

August 30, 2005

VIA E-MAIL AND US MAIL

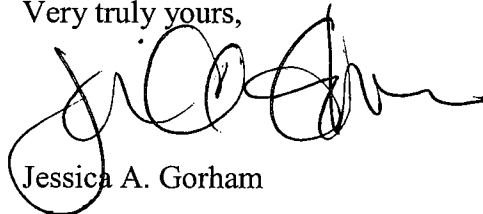
Filing Center
Oregon Public Utility Commission
550 Capitol Street NE #215
PO Box 2148
Salem, OR 97308-2148

Re: IC 12 - LEVEL 3 COMMUNICATIONS LLC'S OBJECTIONS TO RULING

Dear Sir or Madam:

Enclosed for filing in the above-named docket is Level 3 Communications LLC's Objections to Judge Petrillo's Ruling that Compensation for VNXX-Routed ISP-Bound Traffic is Not Authorized Under the Parties' Interconnection Agreement. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosure

cc: IC 12 Service List

**CERTIFICATE OF SERVICE
IC 12**

I hereby certify that a true and correct copy of LEVEL 3 COMMUNICATIONS LLC's OBJECTIONS TO JUDGE PETRILLO'S RULING THAT COMPENSATION FOR VNXX-ROUTED ISP-BOUND TRAFFIC IS NOT AUTHORIZED UNDER THE PARTIES' INTERCONNECTION AGREEMENT was served via U.S. Mail on the following parties on August 30, 2005:

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Jessica A. Gorham

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **IC 12**

4 In the Matter of
5 QWEST CORPORATION,
6 Complainant
7 v.
8 LEVEL 3 COMMUNICATIONS, LLC,
9 Defendant
10 Complaint for Enforcement of Interconnection
11 Agreement

LEVEL 3 COMMUNICATIONS LLC'S
OBJECTIONS TO JUDGE PETRILLO'S
RULING THAT COMPENSATION FOR
VNXX-ROUTED ISP-BOUND TRAFFIC
IS NOT AUTHORIZED UNDER THE
PARTIES' INTERCONNECTION
AGREEMENT

12
13 Level 3 Communications, LLC ("Level 3"), submits these objections to Administrative
14 Law Judge Petrillo's Ruling that Compensation for VNXX-Routed ISP-bound Traffic is Not
15 Authorized Under the Interconnection Agreement ("*Ruling*"), issued in the above-referenced
16 docket on August 16, 2005. Judge Petrillo automatically certified this *Ruling* for review by the
17 Public Utility Commission of Oregon (the "Commission"). Level 3 respectfully requests that the
18 Commission reverse the *Ruling* because Judge Petrillo erred in finding that the FCC's *ISP*
19 *Remand Order*, and hence the Parties' Interconnection Agreement, did not encompass virtual
20 NXX ("VNXX") ISP-bound traffic.¹

21
22
23 ¹ In recent rulings, it appears that this Commission disfavors the use of VNXX routing. *See, e.g., In the Matter of*
24 *the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket No. UM 1025, *Order Closing*
25 *Investigation*, Order No. 04-504 at 1 (September 7, 2004). It is important to note at the outset that the issue here is
26 *not* whether VNXX routing is permissible under state law (either as a policy or legal matter), but rather whether
VNXX ISP-bound traffic was included in the definition of ISP-bound traffic used by the FCC in its *ISP Remand*
Order. This is purely a question of federal law.

1 **I. INTRODUCTION**

2 Judge Petrillo’s *Ruling* addresses the central issue in this case – whether the reciprocal
3 compensation provisions of the Parties’ Interconnection Agreement apply to the exchange of
4 VNXX ISP-bound traffic. Because the Agreement states that Qwest must pay reciprocal
5 compensation for “ISP-bound traffic” as that term is used in the FCC’s *ISP Remand Order*,² the
6 resolution of this issue depends upon the proper interpretation of that *Order*. In addition to being
7 important to the outcome of this case, and Level 3’s operations generally,³ Judge Petrillo’s
8 decision has far-reaching implications for Internet Service Providers (ISPs) and other CLECs
9 providing service to ISPs. Although “broadband” Internet access receives a great deal of
10 attention in the press and from policymakers, the fact remains that a significant portion of the
11 public still obtains Internet access via dial-up connections. In fact, the end users of Qwest
12 Corporation (“Qwest”) routinely call ISPs (such as America Online, MSN, and United Online)
13 who receive their telephone service from Level 3 and other CLECs. Judge Petrillo’s *Ruling* will
14 ultimately increase the price of dial-up Internet access for consumers, which is contrary to the
15 FCC’s stated intent to promote and expand Internet access.

16 These objections present a single legal issue: whether Judge Petrillo erred in finding that
17 the reciprocal compensation regime set forth in the FCC’s *ISP Remand Order*, and therefore the
18 reciprocal compensation provisions of the Parties’ Interconnection Agreement, do not apply to
19 VNXX ISP-bound traffic. As Level 3 sets forth below, Judge Petrillo’s legal conclusion is

20 _____
21 ² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier*
22 *Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP*
23 *Remand Order*”), *rev’d and remanded, without vacating, Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The
24 FCC issued the *ISP Remand Order* after its initial declaratory ruling (*Implementation of the Local Competition*
Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, Declaratory
25 Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd. 3689
26 [1999]), had been reversed, vacated, and remanded by the United States Court of Appeals for the District of
Columbia Circuit. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

³ For instance, the proper interpretation of the *ISP Remand Order* is also at issue in Level 3’s arbitration with Qwest
Corporation for a new interconnection agreement, which is currently pending before this Commission (Docket No.
ARB 665).

1 contrary to the FCC’s *ISP Remand Order* and the decisions of two federal district courts.
2 Accordingly, this Commission must reverse Judge Petrillo’s decision and direct judgment in
3 favor of Level 3.

4 In the alternative, the Commission should find that Judge Petrillo erred in ruling on the
5 issue of whether the reciprocal compensation provisions of the Parties’ Interconnection
6 Agreement apply to VNXX ISP-bound traffic before allowing the parties to fully develop the
7 factual record. Had Judge Petrillo allowed Level 3 to develop the factual record, Level 3 would
8 have presented factual evidence that the vast majority of ISP-bound calls are carried over a
9 network architecture employing VNXX; that the FCC intended all ISP-bound traffic (including
10 VNXX ISP-bound traffic) to be compensable; and that the Parties’ Interconnection Agreement
11 authorized compensation for all ISP-bound traffic. At a minimum, the Commission should
12 vacate the Judge’s *Ruling* and remand this matter to Judge Petrillo for further development of the
13 factual record.

14 II. LEGAL BACKGROUND

15 In its *ISP Remand Order*, the FCC took several significant actions:

- 16 • First, the FCC revisited and expressly repudiated its 1996 conclusion that the
17 reciprocal compensation provisions of Section 251(b)(5) of the Communications
18 Act applied only to “local” telecommunications.⁴ The Commission candidly
19 confessed that it had “erred in focusing on the nature of the service (*i.e.*, local or
20 long distance) . . . for purposes of interpreting the relevant scope of section
21 251(b)(5).”⁵ The FCC acknowledged that its “use of the phrase ‘local traffic’” in

22 ⁴ *ISP Remand Order* at ¶ 32 (“Unless subject to further limitation, section 251(b)(5) would require reciprocal
23 compensation for transport and termination of *all* telecommunications traffic, – *i.e.* whenever a local exchange
24 carrier exchanges telecommunications traffic with another carrier.”) (emphasis in original).

