwest's Response to Petitions*, ¶¶ 15-20; *Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160 (W.D. Wash. 2007) ("*Qwest Remand*"); *Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039 ("Level 3 Complaint case").

it cannot dictate how the Commission should handle the Remand Proceeding.[31] To embrace Qwest's position, however, and *de facto* or *de jure* consolidate the two proceedings now at this late stage in the present case, after the hearings are completed and briefs submitted, would violate long-standing principles of administrative law, fundamental fairness, and due process.[32]

17. The VNXX Ban Proceeding and the Remand Proceeding each must be decided on the basis of its individual record, facts, and context. As demonstrated in Section II above, despite Qwest's efforts to broaden the scope of this case to include intercarrier compensation, this is still strictly a *forward looking* complaint case. It is not a generic case about the appropriate compensation for VNXX traffic, or a case involving retrospective interpretation of Level 3's and others' interconnection agreements for the purpose of awarding Qwest backward looking compensation benefits.[33] Qwest's Complaint did not request that the Commission interpret the Level 3 interconnection agreement, reverse the intercarrier compensation determination made in the Pac-West and Level 3 Complaint Orders, or determine the classification of VNXX traffic for compensation purposes.[34]

18. In sharp contrast, the District Court case is *backward looking* and "centers on a dispute over the meaning of the parties' *existing* interconnection agreements,"[35] and prior commission precedent and state law on compensation for ISP-Bound traffic at the time the

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[31] Qwest Opposition, at ¶ 9 ("Qwest has not (and indeed, could not) dictate how the Commission should handle the remanded proceeding ....").

[32] *See, e.g.,* WAC 480-07-320; *Level 3 Comm'n LLC v. Qwest Corp.*, Docket UT-053039, Order No. 4, *Order Denying Qwest's Motion to Consolidate*, at ¶ 28 (2005) ("Qwest had the opportunity at prehearing conferences in both proceedings to request consolidation and/or conversion of proceedings, *at a time when no party would have been substantially prejudiced by the action* ... Qwest did not do so."). (emphasis added)

[33] Qwest's Complaint, at ¶¶ 107-108, 120, 122-124.

[34] Qwest's Complaint, at ¶¶ 40-46.

[35] *Qwest v. WUTC*, 484 F.Supp.2d 1160, 1169 (emphasis added).

agreement was executed and approved by the Commission.[36] The interpretation of Level 3's interconnection agreement and Qwest's liability for past due intercarrier compensation under that agreement are not before the Commission in this case and the Commission should not take any action that would prejudice Level 3's rights in the Remand Proceeding.

19. As set forth in Level 3's Briefs, the Commission's prior precedent has consistently found that ISP-Bound Traffic, including VNXX traffic, is subject to reciprocal compensation.[37] This was the law at the time the Level 3 interconnection agreement was executed and approved by the Commission. In fact, the arbitration between Qwest and Level 3 leading up to the approval of the parties' ICA dealt with the single issue of which party should bear the cost of the interconnection facilities used to carry Qwest's ISP-Bound originated traffic to Level 3 for termination.[38] In that arbitration, Qwest effectively argued that the VNXX nature of ISP-Bound traffic should relieve it of its interconnection facilities costs but it never disputed its obligation to pay reciprocal compensation for this traffic. The Commission cannot now retroactively reinterpret state law at *the time the agreement was executed* and nearly five years after the agreement was approved.[39] If, contrary to Level 3's recommendation, the Commission

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[36] *See Id.*

[37] *See, e.g.* WUTC Docket No. 063038, Level 3 Initial Brief, at ¶ 28 ("[T]he Commission has consistently held, without exception, that ISP-bound traffic should be subject to the same compensation regime as voice traffic.") (citing *In the Matter of the Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc.'s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001)); *the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252,* Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision at ¶ 7 (Feb. 28, 2003); *Pac-West,* Order No. 3, Recommended Decision to Grant Petition (Aug. 23, 2005); *Level 3*, Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006).

[38] *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.,* WUTC Docket No. UT-023042, Final Order, (Feb. 5, 2003).

