COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

K.C. HALM
ADMITTED IN DC AND MARYLAND
DIRECT DIAL
202-828-9887
KC.HALM@CRBLAW.COM

February 13, 2006

VIA ELECTRONIC FILING AND FEDERAL EXPRESS

Ms. Frances Nichols Anglin
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

Re: ARB 671

Dear Ms. Nichols Anglin:

Enclosed for filing in the above-captioned matter please find an original and one (1) copy of the Comments of Universal Telecom, Inc. to the Arbitrator's Decision in ARB 671. Copies of the same will be electronically filed and served on the parties electronically.

Please direct any questions regarding this matter to the undersigned. Thank you for your consideration of this matter.

Sincerely,

K.C. Halm

Enclosures

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BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of **Qwest Corporation** for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc.	**ARB 671**

COMMENTS OF UNIVERSAL TELECOM, INC. TO THE ARBITRATOR'S DECISION

UNIVERSAL TELECOM, INC.

John C. Dodge
K.C. Halm
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750 (phone)
(202) 452-0067 (fax)

Its Attorneys

February 13, 2006

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COMMENTS OF UNIVERSAL TELECOM, INC. TO THE ARBITRATOR'S DECISION

Pursuant to O.A.R. 860-016-0030(10) Universal Telecom, Inc. ("Universal") hereby files its comments to the Arbitrator's Decision of February 2, 2006, as modified by the Arbitrator's Errata Decision of February 6, 2006 ("the Arbitrator's Decision") in Docket ARB 671. Universal respectfully submits that the Arbitrator's Decision relies upon errors of law and fact on each disputed issue between the Parties. Accordingly, Universal respectfully requests that the Commission review and reverse the Arbitrator's Decision on each disputed issue.

I) Introduction and Summary

The legal errors in the Arbitrator's Decision arise from the Arbitrator's failure to construe and apply the FCC's *ISP Remand Order*,[1] and related FCC regulations and controlling federal

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

law, in a manner consistent with the plain language of the Order and the FCC's intent.

Specifically, the Arbitrator's determination that only "local" ISP-bound traffic (traffic where the ISP's equipment is located in the caller's local calling area) is compensable under the FCC's *ISP Remand Order* is an erroneous reading of that Order. The Commission should therefore review and reverse the Arbitrator's determination of Issue 2 in this proceeding. The Commission should also review and reverse the Arbitrator's decision on the only other disputed issue --Issue 1-- in this proceeding. In that case the Arbitrator decided not to apply FCC regulations which prohibit Qwest's proposed charges for facilities used to carry its own originating traffic. Finally, the Commission should review and reverse the Arbitrator's attempt to rule on the validity and lawfulness of Universal's use of numbering resources in this proceeding. That issue was not identified as a disputed issue by either Qwest or Universal in this proceeding, was not the subject of any complaint, and is therefore not a matter which the Arbitrator, or the Commission, can address in this proceeding.

II) Legal Standard

The Arbitrator and this Commission are duty bound to ensure that the resolution of disputed issues in this proceeding "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). *See also* O.A.R. 860-016-0030(9)(a) (same).

Accordingly, under this standard the OPUC must ensure that arbitration decisions comport with federal law and federal regulations. In so doing, where the federal courts have construed the meaning of Section 251 and FCC regulations implementing that statute, this Commission must defer to the federal courts as to the interpretation and construction of federal

law. The federal courts are the arbiters of the meaning of federal law, and the Commission must therefore conform its arbitration decisions to federal court decisions construing federal law.[2]

III) The Arbitrator Misconstrued and Misapplied the FCC's *ISP Remand Order* and Related FCC Regulations

The Arbitrator's rulings stem from an apparent misreading and application of the FCC's findings in the *ISP Remand Order* and attendant regulations. As Universal explained in previous briefing before the Arbitrator, Section 251(b)(5) of the Telecommunications Act of 1996 (the "1996 Act") requires that all carriers enter into reciprocal compensation arrangements for the transport and termination of telecommunications traffic.[3] Following passage of the 1996 Act, there was controversy surrounding how and whether Section 251(b)(5)'s reciprocal compensation obligation applied to calls delivered to ISPs.