25 ⁵ *Id.* at ¶ 26; *see also id.* ¶ 46 (“[W]e modify our analysis and conclusion in the *Local Competition Order*. There we
26 held that ‘transport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections
251(b)(5) and 251(d)(2).’ We now hold that the telecommunications subject to those provisions are all such
telecommunications not excluded by section 251(g).”) (emphasis in original).

1 its *Local Competition Order*,⁶ as in the subsequent *Declaratory Ruling*, “created
2 unnecessary ambiguities, and we correct that mistake here.”⁷ Consequently, the
3 FCC deleted the word “local” from all of its reciprocal compensation rules⁸ and
4 ruled that Section 251(b)(5) applied to all telecommunications, except for
5 “exchange access, information access, and exchange services for such access,”
6 which, at least for the time being, fell within section 251(g) of the Act.⁹

- 7 • Second, the FCC concluded that ISP-bound traffic was “information access”
8 within the scope of section 251(g) and therefore outside section 251(b)(5) and the
9 authority of states to set intercarrier compensation rates pursuant to section
10 252(d)(2) and (e)(1).¹⁰
- 11 • Third, the FCC exercised its authority of interstate telecommunications under
12 section 201 of the Communications Act to prescribe an interim intercarrier
13 compensation regime for ISP-bound traffic.¹¹ Under that interim ISP-bound
14 regime, the FCC established rate caps on intercarrier compensation for transport
15 and termination of ISP-bound traffic (“rate caps”),¹² created a cap on the number

16
17 ⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection*
18 *between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11
19 FCC Rcd. 15499 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive*
20 *Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in part and vacated in part sub nom. Iowa*
21 *Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d in part sub nom., AT&T Corp. v. Iowa Utils.*
22 *Bd.*, 525 U.S. 366 (1999).

23 ⁷ *ISP Remand Order* at ¶ 46.

24 ⁸ *Id.* at Appendix B (Final Rules).

25 ⁹ *Id.* at ¶ 34.

26 ¹⁰ *Id.* at ¶ 44; *see also Worldcom*, 288 F.3d at 432 (“[A]s a result, the state regulatory commissions would no longer
have jurisdiction over ISP-bound traffic as part of their power to result LEC interconnection issues”).

¹¹ *ISP Remand Order* at ¶ 52 (holding that ISP-bound traffic is interstate and subject to section 201) and ¶¶ 77-88.
The FCC made clear that its preemption of state authority extended only to the determination of intercarrier
compensation rates and not to other carrier obligations under the FCC’s local competition rules. *Id.* at ¶ n.149.

¹² *Id.* at ¶ 78. *See also Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from*
Application of the ISP Remand Order, Order, 19 FCC Rcd 20179, 20181 (¶ 6) (rel. October 18, 2004) (“*Core*
Forbearance Order”), *appeal pending, In re: Core Communications Inc.*, No. 04-1368 (D.C. Cir.).

1 of ISP-bound minutes for which a LEC could receive intercarrier compensation
2 (“growth caps”),¹³ and precluded a LEC entering a new market after adoption of
3 the order from receiving any intercarrier compensation payments for transport and
4 termination of ISP-bound traffic (“new markets rule”).¹⁴

- 5 • Fourth, the FCC conditioned implementation of this new regime for ISP-bound
6 compensation on the ILEC choosing to offer “to exchange section 251(b)(5)
7 traffic at the same rate” (known as the “mirroring rule”).¹⁵

8 Following the FCC’s adoption of the *ISP Remand Order*, on or about November 16,
9 2001, Level 3 and Qwest entered into their current Interconnection Agreement. Section 7.3.4.3
10 of that Agreement provides:

11 7.3.4.3 The Parties agree to exchange all EAS/Local (§251(b)(5))
12 and ISP-bound traffic (as that term is used in the [*ISP Remand*
13 *Order*]. The FCC ordered rate for ISP-bound traffic will apply to
14 EAS/Local and ISP-bound traffic in lieu of End Office call
termination and Tandem Switched Transport. See Section 7.3.6 of
this Agreement for FCC-ordered rates.

15 Section 7.3.6 sets forth the terms governing ISP-bound traffic. Sections 7.3.6.2.2 and
16 7.3.6.3 of that Agreement reflected the FCC’s growth caps and new markets rule.

17 In May 2002, the Court of Appeals for the District of Columbia Circuit issued its decision
18 in *Worldcom*, in which it reviewed the FCC’s *ISP Remand Order*.¹⁶ The D.C. Circuit rejected
19 the FCC’s argument that ISP-bound traffic exchanged between LECs fell within the scope of
20 pre-1996 Act “restrictions” or “obligations” that were preserved by section 251(g) pending future
21 FCC action.¹⁷ The court noted that the FCC had stated there was no pre-1996 Act rule governing
22

23 ¹³ *Id.*; see also *Core Forbearance Order* at ¶ 7.

24 ¹⁴ *ISP Remand Order* at ¶ 81; see also *Core Forbearance Order* at ¶ 9.

25 ¹⁵ *ISP Remand Order* at ¶ 89; see also *Core Forbearance Order* at ¶ 8.

26 ¹⁶ 288 F.3d 429 (D.C. Cir. 2002).

¹⁷ *Id.* at 433-34.

1 the exchange of ISP-bound traffic between LECs, that no party had contested that statement on
2 appeal, and that therefore there was no pre-existing rule to be preserved by operation of section
3 251(g).¹⁸ The court also held that services provided by one LEC to another LEC “are not ‘to’
4 either an IXC or an ISP,” and thus did not fall within the scope of section 251(g) for that reason
5 as well.¹⁹

6 Even though it had overturned the legal underpinnings for the *ISP Remand Order*, the
7 D.C. Circuit merely remanded and did not vacate the *ISP Remand Order*. Indeed, the court
8 expressly declined to review at that time challenges to the interim pricing rules established by the
9 *ISP Remand Order*, including the rate caps, growth caps, and new markets rule. Thus, even
10 following the *Worldcom* decision, these substantive interim rate rules remain in effect.

11 On October 8, 2004, the FCC adopted its *Core Forbearance Order*. In that order,
12 effective as of the adoption date, the FCC declined to enforce – and thereby eliminated – the
13 growth caps and new market rules that it had adopted as part of its *ISP Remand Order*.²⁰ The
14 FCC, however, continued to enforce the rate caps for established ISP-bound traffic and the
15 “mirroring” rule.