[39] The Commission approved the Level 3 interconnection agreement on March 4, 2003 in docket no. UT-023042. Docket No. UT-053036, Order No. 3, at ¶ 8.

wishes to adopt a new policy position on intercarrier compensation for VNXX traffic, it may not apply that new policy retroactively in the Remand Proceeding without violating principles of contract interpretation and administrative law.[40]

20. The District Court did not overrule or alter the substantive result reached by the Commission in the Remand Proceeding in any way. In fact, the Court acknowledged that "it is plausible that the ultimate conclusion reached by the WUTC [in the *Qwest Remand*] will not change."[41] Importantly, unlike this case which is forward looking, the Remand Proceeding must examine the terms of the contract, the intent of the parties, and the state of the law at the time the contract was entered into to determine what constitutes "within a local calling area."[42] With respect to interpretation of the Level 3 interconnection agreement, the Commission may determine that based upon its position during the arbitration, Qwest implicitly agreed to pay Level 3 compensation for VNXX traffic regardless of whether such calls were "within a local calling area." Alternatively, the Commission may reaffirm its determination that FX and VNXX services are analogous,[43] and at the time the parties entered into their agreement, state law treated both types of traffic as terminating "within a local calling area." These are just two of the

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[40] *See, e.g., In the Matter of Starpower Communications, LLC v. Verizon South, Inc.*, FCC 02-105, ¶ 24 (2002) ("The FCC applies the applicable rules of contract interpretation: "Although the cornerstone of a 'plain meaning' analysis is a contract's language, in ascertaining the parties intent 'as expressed by them in the words they have used,' a court may also examine the 'surrounding circumstances, the occasion, and the apparent object of the parties." The court may also consider "the legal context in which a contract was negotiated."); *Randolph v. Reisig,* 272 Mich. App. 331, 333 (Mich. Ct. App. 2006) ("In interpreting a contract, our obligation is to determine the intent of the parties."); *Quality Products and Concepts Co.*, 469 Mich. 362, 375 (Mich. 2003).

[41] *Qwest v. WUTC*, 484 F.Supp.2d 1177.

[42] *Qwest v. WUTC*, 484 F.Supp.2d 1177-78.

[43] The *Initial Order* affirms that (1) "the Commission's finding in the AT&T Arbitration Order that FX and VNXX are functionally equivalent remains persuasive;" and (2) "CLEC's VNXX services ... may qualify as exceptions" to the numbering guidelines" and thus should not be subject to access charges. *Initial Order*, ¶¶ 34, 38; *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"); *See, e.g.,* 47 U.S.C. § 253(a).

possible bases on which the Commission could reaffirm the holding of the Pac-West and Level 3 Orders separate and apart from any forward-looking determination it makes in this case.

21. As demonstrated above, Qwest improperly attempts to expand the scope of this case to address intercarrier compensation issues rather than the VNXX ban issues presented in its Complaint. Although Level 3 disagrees that it is appropriate to expand the proceeding and change state policy on VNXX intercarrier compensation, any such change must be prospective only.

IV. THE DISPOSITION OF THIS VNXX PROHIBITION CASE CANNOT RESOLVE THE ISSUES IN THE REMAND OF LEVEL 3'S AND PAC-WEST'S PETITIONS TO ENFORCE THEIR INTERCONNECTION AGREEMENTS

22. In *Qwest's Response to Petitions*, it asserts that "the *Initial Order*[44] does what the court directed the Commission to do," which, in Qwest's view, is to determine "whether VNXX calls, which CLECs bill as local calls, are actually toll or long distance calls in disguise," and whether this determination should have a retroactive effect.[45] Qwest alleges that the *Initial Order* properly "*adjudicates the parties rights under state law and the ICA.*"[46]

23. Level 3 strenuously objects to any suggestion that the *Initial Order* or the Commission's final order in this case can be used to resolve the issues in the Remand Proceeding.