The FCC's original rules from 1996 applied the reciprocal compensation obligation only to "local" traffic, which the FCC conceived as traffic that one LEC hands off directly to another, as opposed to long distance traffic, where an originating LEC hands calls off to an intermediary carrier – an interexchange carrier – which then hands the calls off to a terminating LEC for completion.[4]

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[2] *Graham v. Atchison, T. & S. F. R. Co.*, 176 F.2d 819, 824 (9th Cir.) (Federal common law applies "to all cases which call for the interpretation of Federal statutes creating rights. This works for uniformity. A contrary rule would be disastrous to the establishment of a jurisprudence on strictly Federal subjects."). *See, e.g., Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp. 2d 552, 558 (W.D.N.C. 2002) (state court's interpretation of law do not trump federal court holdings to the contrary); and *Union P. R. Co. v. Zimmer*, 87 Cal. App. 2d 524, (Ct. App. Cal. 1948) (applying established doctrine that general legal principles governing rights and liabilities under federal statute are matters of federal law as to which the decisions of federal courts are controlling) (citing *Chesapeake & Ohio R. Co.* v. *Kuhn*, 284 U.S. 44 (1931)).

[3] 47 U.S.C. § 251(b)(5).

[4] *First Report and Order on Local Competition*, Report and Order, 11 FCC Rcd 15499 at ¶¶ 1033-35 (1996); *id.* at Appendix B, rule 47 C.F.R. § 51.701 (1996 version of reciprocal compensation rule). *Accord, Western Radio Services,* Order No. 04-600, ARB 537, 2004 Ore. PUC LEXIS 508 (2004) at *25-

In an order issued in early 1999, the FCC ruled that the interstate character of ISP-bound traffic meant that it was not properly classified as "local" for purposes of the FCC's reciprocal compensation rules.[5] The courts, however, rejected this reasoning, because the FCC had not explained why the (generally uncontested) interstate nature of ISP-bound traffic had anything to do with what compensation regime should apply to two LECs that collaborate in getting calls from one LEC's end users to ISPs served by the other LEC.[6]

The FCC tried again in 2001, in the *ISP Remand Order*. That order completely rethought the FCC's approach to reciprocal compensation, not merely for ISP-bound calls, but for all calls. Specifically, the FCC expressly and completely repudiated the notion that the "local" status of a call has any bearing on whether the call is entitled to reciprocal compensation under Section 251(b)(5). It therefore amended its reciprocal compensation rules to remove all references to "local" traffic. *ISP Remand Order* at ¶¶ 45-46. *Id.* at Appendix B (showing new rules, with the term "local" conspicuous by its absence).

That said, the FCC still did not believe that Section 251(b)(5) applied to ***all*** "telecommunications." Instead, it concluded that two classes of traffic identified in another section of the law – Section 251(g) – were properly viewed as excluded from Section 251(b)(5). These two supposedly excluded categories were "information access" and "exchange access."

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26 ("The FCC has made clear that the deciding factor in determining whether the call is local or non-local for purposes of compensation is whether or not an interexchange carrier has a role in handling the call").

5 *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, CC Docket Nos. 96-98, 99-68 (February 26, 1999) ("*ISP Declaratory Ruling*"). The FCC also ruled that the terms of particular interconnection agreements might nonetheless have the effect of treating ISP-bound calls as "local" anyway. *See id.* at ¶¶ 22-25.

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

In its ruling, the FCC did not set up any special compensation rule for "exchange access," which makes sense because the pre-existing access charge regime already ensured that exchange access charges would be payable in connection with toll calls. The FCC, however, re-affirmed its interstate jurisdictional authority over ISP-bound traffic as a form of "information access," and set up a special intercarrier compensation regime applicable to it. Under that regime, ISP-bound calls and non-toll calls (that is, traffic that isn't "exchange access") are to be treated the same, with the specific rate – reciprocal compensation or FCC-set – chosen by the ILEC.[7]

Notably, the FCC's decision to alter the compensation regime for ISP-bound traffic ***did not alter*** the FCC's ***existing rules*** governing the ***origination*** of traffic. This subtle and oft-overlooked fact is key to the proper resolution of Issue 1 in the underlying arbitration proceeding. The Arbitrator's Decision on that issue fails to recognize that the *ISP Remand Order* addressed only compensation obligations for the ***transport and termination*** of traffic. What the *ISP Remand Order* did not alter, though, were existing obligations governing the ***origination*** of traffic.