16 It is undisputed here that if traffic is “ISP-bound traffic” within the scope of the FCC’s
17 *ISP Remand Order*, sections 7.3.4.3 and 7.3.6 of the Parties’ Interconnection Agreement directs
18 that compensation will be paid in accordance with the regime established in that *Order*.
19 Moreover, it is undisputed that the *Core Forbearance Order* eliminated the growth caps and new
20 market rules that had previously been established in the *ISP Remand Order*, requiring that
21 compensation be paid with respect to all minutes subject to the *ISP Remand Order*. As Judge
22 Petrillo noted, Qwest concedes that under the *ISP Remand Order* (as limited by the *Core*
23 *Forbearance Order*), Qwest must compensate Level 3 for ISP-bound traffic under the FCC’s

24 ¹⁸ *Id.*

25 ¹⁹ *Id.*

26 ²⁰ See *Core Forbearance Order* at ¶ 1.

1 ISP-bound compensation regime. Qwest, however, contends that the FCC’s *ISP Remand Order*
2 only directs that it compensate Level 3 with respect to “local” ISP-bound traffic – *i.e.*, traffic that
3 originates from an ISP customer and terminates at an ISP location within the same Qwest local
4 calling area – whereas Level 3 argues (supported by case law) that the *ISP Remand Order*
5 applies to all ISP-bound traffic exchanged between Level 3 and Qwest, regardless of the ISP’s
6 location within the LATA.

7 In briefing and at the prehearing conference, Level 3 sought a hearing, noting that Judge
8 Petrillo “should forbear from issuing a ruling on any one issue before the factual record is fully
9 developed.”²¹ Judge Petrillo, however, disagreed. He directed the parties to brief a single issue
10 of federal law and ruled on the basis of those legal briefs alone that VNXX ISP-bound calls are
11 not compensable under the Interconnection Agreement, based on his reading of the FCC’s *ISP*
12 *Remand Order*.²²

13 Judge Petrillo erred on the legal question of whether the *ISP Remand Order* applies to all
14 ISP-bound traffic. Two federal district courts – the United States District Court for the District
15 of Connecticut in *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*,²³
16 and the United States District Court for the Northern District of Illinois in *AT&T*
17 *Communications of Illinois, Inc. v. Illinois Bell Telephone Company*²⁴ – have recently concluded
18 that the *ISP Remand Order* governs the intercarrier compensation rates for all ISP-bound traffic,
19 including VNXX ISP-bound traffic. In contrast, the United States District Court for the District

21 ²¹ *In the Matter of Qwest Corporation v. Level 3 Communications, LLC*, Docket No. IC 12, Level 3
22 Communications’s Brief Regarding Whether the Interconnection Agreement Encompasses VNXX ISP-Bound
23 Traffic at 3, n.6, filed July 18, 2005 (“*Level 3 Brief*”).

24 ²² Judge Petrillo noted that § 7.3.4.3 of the agreement says in substance that intercarrier compensation with respect
25 to ISP-bound traffic shall be in accordance with the FCC’s ruling in the *ISP Remand Order*. *Ruling* at 2. He
26 therefore directed the parties to brief “whether the FCC’s use of the term ‘ISP-bound traffic’ in [the *ISP Remand*
Order] encompasses VNXX traffic.” *Id.*; see also *Level 3 Brief* at 2.

²³ 359 F. Supp. 2d 229 (D. Conn. 2005) (“*SNET v. MCI Worldcom*” or “*SNET*”).

²⁴ United States District Court for the Northern District of Illinois, No. 04 C 1768, slip op. (March 25, 2005)
(“*AT&T v. Illinois Bell*”)

1 of Oregon’s decision in *Qwest Corp. v. Universal Telecom, Inc.*,²⁵ did not purport to interpret the
2 scope of the FCC’s *ISP Remand Order* and, indeed, addressed an interconnection agreement that
3 pre-dated the *ISP Remand Order* and did not incorporate its definitions or limitations. Judge
4 Petrillo also erred in issuing his ruling without allowing Level 3 to develop the factual issues.

5 Level 3 believes that the materials presented here are sufficient for the Commission to
6 enter a final ruling in Level 3’s favor on the question whether VNXX-routed ISP-bound traffic is
7 subject to compensation under the Parties’ Interconnection Agreement. At a minimum, however,
8 the *Ruling* should be vacated and this matter returned to Judge Petrillo for a complete hearing on
9 the merits, including the right of each party to submit evidence in support of that party’s
10 positions.

11 III. ARGUMENT

12 A. The Administrative Law Judge Erred in Ruling that the *ISP Remand Order* Does 13 Not Apply to *All* ISP-bound Traffic Exchanged Between Two LECs, Including 14 VNXX

15 1. The *ISP Remand Order* is not Limited to Local ISP-bound Traffic.

16 The core of that the Administrative Law Judge’s *Ruling* is the conclusion that “the term
17 ‘ISP-bound traffic,’ as used in the *ISP Remand Order*, does not include VNXX-routed ISP-
18 bound traffic.”²⁶ To reach this result, Judge Petrillo incorrectly concluded that when the FCC
19 stated that it was “reconsider[ing] the proper treatment for purposes of intercarrier compensation
20 of telecommunications traffic delivered to Internet service providers (ISPs),”²⁷ the FCC did not
21 mean that it was addressing *all* traffic delivered to ISPs, but only “local” traffic delivered to
22 ISPs. No such limitation appears in any decisional portion of the FCC’s *ISP Remand Order*.

23
24 ²⁵ United States District Court for the District of Oregon, Civil No. 04-6047-AA, slip op. (December 15, 2004)
 (“*Universal Telecom*”).

25 ²⁶ *Ruling* at 12.

26 ²⁷ *ISP Remand Order* at ¶ 1.

1 Indeed, such a limitation would have made little sense in an order in which the FCC called its
2 use of the term “local traffic” in the *Declaratory Ruling* and *Local Competition Orders* a
3 “mistake” and rejected the “local”/“long distance” dichotomy as defining the scope of reciprocal
4 compensation.²⁸ Moreover, the FCC in the *ISP Remand Order* was responding to the D.C.
5 Circuit’s observation that a call to an ISP does not fit clearly into either the local or long distance
6 category,²⁹ and thus had good reason to avoid invoking categorization into “local” or “long
7 distance” traffic as a basis for setting ISP-bound intercarrier compensation. This Commission
8 cannot and should not insert language into the FCC’s *ISP Remand Order* that simply is not there.
9 Accordingly, the *ISP Remand Order* applies to all ISP-bound traffic, including VNXX, and
10 expressly preempts state authority to determine the intercarrier compensation rates for such
11 traffic.

12 In *SNET v. MCI Worldcom*, the United States District Court for the District of
13 Connecticut recently addressed this precise issue and refused to insert words of limitation where
14 none exist. Like Qwest here, SBC (owner of Southern New England Telephone Company, the
15 ILEC) argued that the *ISP Remand Order* “does not cover all ISP-bound traffic, but only covers
16 ‘local’ ISP-bound traffic.”³⁰ The court, however, concluded that the *ISP Remand Order* applied
17 to “all ISP-bound traffic, without exception.”³¹

18 In rejecting SBC’s arguments, the court held that “the language of the *ISP Remand Order*
19 is unambiguous – the FCC concluded that *section 201* gave it jurisdiction over all ISP-bound
20 traffic, and it proceeded to set the intercarrier compensation rates for such traffic.”³² The court
21 noted that “the FCC did not use the term ‘local ISP-bound’ traffic and did not impose any
22

23 ²⁸ *ISP Remand Order* at ¶ 46.