24. The District Court underscored that the case before it "centers on a dispute over the meaning of the parties' interconnection agreements" at the time the agreements were

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[44] *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).

[45] *Qwest's Response to Petitions*, ¶¶ 16-17, 108.

[46] In effect, Qwest asserts that this proceeding should decide all of the issues raised in the *Qwest Remand* proceeding. *Id.* ¶¶ 107-108, 120, 122-124.

executed and approved.[47] The Court noted that the "parties agree that this case is about interpretation [of the ICAs], not preemption."[48] Thus, the focus of the Remand Proceeding is backward looking on the interpretation of Level 3's and Pac-West's approved interconnection agreements at the time they were approved and Qwest's obligation to pay past due amounts under those agreements.

25. Neither Qwest's Complaint nor the Commission's procedural orders put Level 3 on notice that any interpretation of Level 3's ICA in the present proceeding could be applied retroactively to the Remand Proceeding. As already noted, Qwest's requested relief was devoted to number resource management and tariff compliance, not contract interpretation. Specifically, Qwest requested (1) a holding that VNXX violates state law and Qwest's tariff; (2) a prohibition against assignment of NPA/NXXs in local calling areas other than where the customer has a physical presence; (3) a prohibition against so-called "misuse" of numbering resources; and 4) a requirement that Respondents comply with Qwest's access tariffs, as Qwest interprets those tariffs.[49]

26. Because issues related to Level 3's interconnection agreement were not part of Qwest's Complaint, nor even alluded to, the interpretation of the Level 3 ICA has not been briefed in this proceeding,[50] and neither the testimony nor the Initial Order substantively addressed interpretation of Level 3's ICA or other issues presented in the Remand Proceeding.

27. As Level 3 has shown, the Initial Order did not determine whether "VNXX" provisioned FX traffic is within or outside the local calling area, and the Commission should

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47 *Qwest v. WUTC*, 484 F.Supp.2d 1169; *Id.* at 1167 ("The proceedings began with a the parties' disagreement regarding the terms of their interconnection agreements.").

48 *Id.*

49 *See, e.g.,* Qwest's Complaint, at ¶¶ 42-46; *see, also* Notice of Prehearing Conference, *infra,* n. 20.

50 *See, e.g., Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest's Complaint, ¶¶ 41-46 (May 22, 2006).

not make any such determination in this docket because it would violate principles of administrative law. If the Commission nevertheless makes such a determination in this case, issues specific to Level 3 and Pac-West remain to be resolved in the Remand Proceeding. These issues may include, but are not limited to whether any new compensation mechanism that may be adopted in this docket could be applied retroactively to Level 3's interconnection agreement with Qwest, the calculation of any such compensation, and the existence and amount of "VNXX" traffic Level 3 has terminated. Those issues are not before the Commission in this case. Indeed, Level 3's ICA[51] was never at issue in this case, nor was Level 3's enforcement action ever consolidated with this case.

28. Further, the remanded question was not presented for decision in this proceeding, has not been briefed by the parties, and was not decided by the *Initial Order*.[52] The *Initial Order* did not "address" questions concerning retrospective compensation at all – rather it simply reached conclusions without discussion or any justification.[53] Yet, as Qwest continues its efforts to take the question over the legality of "VNXX" and transform it into yet another attempt to sidestep its obligation to compensate terminating carriers, it implies that the Initial Order's bill and keep compensation mechanism must be imposed in the separate Level 3 and Pac-West Remand Proceeding. It is Level 3's position that any new compensation mechanism cannot be applied retroactively under established principles of law, while Qwest claims that a retroactivity

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[51] *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Pac-West's Reply to Staff's Answer to Petitions for Administrative Review and Petition for Leave to Reply and Reply to Qwest's Response, at ¶¶ 27-29.

[52] *See, e.g., Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Qwest's Complaint, ¶¶ 41-46 (May 22, 2006); *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 1 Prehearing Conference Order, ¶ 1 (July 20, 2006) (Qwest's complaint alleges "that the companies' use of virtual NXX or VNXX numbering arrangements violates Qwest's access tariffs, prescribed exchange areas and state law, and is contrary to public policy."); *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Notice of Prehearing Conference, ¶ 1 (July 12, 2006).