The distinction between the origination and termination of traffic is critical to the proper resolution of Issue 1, and a distinction the Arbitrator's Decision fails to acknowledge. When two LECs are involved in the completion of a call, there are two steps involved in the transmission and delivery of a call: origination and termination. The ***origination*** of traffic constitutes the delivery of a call from the calling party's network to the called party's network. As a practical

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[7] Under the FCC's rule, the ILEC can choose whether the rate that applies is a state-determined "reciprocal compensation" rate or the FCC's own low rate (now $0.0007 per minute), but ***the same rate applies to <u>all</u> non-toll traffic.*** To deal with what it saw as an immediate problem of "arbitrage," the FCC initially ruled that the rate of growth in CLEC bills for ISP-bound traffic would be limited to a 10% annual traffic growth cap, and that no compensation for ISP-bound traffic would be due to CLECs who were not serving ISPs in a particular market as of the first quarter of 2001. These restrictions were removed as of October 2004 in the *Core Forbearance Order*. As a result, it is simply unlawful discrimination to establish a regime in which ISP-bound and non-ISP-bound traffic are compensated at different rates.

matter, this occurs when an end user (the calling party) dials another end user (the called party) served by a second LEC. The calling party's network must then carry the call from the end user, through its switch, to the point of interconnection with the second LEC.

The ***termination*** of traffic is the second step in the process in completing a call where two LECs are involved. The FCC defines this process as both the transport and termination of a call from an interconnection point to the called party's destination. More specifically, transport, as defined by the FCC, is the "transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC."[8] Termination constitutes the switching and delivery of that call to the end user. Specifically, termination is the "switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[9]

Thus for all communications between Qwest and Universal there are two broad steps involved in completing the call: (Step 1) origination of the call, which Qwest performs for its end users; and, (Step 2) transport and termination of the call, which Universal performs for its end users. In other words, Qwest is responsible for delivery the call to Universal, and Universal is responsible for delivering the call to the called party.

The distinction between origination and termination is critical because the *ISP Remand Order* modified only obligations under Step 2, transport and termination. However, the FCC did not alter its existing rules governing Step 1, origination of traffic. This is evident by the FCC's

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8 47 C.F.R. § 51.701(c).

9 *Id.* at 51.701(b).

own words. In its discussion of the interim compensation regime adopted in the *ISP Remand Order* the FCC makes clear that the interim regime only applies to termination, not origination:

> This interim regime affects only the intercarrier *compensation* (*i.e.,* the rates) applicable to the delivery of ISP-bound traffic. It ***does not alter carriers' other obligations*** under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as ***obligations to transport traffic to points of interconnection***.

ISP Remand Order at ¶ 78, n. 149 (emphasis added).

The "other obligations" referred to in this statement include, *inter alia*, the obligation of all carriers to deliver originating traffic to a point of interconnection without charge to the interconnected carrier. *See, e.g., Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*[10] (FCC Rules "unequivocal[ly] prohibit LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."). Thus, the *ISP Remand Order* altered obligations associated with the termination of traffic, but expressly did not alter existing rules requiring all carriers to deliver their own traffic to other interconnected LECs ***without charge***. *See also Qwest v. Universal*, 2004 U.S. Dist. LEXIS 28340 at * 12 (D. Or. 2004) (FCC prohibition on traffic origination charges "remain in full effect").

The 2001 *ISP Remand Order* fared a bit better in the courts than had its predecessor order. The D.C. Circuit did hold, without any hesitation, that the FCC's basic legal analysis was flatly wrong. There is nothing in Section 251(b)(5) or Section 251(g) that supported the FCC's conclusion that calls to ISPs were somehow properly carved out from the reciprocal compensation obligation of Section 251(b)(5).[11]

But the D.C. Circuit concluded that even though the FCC's specific legal reasoning was

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[10] 352 F.3d 872 (4th Cir. 2003).

[11] *WorldCom v. FCC, supra,* at 433-34.