24 ²⁹ *Bell Atlantic v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

25 ³⁰ *SNET*, 359 F. Supp. 2d at 230.

26 ³¹ *Id.* at 230, quoting 353 F. Supp. 2d 287, 299 (D. Conn. 2005).

³² *Id.* at 231 (emphasis in original).

1 explicit restriction on the term ‘ISP-bound traffic.’³³ The court also found SBC’s argument
2 implausible, noting “the FCC expressly disavowed the use of the term ‘local,’ making it difficult
3 to believe the Commission nevertheless intended that term to be implicitly read back into its
4 ruling.”³⁴

5 In the face of the “plain language” of the FCC’s order, SBC nonetheless argued that “in a
6 number of places the language of the *ISP Remand Order* makes clear that the FCC was
7 discussing local ISP-bound traffic.”³⁵ The *SNET v. MCI WorldCom* court recognized, however,
8 that the passages cited by SBC – like the passages relied on by Qwest and in the *Ruling* below –
9 were not decisional. As the *SNET* court explained, “these statements indicate the FCC began by
10 addressing the question whether ISP-bound traffic that would typically be subject to reciprocal
11 compensation – which at the time would have consisted of ‘local’ ISP-bound traffic – was
12 nevertheless exempt.”³⁶ The court recognized, however, that “[w]hat these statements, taken by
13 themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand*
14 *Order*.”³⁷ Noting that the FCC “(a) disclaimed the use of the term ‘local,’ (b) held that all traffic
15 was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was
16 exempted because it is ‘information access,’ (d) held that all ISP-bound traffic was subject to the
17 FCC’s jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-

19 ³³ *Id.*

20 ³⁴ *Id.*

21 ³⁵ *Id.* SBC pointed to paragraph 13 of the *ISP Remand Order*, in which the FCC stated that, after it ruled in the 1996
22 *Local Competition Order* that section 251(b)(5) reciprocal compensation applied only to traffic that “originates and
23 terminates within a local area,” “the question arose whether reciprocal compensation obligations apply to the
24 delivery of calls from one LEC’s end-user to an ISP in the *same local calling area*.” *SNET*, 359 F. Supp. 2d at 231,
quoting *ISP Remand Order*,. at ¶ 13. SBC also pointed to the D.C. Circuit’s statement in *Worldcom*, also relied
upon by Qwest here, that “[I]n the order before us the Federal Communications Commission held that under §
251(g) of the Act it was authorized to ‘carve out’ from § 251(b)(5) calls made to internet service providers (‘ISPs’)
located within the caller’s local calling area.” *SNET v. MCI Worldcom*, 349 F. Supp. 2d at 231; *Ruling* at 7, quoting
Worldcom, 288 F.3d at 430.

25 ³⁶ *SNET*, 359 F. Supp. 2d at 231.

26 ³⁷ *Id.* at 232.

1 bound traffic,” the court concluded that “though the FCC started with the question whether
2 ‘local’ ISP-bound traffic was subject to reciprocal compensation, it answered that question in the
3 negative on the basis of its conclusion that *all ISP-bound traffic was in a class by itself.*”³⁸ This
4 “class by itself” – “all ISP-bound traffic” – was then subject to the intercarrier compensation
5 mechanism in the *ISP Remand Order*.

6 Judge Petrillo’s citation to language in paragraph 10 of the *ISP Remand Order*, stating
7 “[a]s we noted in the *Declaratory Ruling*, an ISP’s end-user customers typically access the
8 Internet through an ISP server located in the same local calling area,” does not alter the District
9 court’s analysis in *SNET v. MCI Worldcom*. In the first instance, a description of a “typical”
10 arrangement cannot reasonably be read to mean that the *ISP Remand Order* applies *exclusively* to
11 such arrangements, as both Qwest and Judge Petrillo contend.³⁹ Indeed, the fact that the
12 Commission acknowledged that there were atypical arrangements and did not exclude those
13 arrangements from the sweep of its interim ISP-bound compensation scheme is further evidence
14 that the *ISP Remand Order* applies to all ISP-bound traffic, not just “local” ISP-bound traffic.
15 Furthermore, like the language cited by SBC to the *SNET* court, this sentence from paragraph 10
16 “do[es] not reveal . . . how the FCC proceeded to answer that question in the *ISP Remand*
17 *Order.*”⁴⁰

18 Moreover, Judge Petrillo’s decision relies on statements the FCC made in its *Declaratory*
19 *Ruling*.⁴¹ However, Judge Petrillo does not recognize that the FCC itself has declared its use of
20 the phrase “local traffic” in the *Declaratory Ruling* to have been a “mistake.”⁴² Accordingly,
21 statements from the *Declaratory Ruling* that the FCC was addressing “local” traffic in no way

22 ³⁸ *Id.* (emphasis added).

23 ³⁹ In addition, Judge Petrillo’s description of a “typical” ISP-bound call is incorrect. See Section III.B.1, *infra.*, and
24 the *Affidavit of Mack Greene*, filed herewith.

25 ⁴⁰ *Id.* at 231-32.

26 ⁴¹ *Ruling* at 7.

⁴² *ISP Remand Order* at ¶ 46.

1 limit the scope of the *ISP Remand Order*. Accordingly, neither Qwest nor Judge Petrillo has
2 provided any basis to distinguish the court’s decision in *SNET v. MCI Worldcom*.

3 The United States District Court for the Northern District of Illinois, in *AT&T v. Illinois*
4 *Bell*, also concluded that the *ISP Remand Order* applied to all ISP-bound traffic and did not
5 permit the Illinois Commerce Commission to require bill-and-keep for ISP-bound VNXX traffic
6 while retaining compensation at the \$.0007 rate cap for non-VNXX ISP-bound and voice
7 traffic.⁴³ The court ruled that the *ISP Remand Order* requires that the rate charged for all ISP-
8 bound traffic, whether VNXX traffic or otherwise, must be the same as for traffic under Section
9 251(b)(5).⁴⁴ The court could not have reached this determination without also concluding that
10 the *ISP Remand Order* applies to all ISP-bound traffic, specifically including VNXX traffic.

11 The conclusion that the *ISP Remand Order* addressed all ISP-bound traffic, not just
12 “local” ISP-bound traffic, is further buttressed by the FCC’s statements both at the time of and
13 subsequent to the *ISP Remand Order*. First, the FCC acknowledged in the *ISP Remand Order*
14 that it was a mistake to use the phrase “local traffic” in its prior decisions.⁴⁵ In fact, in the *ISP*
15 *Remand Order*, the FCC amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart
16 H) by eliminating the word “local” in each place it appeared.⁴⁶ Second, in its *Intercarrier*
17 *Compensation NPRM*,⁴⁷ the FCC described the *ISP Remand Order* as follows:

18 In a related order that we are adopting today (“*ISP Intercarrier*
19 *Compensation Order*”), we address intercarrier compensation for
20 traffic that is specifically bound for Internet service providers
21 (“ISPs”). We adopt interim measures that, for the next three years,
will significantly reduce, but not altogether eliminate, the flow of

22 ⁴³ *AT&T v. Illinois Bell*, slip op. at 6. In that decision, the court referred to VNXX traffic as “ISP-bound FX [foreign
exchange] traffic.”