[53] *See* Level 3 Petition for Review, at ¶¶ 21, 73; Broadwing Petition for Review, at ¶ 38.

analysis is irrelevant.[54] Once again, this disagreement shows the importance of establishing a full record in the Remand Proceeding.

29. The Commission, therefore, should limit its final order to resolution of the issues presented in Qwest's Complaint and the Commission's scoping order and should leave open issues specific to Level 3, Pac-West and their ICAs with Qwest for resolution in the Remand Proceeding.

V. THE COMMISSION SHOULD NOT MAKE ANY FINDINGS IN THIS CASE THAT WOULD IMPACT THE RETROACTIVITY ANALYSIS IN THE REMAND PROCEEDING

30. If the Commission adopts a new state policy on VNXX intercarrier compensation in this case, it should not make any findings that would prejudice the outcome of a retroactivity analysis in the Remand Proceeding. "[S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[55]

31. In *Montgomery Ward*, the U.S. Court of Appeals for the Ninth Circuit evaluated a regulated party's interest to rely on the terms of a rule against an agency's interest in retroactive application of an adjudicatory decision. Adopting the analytical framework set forth in *Retail, Wholesale and Department Store Union v. NLRB*,[56] the Ninth Circuit examined "(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 which a retroactive order imposes on a party, and (5) the statutory interest

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[54] *See, e.g., Qwest's Response to Petitions*, ¶¶ 107-108, 120, and 122.

[55] *Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322, 1327 (9th Cir. 1982), *quoting Chenery*, 332 U.S. at 203.

[56] *Retail, Wholesale and Department Store Union v. NLRB,* 466 F.2d 380 (D.C. Cir. 1972).

in applying a new rule despite the reliance of a party on the old standard."[57] This same analysis must be performed in the separate Remand Proceeding.

32. As to the first two factors, the analysis of whether the termination of ISP-Bound traffic is eligible for compensation is not a matter of first impression and any decision to adopt and retroactively impose bill and keep would be an abrupt departure from Commission precedent.[58] As the Ninth Circuit has stated, "retroactivity is disfavored 'where the [agency] ha[s] confronted the problem before, ha[s] established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted.'"[59] Thus, the Commission must review and reconcile its prior holdings on this issue, an analysis that it has not conducted in this proceeding, precisely because this proceeding focused on a prospective ban on VNXX services. Moreover, the Commission must determine the extent that Level 3 and others reasonably relied on its prior decisions regarding ISP-Bound traffic and the burden a change in law would impose on these carriers, issues that have not been presented in the present case.

33. In sum, Level 3 must be permitted to show that it reasonably relied on the Commission decisions interpreting the terms of its interconnection agreement with Qwest that ISP-Bound traffic was compensable. Retroactive application of a proposed new rule must be evaluated on a fact-specific basis. That evaluation with respect to Level 3's agreement did not take place in this proceeding and must be performed in the Remand Proceeding.

VI. CONCLUSION AND RECOMMENDATIONS

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[57] *Montgomery Ward & Co. v. FTC*, 691 F.2d at 1333, quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d at 390.

[58] *See* Level 3 Initial Brief, ¶ 63.

[59] *Miguel-Miguel v. Gonzales*, 2007 WL 2429377, *8 (9th Cir. 2007), quoting *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d, 380 at 391 (D.C. Cir. 1972).

34. Notwithstanding Qwest's efforts to broaden the scope of the proceeding and re-litigate settled state law providing for reciprocal compensation for all ISP-Bound traffic, this is a *forward looking* complaint case in which Qwest alleges that FX or FX-like services using so-called VNXX numbering arrangements should be banned. It is not a generic case as to the appropriate compensation for VNXX traffic or a case involving enforcement of Level 3's and other interconnection agreements based upon a *backward looking* examination of existing state law at the time the agreement was approved.