"precluded," the actual compensation regime the FCC had established – treating both ISP-bound and non-ISP-bound traffic the same – could remain in effect while the FCC tried yet again to develop a coherent legal analysis of this matter. So, this arbitration is governed by the specifics of the FCC regime adopted in the *ISP Remand Order,* conditioned, however, by the fact that the specific ***reasoning*** the FCC used to create that regime is legally invalid and, therefore, may not be used to interpret or justify that regime.[12]

IV) The Arbitrator's Decision Commits Legal Error by Misconstruing the FCC's *ISP Remand Order* to Preclude Compensation for Traffic That Is Not "Local" Traffic

In its arguments to the Arbitrator on this issue, Universal provided multiple rationales for including so-called "VNXX" ISP-bound telecommunications traffic as compensable traffic. Universal adopts these rationales by reference herein and reiterates them briefly here: First, the FCC's current Intercarrier Compensation scheme does not distinguish between "local" and "VNXX" ISP-bound telecommunications traffic. Second, at least two federal courts agree with Universal's interpretation of the FCC's current Intercarrier Compensation Scheme. Third, the record evidence in this case – much of it adduced from Qwest – proves that Universal's costs in terminating the ISP-bound telecommunications traffic originated by Qwest end users do not differ whether the traffic is local or VNXX. And fourth, to proscribe Universal from receiving just compensation for use of its facilities constitutes an impermissible regulatory taking.

In response to Universal's arguments the Arbitrator relies primarily on *state* authority to find that the FCC carved VNXX traffic out of its Intercarrier Compensation regime, ignoring controlling *federal* authority that the FCC did no such thing. In addition, the Arbitrator ignores

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[12] Universal discusses below the specific implications of the court's evisceration of the FCC's ***rationale,*** while leaving the specific ***regime*** in place.

entirely the record evidence in this case in favor of unfounded assertions with no basis in the record.[13] Next the Arbitrator belittles Universal's Constitutional assertions, and rebuts them not with legal discourse but non-record-based policy observations. Finally, the Arbitrator takes the unprecedented step of determining that Universal is in violation of its Certificate of Public Convenience and Necessity, despite the fact that Universal's operations are not a contested issue in this matter and the Commission has specifically ruled that it does not have jurisdiction over VNXX ISP-bound telecommunications traffic.

A) The Arbitrator's Decision Contravenes *Controlling* Federal Common Law

To support his conclusion that the FCC expressly carved VNXX traffic out of compensable ISP-bound traffic the Arbitrator relies on three state-level decisions. The first two state decisions – from the Vermont Public Service Board and the Massachusetts Department of Telecommunications and Energy – are more than three years old and were decided *before* the federal court cases upon which Universal relies. The third state decision – from an administrative law judge of the Minnesota Public Utilities Commission – is of very recent vintage (January 2006) but suffers from the same deficiencies in law that Universal argued originally and which are pointed out herein. (Universal also provides as an attachment hereto the latest state-level pronouncement on this matter from neighboring Washington State, released this past Friday, February 10, 2006 and which reaches a diametrically opposite conclusion than the Arbitrator here. *See Level 3 Communications, LLC v. Qwest Corp.*, Docket No. UT-053039, Order No. 5 (slip op.) (Wash. UTC Feb. 10, 2006), attached hereto as Attachment 1.) In addition to the arguments advanced below, Universal adds the following.

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[13] These extra-record observations include the Arbitrator's "general observations" at page 5 of the Arbitrator's Decision; the characterization of FCC actions and businessperson incentives at page 7; the unsupported claim that Qwest is denied access charge revenues at page 12; and the "common" situation discussion at n. 41.

However inscrutable the FCC's *ISP Remand Order* might otherwise appear, there is no argument that in that order the FCC reserved to state commissions the authority to interpret and enforce only contractual obligations that existed prior to April 27, 2001.[14] By contrast, the interim compensation scheme adopted by the FCC applies as carriers re-negotiate expired or expiring contracts.[15] In such a circumstance, "state commissions will no longer have authority to address this issue."[16] From the effective date of the *ISP Remand Order* forward, the FCC preempted state commissions pursuant to principles of federal supremacy because the FCC reaffirmed that ISP-bound telecommunications traffic is predominantly interstate in nature.