23 ⁴⁴ *Id.*

24 ⁴⁵ See *Level 3’s Brief* at 3-7.

25 ⁴⁶ *Id.*

26 ⁴⁷ *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16
FCC Rcd 9610 (2001) (“*Intercarrier Compensation NPRM*”).

1 intercarrier payments associated with delivery of dial-up traffic to
2 ISPs.⁴⁸

3 The FCC did not in any way indicate that the scope of the *ISP Remand Order* was limited to
4 “local” ISP-bound traffic. To the contrary, it characterized the *ISP Remand Order* as addressing
5 “intercarrier compensation for traffic that is specifically bound for” ISPs – with no concern or
6 qualification about where those ISPs might be located.⁴⁹

7 Third, the FCC’s description of the *ISP Remand Order* in the *Core Forbearance Order*,
8 gave no indication that the *ISP Remand Order* was limited to “local” ISP-bound traffic. To the
9 contrary, the FCC clearly refers to “ISP-bound traffic” or “traffic bound for Internet Service
10 Providers” without further distinction.⁵⁰

11 Furthermore, when the FCC’s Wireline Competition Bureau itself acted as an arbitrator
12 in lieu of the Virginia Corporation Commission, the Bureau never gave any indication that the
13 scope of the *ISP Remand Order* extended only to “local” ISP-bound calls, rather than all ISP-
14 bound calls.⁵¹ To the contrary, the FCC’s Wireline Competition Bureau required that all calls –

15 ⁴⁸ *Inter-carrier Compensation NPRM* at ¶ 3 (footnote citing *ISP Remand Order* omitted).

16 ⁴⁹ *See id.* at ¶ 115 (noting ILEC claims that VNXX arrangements are “inappropriate” and seeking comment). As
17 further evidence that the FCC was aware of VNXX arrangements at the time it issued the *ISP Remand Order*, Time
18 Warner Telecom specifically addressed the issue of VNXX-routed ISP-bound traffic, praising VNXX arrangements
19 (called “remote NXXs”) as a means of improving efficiency:

20 Indeed, several of the CLEC practices labeled as “scams” by the ILECs seem in
21 fact to be simply more efficient means of providing service. For example,
22 Verizon points to Brooks Fiber’s use of remote NXXs in Maine as an
23 impermissible waste of numbering resources, since Brooks Fiber obtained
24 NXXs solely to provide ISP customers with local numbers in particular rate
25 centers. Verizon Comments at 18-19. However, while Maine prohibited the use
26 of remote NXXs, California has approved them.

22 *Reply Comments of Time Warner Telecom*, CC Docket Nos. 96-98, 99-68, at 30 (filed August 7, 2000) (footnote
23 omitted).

24 ⁵⁰ *See, e.g., Core Forbearance Order* at ¶ 4 (describing “traffic bound for Internet Service Providers” as not subject
25 to the reciprocal compensation requirements of section 251(b)(5) under the *ISP Remand Order*).

26 ⁵¹ *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the
Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon
Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd. 27039, 27158-27176
(¶¶ 244-85) (2002) (discussing intercarrier compensation for ISP-bound traffic) (“*Virginia Arbitration Order*”).

1 whether or not ISP-bound – be rated according to the NPA-NXX of the telephone numbers
2 associated with the calls.⁵² Rating all calls according to the NPA-NXX of the telephone numbers
3 associated with the calls treats all ISP-bound traffic exchanged between two LECs according to
4 the interim regime established in the *ISP Remand Order*, without distinguishing between a
5 physically “local” ISP and a distant ISP.

6 Other decisionmakers have also concluded that the *ISP Remand Order* applies to all ISP-
7 bound traffic, not just “local” ISP-bound traffic. For example, the Washington Utilities and
8 Transportation Commission (WUTC) held that the *ISP Remand Order* applied to all ISP bound
9 traffic, not just “local” ISP bound traffic. Responding to CenturyTel’s argument that references
10 in the *ISP Remand Order* and *Worldcom* decision to “local” traffic demonstrated that the *ISP*
11 *Remand Order* applied only to “local” traffic, the WUTC stated “[t]he substance of the [*ISP*
12 *Remand Order* and *Worldcom*] decisions makes no distinction based on the location of the ISP’s
13 modems, and doing so would be inconsistent with rationales previously offered by the FCC for
14 its treatment of ISP-bound traffic.”⁵³ The Commission therefore upheld the arbitrator’s decision
15 rejecting CenturyTel’s argument.⁵⁴ More recently, two Administrative Law Judges at the WUTC
16 recently rejected the same arguments by Qwest, citing both the WUTC’s decision in the *Level 3-*
17 *CenturyTel Order* and the *SNET v. MCI Worldcom* decision.⁵⁵ The New Hampshire PUC has
18 also concluded that intercarrier compensation for ISP-bound VNXX traffic, not just local ISP-

19 ⁵² *Id.* at ¶¶ 286-88.

20 ⁵³ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications,*
21 *LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252, Seventh Supplemental Order:*
22 *Affirming Arbitrator’s Report and Decision, WUTC Docket No. UT-023043, ¶ 10 (Feb. 28, 2003), affirming Fifth*
23 *Supplemental Order, Arbitrator’s Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003)*
24 *(“Level 3-CenturyTel Order”).*

25 ⁵⁴ *Id.*

26 ⁵⁵ *See Pac-West Telecom, Inc. v. Qwest Corp.*, Docket No. UT-053036, Order No. 03, Recommended Decision to
Grant Petition at ¶¶ 31, 37 (Aug. 23, 2005); *Level 3 Communications, LLC v. Qwest Corp.*, Docket No. UT-053039,
Order No. 03, Order Denying in part and Granting in part Level 3’s Motion for Summary Determination; Denying in
part and Granting in part Qwest’s Motion for Summary Determination, at ¶¶ 34-35 (August 26, 2005) (“*Level 3-*
Qwest Washington Decision”).