35. Qwest had ample opportunity to move to consolidate this case with the Remand Proceeding if it felt that was in fact appropriate. The Commission has consistently treated these two dockets as distinct, involving different administrative records, facts, context and issues. To embrace Qwest's position and *de facto* or *de jure* consolidate them now at this late stage in the present case, after the hearings are completed and briefs submitted, would violate long-standing principles of administrative law, fundamental fairness, and due process.[60] The Initial Order does not answer the question posed by the District Court and this case should not answer that question.

36. The Commission's prior precedent has consistently found that ISP-Bound Traffic, including VNXX traffic, is subject to reciprocal compensation.[61] This was the extant law at the

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[60] *See, e.g.,* WAC 480-07-320; *See* note 32 *supra* ("Qwest had the opportunity at prehearing conferences in both proceedings to request consolidation and/or conversion of proceedings, *at a time when no party would have been substantially prejudiced by the action* ... Qwest did not do so."). (emphasis added).

[61] *See, e.g.* WUTC Docket No. 063038, Level 3 Initial Brief, at ¶ 28 ("[T]he Commission has consistently held, without exception, that ISP-bound traffic should be subject to the same compensation regime as voice traffic.") (citing *In the Matter of the Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc. 's Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001); *the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252,* Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision at ¶ 7 (Feb. 28, 2003); *Pac-West,* Order No. 3,

time the Level 3 interconnection agreement was executed and approved by the Commission. The Commission cannot now engage in revisionist history and retroactively reinterpret state law at *the time the agreement was executed* and nearly five years after the agreement was approved, and retroactively change the parties' intent under the interconnection agreement, without violating principles of contract interpretation, administrative law, and fundamental fairness. If the Commission adopts a new VNXX intercarrier compensation policy in this case, it must conduct a retroactivity analysis in the Remand Proceeding and must not make any findings in this case that would prejudice Level 3's rights in that separate proceeding.

37. Level 3 underscores that the Ninth Circuit in *Peevey* upheld the California Commission's decision that FX-like traffic is subject to reciprocal compensation under section 251(b)(5) and rejected Verizon's arguments that access charges should apply.[62] Recently, the Washington District Court acknowledged that *Peevey* determined that reciprocal compensation applies to CLEC FX-like traffic and concluded that the WUTC could reach the same conclusion.[63] Level 3 agrees with the Washington District Court and Staff that the Commission "'could reach the same result' (*i.e.,* requiring Qwest to pay the CLECs compensation on VNXX calls)" as the California Commission and Ninth Circuit.[64] Because its substantive determination in the Pac-West and Level 3 Complaint Orders, and at least four

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Recommended Decision to Grant Petition (Aug. 23, 2005); *Level 3*, , Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006).

[62] *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1158-59 (9th Cir. 2006) ("*Peevey*") ("Pac-West is entitled to reciprocal compensation for traffic that appears to originate and terminate within a single exchange by virtue of Pac-West's assignment of ... so-called 'Virtual Local' or 'VNXX traffic.'").

[63] *Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, 1176 (D. Wash. Apr. 9, 2007) ("By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue ... *It is plausible that the ultimate conclusion of the WUTC will not change.*") (emphasis supplied).

[64] Commission Staff's Opening Brief, ¶ 67; Washington District Court Remand Decision, at *26; *Peevey* at 1159 ("Pac-West is entitled to reciprocal compensation for Virtual NXX traffic.").

earlier decisions were correct, this Commission should reach the same result both in this proceeding and, separately, in the Remand Proceeding, relying on state and federal law rather than federal preemption by the *ISP Remand Order*.

38. For these and the other reasons stated herein, Level 3 respectfully requests that the Commission review the *Initial Order*, reject Qwest's positions in its *Response 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.[65]

Respectfully submitted,

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[65] *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.

Dated: January 14, 2008

CERTIFICATE OF SERVICE

I, Jeffrey Strenkowski, hereby certify that on the day of January 14, 2008, true and correct copies of Level 3 Communications, LLC's Reply to Qwest'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 14th day of January, 2008