The FCC's preemption of ISP-bound telecommunications traffic thus arises from the agency's interpretation of the *federal* Telecommunications Act of 1996, the agency's plenary authority under *federal* statute over interstate communications, and the finding that ISP-bound telecommunications traffic is *interstate* in nature. There can be no dispute, therefore, that subsequent interpretations of the *ISP Remand Order* present *federal* questions of law.[17] In such a circumstance, a state commission must follow established doctrine that rights and liabilities under the *ISP Remand Order* are matters of federal law as to which the decisions of federal courts are controlling.[18]

With respect to whether VNXX traffic is compensable ISP-bound telecommunications traffic under the FCC's interim compensation regime (versus construing a preexisting interconnection contract), there have been two federal court decisions. Both federal courts agree

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14 *ISP Remand Order* at ¶ 82.

15 *Id.*

16 *Id.*

17 *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir.) ("When federal law applies . . . it follows that the question arises under federal law".)

18 *Graham v. Atchison, T. & S. F. R. Co.*, 176 F.2d 819, 824 (9th Cir.) (Federal common law applies "to all cases which call for the interpretation of Federal statutes creating rights. This works for uniformity. A contrary rule would be disastrous to the establishment of a jurisprudence on strictly Federal subjects.").

with Universal that the FCC in the *ISP Remand Order* did *not* carve VNXX traffic out of compensable ISP-bound telecommunications traffic. Both *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*[19] and *AT&T Communications of Illinois v. Illinois Bell Telephone Co.*[20] hold that *all* ISP-bound telecommunications traffic is subject to reciprocal compensation under the *ISP Remand Order*. These decisions are the controlling federal court decisions on the VNXX issue, and Universal did not merely provide them "in support" of the company's position on the propriety of including VNXX ISP-bound telecommunications traffic in the FCC's interim compensation scheme. Universal *relies* on these cases as sound jurisprudence mandates.

Rather than accede to federal common law with respect to interpretation of the *ISP Remand Order*, however, the Arbitrator does exactly the opposite. Indeed, the Arbitrator does not even accord the only federal common law on point either deference or even admit that it is persuasive. Instead and incorrectly, the Arbitrator's Decision – although conceding the *SNET* case is on point – attempts to point out flaws "in several critical respects, which bear thorough discussion." Arbitrator's Decision at 13. The Arbitrator finds the *SNET* Court's reasoning "broad and unreasonable overreaching" and he "reject[s] the Court's approach in *SNET*". *Id.* at 14, 15. Thus, the Arbitrator was "not persuaded" by the *SNET* Court. *Id.* at 15.

With due respect, the Arbitrator is simply wrong. The court in *SNET* specifically and correctly pointed out that the issue of whether traffic is "local" or not mattered to whether intercarrier compensation was due under the FCC's original rules, but had no role to play under the FCC's new (2001) rules, which (as noted above) were specifically amended to delete the

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[19] 353 F.Supp.2d 287 (D. Conn. 2005); and 359 F.Supp.2d 229 (D. Conn. 2005) (denying motion to alter or amend judgment) (hereinafter "*SNET*").

[20] 2005 WL 820412, No. 04 C 1768 (N.D. Ill. Mar. 25, 2005).

term "local."[21] Properly interpreting FCC orders is not a game of "gotcha," where the mere fact that the FCC used the term "local" to describe the ***history*** of the dispute about intercarrier compensation somehow means that its ***new resolution*** of that dispute is limited to or relies on that concept. To the contrary, properly interpreting FCC orders requires careful consideration of what the FCC actually said and what actions it actually took. What the FCC said, as Universal pointed out, is that the term "local" was "ambiguous" and an "error," and that eliminating that concept constituted "correct[ion]" of that "error." And what the FCC actually did, as noted above, was to eliminate any and all reference to the term "local" from its reciprocal compensation rules.

It would certainly be odd for the FCC to eliminate all use of the "local" concept if the traffic it was dealing with was actually intrastate, "local" traffic. But the FCC plainly concluded that ISP-bound traffic was ***not*** intrastate and was ***not*** local. For that reason, the FCC concluded that it was empowered to, and that it should, create new, preemptive, entirely ***federal*** rules – under Section 201, not Section 252 – governing the exchange of such traffic. The *SNET* court understood what the FCC actually said and did in the *ISP Remand Order*. With due respect, the Arbitrator below did not.