1 bound traffic, was governed by FCC rules, and thus its dockets concerning VNXX “exclude[]
2 any ruling regarding inter-carrier compensation for ISP-bound traffic.”⁵⁶

3 The United States District for the District of Oregon’s decision in *Universal Telecom*
4 does not compel a contrary conclusion. As the court recognized, the interconnection agreements
5 in the *Universal Telecom* case predated the *ISP Remand Order* and had not been modified in
6 light of that order.⁵⁷ Unlike the Interconnection Agreement in this docket, the interconnection
7 agreement between Qwest and Universal Telecom did not expressly address ISP-bound traffic
8 and did not incorporate the FCC’s interim intercarrier compensation mechanism for ISP-bound
9 traffic, as would be expected for an agreement that predated the *ISP Remand Order*. Instead, the
10 Qwest/Universal Telecom interconnection agreement only provided for reciprocal compensation
11 for “local/EAS traffic” at the rate of \$.00133, nearly double the *ISP Remand Order* rate of
12 \$.0007 per minute.⁵⁸ Accordingly, when the *Universal Telecom* court held that VNXX traffic
13 was not subject to reciprocal compensation under the terms of that interconnection agreement, it
14 relied on the fact that the interconnection agreement expressly specified that reciprocal
15 compensation was “for the termination of local/EAS traffic per minute of use,” and that the
16 agreement itself “adopted the definition of ‘local’ that was listed in Qwest’s Oregon tariff at the
17 time the agreement became effective.”⁵⁹

18 Nor does the District of Oregon’s decision in *Level 3 Communications v. Pub. Util.*
19 *Comm’n of Oregon*, Docket No. CV 01-1818-PA (Nov. 22, 2002) (“*Level 3 v. Oregon PUC*”)
20 provide any support for Judge Petrillo’s decision. The issue before the Court in that case was
21 whether the FCC’s reciprocal compensation rules (not its ISP-bound compensation rules)
22

23 ⁵⁶ See *Investigation as to Whether Certain Calls are Local*, Final Order, Order No. 24,080, 2002 N.H. PUC Lexis
165, 46-47 (October 28, 2002) (“*NH VNXX Order*”).

24 ⁵⁷ *Universal Telecom*, slip op. at 12.

25 ⁵⁸ *Id.* at 16.

26 ⁵⁹ *Id.* at 22-3.

1 governed whether Qwest or Level 3 bore the cost of interconnection trunks used to connect the
2 two carriers' networks. That decision did not address the scope of the *ISP Remand Order*,
3 particularly with respect to the issue of termination compensation pursuant to that *Order*.

4 The court's reasoning in *Universal Telecom* and *Level 3 v. Oregon PUC* is simply
5 inapplicable in this docket because the court did not address the scope of the FCC's *ISP Remand*
6 *Order*. This contrasts sharply with the *SNET v. MCI Worldcom* decision – and the current
7 dispute between Level 3 and Qwest – in which the issue of whether the *ISP Remand Order*,
8 covers all ISP-bound traffic, as opposed to only “local” ISP-bound traffic, is squarely presented.
9 The Commission should follow the District of Connecticut's on-point decision in *SNET v. MCI*
10 *Worldcom* and not be misled by the District of Oregon's conclusions in the inapposite *Universal*
11 *Telecom* and *Level 3 v. Oregon PUC* cases.

12 **2. The Administrative Law Judge's Ruling is an Impermissible**
13 **Alteration of the FCC's Interim Intercarrier Compensation Regime.**

14 The *ISP Remand Order* unambiguously displaced state authority to establish intercarrier
15 compensation rates for ISP-bound traffic that are inconsistent with the interim pricing rules.
16 With respect to intercarrier compensation rates (but not other duties under the FCC's local
17 competition rules),⁶⁰ state regulatory commissions “no longer have jurisdiction over ISP-bound
18 traffic as part of their power to resolve LEC interconnection issues under § 252(e)(1) of the
19 Act.”⁶¹ Where, as here, prior to the *ISP Remand Order*, a state had not adopted rates applicable
20 to the exchange of ISP-bound traffic, “the rate caps in the [*ISP Remand Order*] are the rates
21 governing the exchange of ISP-bound traffic.”⁶² As the New Hampshire Commission has
22 recognized, it is the FCC's rules that govern ISP-bound traffic, including VNXX.⁶³ In a recent

23 _____
⁶⁰ *ISP Remand Order* at n.149.

24 ⁶¹ *Worldcom*, 288 F.3d at 432.

25 ⁶² *Virginia Arbitration Order*, 17 FCC Rcd. at 27173 (¶280).

26 ⁶³ See footnote 56, *supra*.

1 decision, a Washington Administrative Law Judge similarly recognized that “[t]he FCC has
2 established an interim compensation regime for ISP-bound traffic until it determines an
3 appropriate uniform intercarrier compensation regime. States and carriers must abide by the
4 FCC’s compensation regime for ISP-bound traffic until the FCC adopts different rules.”⁶⁴ Judge
5 Petrillo had no authority to require VNXX ISP-bound traffic to be exchanged on a “bill-and-
6 keep” basis, or to set any other ISP-bound rate other than the FCC-mandated \$.0007/minute.

7 Furthermore, a state Commission may not, under the *ISP Remand Order* “mirroring
8 rule,” establish different intercarrier compensation rates for VNXX ISP-bound traffic than for
9 other ISP-bound traffic or section 251(b)(5) traffic. As discussed above, the United States
10 District Court for the Northern District of Illinois expressly held that the *ISP Remand Order*
11 precluded the Illinois Commerce Commission from taking such action.⁶⁵

12 Accordingly, because the *ISP Remand Order* governs all ISP-bound traffic, not just
13 “local” ISP-bound traffic, and because the *ISP Remand Order’s* caps prescribe the rate that
14 applies in the absence of a lower applicable state rate, the *ISP Remand Order* requires that Qwest
15 compensate Level 3 for ISP-bound traffic terminated on Level 3’s network at the \$.0007/minute
16 rate set by the *ISP Remand Order*. Judge Petrillo’s *Ruling* impermissibly alters this regime and
17 should be reversed.

18 **B. The Administrative Law Judge Erred by Failing to Give the Parties an**
19 **Opportunity to Develop the Factual Record**

20 **1. Judge Petrillo Relied on an Incorrect Assumption About the**
21 **“Typical” ISP-bound Call**

22 In ruling that the intercarrier compensation regime for ISP-bound traffic set forth in the
23 FCC’s *ISP Remand Order* did not apply to VNXX ISP-bound traffic, Judge Petrillo relies on an
24 implicit factual assumption about the routing of a “typical” ISP-bound call. Specifically, Judge

25 ⁶⁴ *Level 3-Qwest Washington Decision*, Order at ¶ 35.

26 ⁶⁵ *AT&T of Illinois v. Illinois Bell*, slip op. at 6.

1 Petrillo states that the *ISP Remand Order* contains the same description of ISP traffic as set forth
2 in the FCC’s *Declaratory Ruling* – “an ISP’s end user customers typically access the Internet
3 through an ISP server *located in the same local calling area.*”⁶⁶ Inherent in Judge Petrillo’s
4 ruling is the assumption that this characterization of a “typical” ISP-bound call was either correct
5 or central to the FCC’s holdings. However, had Level 3 been allowed to develop the factual
6 record in this docket, Level 3 would have demonstrated that the relied-upon description of a
7 typical call is (a) incorrect, and (b) simply an artifact of earlier descriptions of ISP-bound calls
8 contained in prior orders and did not constitute a factual or critical finding by the FCC.⁶⁷

9 First, if the parties had been given the opportunity to develop the factual record, Level 3
10 would have shown that by the time the FCC issued its *ISP Remand Order*, it was far from
11 “typical” for an ISP-bound call to originate and terminate in the same local calling area. As
12 technology has evolved, the vast majority of ISP-bound calls are not placed to servers or modem
13 banks located in the same local calling area as the end user, but rather are sent to centrally
14 located servers that service much larger volumes and geographic areas than a single local calling
15 area.⁶⁸ Not only is this true for Level 3’s network, but it is also true for Qwest’s network.