Under this nation's hierarchy of legal authority, moreover, the twin concepts of federalism and uniformity do not care and do not countenance that a state administrative law judge might find controlling federal common law distasteful or wrong, or that a state administrative law judge might not be "persuaded" by uniform federal common law. The Arbitrator and this Commission are legally bound to enforce federal common law on this matter, and federal common law unanimously holds that VNXX ISP-bound telecommunications traffic

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[21] *SNET* 359 F.Supp.2d at 231 ("FCC expressly disavowed the use of the term 'local'").

is reciprocally compensable under the *ISP Remand Order*. The Arbitrator's decision, therefore, constitutes a fundamental mistake of law and reversible error. Should the Commission choose to adopt the Arbitrator's decision Universal will pursue its complementary federal rights under 47 U.S.C. § 252(e)(6) to reverse such action and enforce clear federal common law.

B) The Arbitrator Wholly Ignores Unrefuted Record Evidence

It is axiomatic that an administrative decision must rely on only the law and the record evidence of the case.[22] And it is similarly axiomatic that an administrative decision may not simply ignore record evidence that favors a party's case.[23] In this docket Universal submitted *unrefuted* evidence that it incurs costs in terminating Qwest-originated ISP-bound traffic and that the company's termination costs do not differ whether the Qwest-originated traffic is local or VNXX. *See* Qwest Response to Universal Data Request Nos. 006 & 007.[24] The Arbitrator's Decision wholly ignores this evidence. There is not one word, let alone reasoned analysis, of this unrefuted record evidence anywhere in the Arbitrator's Decision. It is a mistake of law for the Arbitrator not to consider and address Universal's unrefuted evidence, and Universal believes the Arbitrator has omitted necessary findings of fact and law based on that evidence in contravention to OAR 860-014-0092(3)(a)(A) and (B).

If the Commission were to consider Universal's unrefuted evidence, it would necessarily have to conclude that Universal incurs costs in terminating Qwest-originated ISP-bound telecommunications traffic and that the company's termination costs do not differ whether the Qwest-originated traffic is local or VNXX. These conclusions will make it impossible for the

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22 *See, e.g.*, OR. REV. STAT. §756.558(2) (2005).

23 *See Diallo v. Ashcroft*, 381 F.3d 687, 695 (2004).

24 This evidence was entered into the record entered by mutual consent through a letter to ALJ Arlow by Qwest's counsel Alex Duarte. *See* ARB 671 docket entry dated Nov. 14, 2005. Qwest's Responses to Universal's Data Requests were formally filed with Universal Tel.'s Final Brief, (Nov. 18, 2005).

Commission to deny Universal compensation for terminating Qwest-originated VNXX traffic. But at the least Universal is entitled under common principles of contested case administration to have its unrefuted evidence considered, explained or explained away.

C) The Arbitrator Fails to Rebut Universal's Fifth Amendment Claims

So far as Universal can tell, it is the first CLEC to raise Fifth Amendment claims in the context of VNXX reciprocal compensation. Just because this might present a novel argument to the Commission, however, is no justification for the gratuitously dismissive response from the Arbitrator. Rather than consider Universal's Takings Clause claims in a serious and reasoned manner, the Arbitrator summarily brushes them aside with a simple and unexplained observation that Universal's argument "strains both logic and credulity." Arbitrator's Decision at 12. Universal is entitled to a more serious examination of claims that it raised in good faith and which it supported with several pages of argument and recitation to relevant law.

The Arbitrator's short shrift attempt to rebut Universal's Constitutional claims by citations to other state arbitrators must fail for two simple reasons. First, those state officials were not speaking to the Fifth Amendment in the passages upon which the Arbitrator relies and their dicta contains no refutation to any Constitutional argument in their cases or that Universal has raised here. Second, both the Vermont and Massachusetts arbitrators appear to be describing the costs which the ***originating*** LEC incurs in the VNXX situation. Universal's Fifth Amendment claims go to the ***terminating*** LEC's costs. The Arbitrator did not deal with this distinction in any way.