16 The network architecture for Qwest’s wholesale ISP dial-up service (“Qwest Wholesale
17 Dial”) is essentially identical to Level 3’s wholesale dial-up service. Qwest promotes its Qwest
18 Wholesale Dial service for ISPs through product attributes such as “virtual storefronts that know
19 no physical boundaries.” Qwest promises to provide its ISP customers with “a dial-up network
20 infrastructure . . . covering more than 85 percent of the U.S. population with a local call” – calls
21 being “sent over the public switched telephone network (“PSTN”) via primary/intermachine
22 trunk (“PRI/IMT”) connections. In responses to data requests, Qwest has admitted that its

23
24 ⁶⁶ *Ruling* at 7, quoting the *ISP Remand Order* at ¶ 10 (emphasis added by Judge Petrillo).

25 ⁶⁷ See *Level 3’s Brief* at 5-6.

26 ⁶⁸ *Affidavit of Mack Greene* at ¶ 7, filed herewith.

1 Wholesale Dial service does not require servers in the local calling area.⁶⁹ Instead, Qwest claims
2 that it maintains a physical presence in each local calling area through its primary rate
3 interface/intermachine trunk connections.⁷⁰

4 Carriers are provisioning their ISP customers in this fashion because it makes financial
5 and engineering sense to do so. Because of the economies of scale of IP-based technologies (*i.e.*,
6 SONET and fiber based reliable transport technologies), it is less expensive and more efficient to
7 locate ISP servers in central locations rather than in the local end office. The new technology
8 ISP equipment can handle much higher volumes of traffic than is typically generated from one
9 local calling area.⁷¹ Thus, Judge Petrillo’s implicit assumption is incorrect.

10 Second, the position adopted by Judge Petrillo depends on the notion that VNXX
11 arrangements in general, and for ISP-bound traffic in particular, were somehow unknown or rare
12 at the time of the *ISP Remand Order*, thereby supporting an inference that a general reference to
13 “ISP-bound traffic” would **exclude** such arrangements. In fact, the FCC, and the industry in
14 general, were fully cognizant of VNXX arrangements at that time. For example, the FCC
15 expressly recognized in the *ISP Remand Order* that an ISP’s server or modem bank might not be
16 collocated with CLEC switches: “Ameritech maintains that it costs CLECs less to deliver ISP-
17 bound traffic than it costs incumbent LECs to deliver local traffic because CLECs can reduce
18 transmission costs by locating their switches close to ISPs. *The proximity of the ISP or other*
19 *end-user to the delivering carrier’s switch, however, is irrelevant to reciprocal compensation*
20 *rates.”⁷² It follows that general references to “ISP-bound traffic” would normally be construed*
21 *to include VNXX-routed traffic, unless some specific effort is made to carve it out. If the parties*

23 ⁶⁹ See Qwest’s responses to Level 3 Data Request Nos. 17 and 19, attached to the *Affidavit of Mack Greene* as
24 Exhibits A and B, respectively.

25 ⁷⁰ *Id.*

26 ⁷¹ *Affidavit of Mack Greene* at ¶ 10.

⁷² *ISP Remand Order* at ¶ 92.

1 had been permitted to develop the factual record in this proceeding, Level 3 would have
2 presented evidence proving this fact.

3 As discussed above, the Administrative Law Judge relied on an incorrect assumption of
4 what a “typical” ISP-bound call is – an assumption that is not supported by any factual evidence.
5 This mistaken assumption informed the Judge’s reading of the *ISP Remand Order* and allowed
6 the conclusion that the *Order* does not apply to VNXX ISP-bound traffic because it is not
7 “typical” ISP-bound traffic. Had Level 3 been allowed a hearing in this case, it would have
8 demonstrated that VNXX constitutes the majority of all ISP-bound traffic, thus compelling the
9 conclusion that the FCC intended to include it under the reciprocal compensation regime adopted
10 in the *ISP Remand Order*. The Judge’s interpretation of the *ISP Remand Order* simply cannot be
11 upheld because of the underlying factual error inherent in the ruling.

12 **2. The Parties’ Interconnection Agreement Confirms that the Parties’**
13 **Intended to Apply to the FCC’s Intercarrier Compensation Regime to**
14 **All ISP-bound Traffic**

15 If Level 3 had been given the opportunity to develop the factual record in this docket, it
16 would have shown that, in addition to the plain language of the *ISP Remand Order*, the Parties’
17 Interconnection Agreement, executed just seven months after the issuance of that *Order*,
18 supports the conclusion that the *ISP Remand Order* is not limited to “local” ISP-bound traffic.

19 Intercarrier compensation for transport and termination is governed by Section 7.3 of the
20 Interconnection Agreement. The Agreement’s structure parallels the *ISP Remand Order*, which
21 also identifies two classes of traffic subject to (non-access charge) intercarrier compensation:
22 §251(b)(5) traffic and ISP-bound traffic. The Agreement divides compensable traffic into these
23 two independent classes: “Exchange Service (EAS/Local) Traffic” and “ISP-bound traffic.”⁷³
24 Section 7.3.4.3 of the Interconnection Agreement provides that “all EAS/Local (§251(b)(5)) and
25 ISP-bound traffic (as that term is used in the [*ISP Remand Order*]” will be compensated “at the

26 ⁷³ See Interconnection Agreement §§ 7.3.4 (Exchange Service (EAS/Local) Traffic and 7.3.6 (ISP-bound traffic).

1 FCC ordered rate,” which is the rate set forth for ISP-bound traffic. Thus, traffic is compensable
2 if it falls into either the definition of “EAS/Local (§ 251(b)(5)) traffic” or “ISP-bound traffic.”

3 The Interconnection Agreement expressly addresses the geographic scope of EAS/Local
4 traffic, but contains no parallel express limitation on ISP-bound traffic. Section 4.23 defines
5 “Exchange Service” or “Extended Area Service (EAS)/Local Traffic” as “traffic that is
6 originated and terminated within the local calling area which has been defined by the
7 Commission and documented in applicable tariffs.”⁷⁴ At the same time, the Interconnection
8 Agreement contains no such limitation on “ISP-bound traffic” and simply defines that term as
9 “used in the FCC [*ISP Remand Order*].”⁷⁵ Had the parties believed that the term “ISP-bound
10 traffic” was limited to traffic that “originated and terminated within the local calling area which
11 has been defined by the Commission and document in applicable tariffs,” they clearly could have
12 included that limitation in the Agreement. In this context, the Commission should not interpret
13 the Agreement to add a limitation the parties did not expressly provide.

14 The terms of the Interconnection Agreement therefore provide that the parties intended,
15 as the *SNET v. MCI Worldcom* court held, that “the FCC did not use the term ‘local ISP-bound’
16 traffic and did not impose any explicit restriction on the term ‘ISP-bound traffic.’”⁷⁶

17 IV. CONCLUSION

18 As the *ISP Remand Order* requires, and as already been decided by federal courts and
19 other state public utility commissions, the interim intercarrier compensation regime established
20 in the FCC’s *ISP Remand Order* applies to *all* ISP-bound traffic, not just “local” ISP-bound
21 traffic. The FCC is the only regulatory agency with the authority to amend or alter these rules.
22 Accordingly, Level 3 respectfully requests that the Commission reverse the *Ruling*, rule that *all*

23 ⁷⁴ *Id.* at § 4.23. Section 7.3.4.3, however, uses a different term “EAS/Local (§ 251(b)(5)) Traffic. This appears to
24 be broader than Extended Area Service (EAS)/Local Traffic. For example, a cellular call would be § 251(b)(5)
25 traffic, but does not originate and terminate within the same Commission-designated local calling area.

25 ⁷⁵ *Id.* at § 7.3.4.3.

26 ⁷⁶ *SNET*, 359 F. Supp. 2d at 230.

1 VNXX-routed ISP-bound traffic, including VNXX ISP-bound traffic, is fully compensable under
2 the Parties' Interconnection Agreement, and direct Qwest to pay Level 3 for such traffic. In the
3 alternative, and at a minimum, Level 3 requests that the Commission vacate the *Ruling* and
4 remand the matter to Judge Petrillo for full and unrestricted hearings, including evidentiary
5 submissions as appropriate, on all aspects of the disputes between Qwest and Level 3 raised in
6 Qwest's complaint and Level 3's counterclaims.

7 Respectfully submitted this 30th day of August, 2005.

8 ATER WYNNE, LLP

9
10 By: /s/ Sarah K. Wallace

11 Lisa F. Rackner

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15 LEVEL 3 COMMUNICATIONS, LLC

16 Gregg Strumberger, Regulatory Counsel

17 Victoria R. Mandell, Regulatory Counsel

18 Richard Thayer, Director Interconnection

19 Law & Policy

Oregon
IC 12
L3C 1-017I

INTERVENOR: Level 3 Communications, LLC

REQUEST NO: 017I

Is it Qwest's regulatory position that a Qwest network access server ("NAS") is an "ISP Server" for purposes of determining whether a Qwest-served ISP has a physical presence in the same local calling area as a physical location of the Qwest local tone subscriber originating the locally dialed ISP-bound call?

RESPONSE:

For purposes of establishing a local presence within a local calling area, an ISP may purchase local service within a local calling area. The location of the ISP server may or may not be located within the same local calling area where the local service was purchased by the ISP. Subsequent traffic would therefore be subject to different regulatory requirements.

Respondent: Phil Linse, Qwest Manager

Oregon
IC 12
L3C 1-019I

INTERVENOR: Level 3 Communications, LLC

REQUEST NO: 019I

Does Qwest consider the primary rate interface/intermachine trunk provided for Qwest's Wholesale Dial Service ISP customers to be providing such Qwest ISP customers physical presence in the same local calling area of the Qwest end user originating the locally dialed ISP-bound call even if there is no ISP server in the same local calling area?

RESPONSE:

For purposes of establishing a local presence within a local calling area, an ISP may purchase local service within a local calling area. The location of the ISP server may or may not be located within the same local calling area where the local service was purchased by the ISP. Subsequent traffic would therefore be subject to different regulatory requirements.

Respondent: Phil Linse, Qwest Manager

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

In the Matter of
QWEST CORPORATION,
Complainant
v.
LEVEL 3 COMMUNICATIONS, LLC,
Defendant
Complaint for Enforcement of
Interconnection Agreement

AFFIDAVIT OF MACK GREENE

I, Mack Greene, do hereby depose and say:

1. I have been employed by Level 3 Communications, Inc. (“Level 3”) since 2003. I am currently the Director of Interconnection Services. In this position, I am responsible for negotiation, implementation, and enforcement of interconnection agreements with over one hundred and fifty incumbent LECs (including RBOCs and rural LECs), competitive LECs, CMRS providers, cable MSOs, and other communications providers.

2. Prior to my appointment as Director of Interconnection Services, I served as the Director of Customer Access Solutions for Level 3. As such, I directed all product management activities for Customer Access Solutions to the Level 3 network, including management of, as well as pricing and design support for, the direct and indirect sales teams and leased network expense.

3. Before joining Level 3, I worked for Qwest Communications. At Qwest, I held a variety of product positions. My last two positions at Qwest were Vice President of Strategy and Implementation, and Vice President of Voice and Data Product Management.

1 4. I attended Howard University in Washington D.C., where I participated in the
2 mechanical engineering program.

3 5. I have reviewed the Administrative Law Judge's *Ruling* in this docket, issued on
4 August 16, 2005. In particular, I note that the Administrative Law Judge quotes from the *ISP*
5 *Remand Order* where the FCC stated that "an ISP's end-user customers typically access the
6 Internet through an ISP server located in the same local calling area."¹ It is this characterization
7 that I would like to address.

8 6. It is true that in some cases ISPs' end-user customers access the internet through
9 an ISP server that is located in the same local calling area as the end-user. However, this is the
10 exception as opposed to the rule.

11 7. For many years it has been the case that the typical dial-up ISP-bound-call is not
12 sent to a server that is located in the caller's local calling area, but rather, the typical ISP-bound
13 call is sent to a centrally located server that services a much larger call volume and geographic
14 territory than that of a single local calling area. This is true for Level 3's network architecture,
15 and it is true for Qwest's as well.

16 8. In responses to data requests served in Oregon, Qwest has admitted that its
17 wholesale dial up service for ISPs does not require servers in the local calling area.²

18 9. In addition, I know through my experience that the vast majority of carriers that
19 serve ISP customers employ similar network architectures.

20 10. Carriers are provisioning their ISP customers in this fashion because it makes
21 financial and engineering sense to do so. Because of the economies of scale of IP based
22 technologies, (*i.e.*, SONET and fiber based reliable transport technologies), it is less expensive

23 _____
24 ¹ *Ruling* at 7, quoting the *ISP Remand Order* at ¶ 10.

25 ² Instead, Qwest claims that it maintains a physical presence in each local calling area through its primary rate/intermachine trunk connections. *See* Qwest's responses to Level 3 data requests Nos. 17 and 19 (copies attached hereto as Exhibits A and B, respectively).

1 and more efficient to locate ISP servers in central locations rather than in the local end office.
2 The new technology ISP equipment can handle much higher volumes of traffic than is typically
3 generated from one LCA. IP transport is not constrained by distance and does not have the
4 same reliability, volume, geographic, and economic constraints of traditional circuit-based
5 equipment. In addition, developments in switching technologies make it possible to locate
6 switching functions in central locations that cover much larger geographic territories. Thus,
7 engineering and economics both dictate that ISP server equipment should be centrally located.

8 DATED this ____ day of August, 2005.

9 LEVEL 3 COMMUNICATIONS, LLC

10
11 _____
12 Mack Greene
13 Level 3 Communications, LLC
14 Vice President, Interconnection Services

15 SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2005.

16
17 _____
18 Notary Public for _____
19 My commission expires: _____
20
21
22
23
24
25