D) The Arbitrator Misreads the Federal *Universal* Case

The Arbitrator has committed clear error in his use of the *Universal* case to justify excision of VNXX traffic from compensable ISP-bound telecommunications traffic. At page 15

of the Arbitrator's Decision the Arbitrator repeats a statement of Judge Aiken for the proposition that, under the FCC's interim compensation scheme VNXX traffic is not compensable. The Arbitrator either fails to realize or fails to acknowledge that Judge Aiken in that case was interpreting a *preexisting* contract between Universal and Qwest that predated the *ISP Remand Order*. It is worthwhile for the Commission to recall the chronology of that contract and the dispute between Universal and Qwest.

Universal opted into a prior approved interconnection contract with Qwest in 1999.[25] Over the succeeding years the parties experienced several disputes under the contract, including what type of ISP-bound telecommunications traffic is subject to reciprocal compensation. Eventually, in 2004, Qwest brought a federal court action against Universal, ostensibly to enforce the contract to collect certain facilities charges.[26] Universal counterclaimed against Qwest for unpaid reciprocal compensation, including compensation on so-called VNXX traffic.[27] The parties' contract employed the term "Local Traffic," and that term was defined, in terms of Qwest's own intrastate tariffs, to mean traffic beginning and ending in the same LCA or EAS area. In the face of this contractual language, Judge Aiken decided that only ISP-bound telecommunications traffic originated by Qwest in the same LCA or EAS area in which Universal maintains a point of interconnection (defined as a physically sited modem) was intended by the parties to the contract to be compensable traffic under its terms.[28]

Whether or not Judge Aiken was correct about the meaning of the parties' 1999-vintage contract, reliance on that ruling in setting the terms of a ***new*** contract in 2006 is completely inappropriate. The Arbitrator's use of that aspect of Judge Aiken's ruling, therefore, is both a

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25 *See Qwest v. Universal* at * 3.

26 *Id.*

27 *Id.*

28 *Id.* at *25-*32.

mistake of law and unjustified. In that part of her decision Judge Aiken specifically and expressly was interpreting the terms of a preexisting contract pursuant to a contract claim advanced by Universal, not what terms should be included in a post-*ISP Remand Order* contract.

V) The Arbitrator's Decision Fails to Properly Apply Federal Law and FCC Regulations to Prohibit Qwest's Charges for Facilities Used to Carry Qwest-Originated Traffic

A) Qwest's Proposed Recurring Charges Are Unlawful Under Applicable Precedent and FCC Regulation

With regard to Issue 1, application of Qwest's proposed Relative Use Factor ("RUF"), the Arbitrator's Decision finds in favor of Qwest and orders the Parties to use Qwest's proposed language. This decision misconstrues the *ISP Remand Order*, FCC regulations, and binding federal law by concluding that traffic at issue in this case is not subject to the prohibition under FCC rules 51.703(b) and 51.709.

Qwest's proposed contract language requires Universal to pay for telecommunications facilities used by Qwest to deliver Qwest's traffic (originating on Qwest's network and initiated by Qwest's end users) to Universal. Qwest refers to these facilities as "Direct Trunked Transport" and "LIS Entrance Facilities." *See* Arbitrator's Decision at 4. To be clear, these facilities are located on Qwest's network and are used by Qwest to send originating traffic to Universal. Universal receives this traffic on network facilities that it deploys, and pays for, and delivers (terminates) this traffic to its end users.

Under Qwest's proposal the cost of Qwest's facilities used to carry Qwest's own origination traffic are borne by the termination carrier (in this case Universal). *See* Arbitrator's Decision at 4 (citing § 7.3.1.1.3.1 of Qwest's proposed contract ("the terminating carrier is responsible for ISP-bound traffic and VNXX traffic.")).

The Arbitrator adopted Qwest's proposed contract language after rejecting Universal's argument that such charges are prohibited by federal law. Specifically, FCC Rule 51.703(b) states that: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b) (emphasis added).

The Arbitrator's Decision declines to apply this rule, however, based on the erroneous conclusion that this rule does not apply to the traffic exchanged between Qwest and Universal. Specifically, the Arbitrator ruled that the "FCC determined that ISP-bound traffic is 'information access' and not 'telecommunications traffic'", Decision at 7, and that "[s]ince ISP-bound traffic is not telecommunications, it is not subject to the RUF." *Id.*

In so ruling the Arbitrator completely ignores the factual findings and conclusions of law of the federal district in *Universal*. In that case the ***same facts*** and ***same law*** were before the federal court, and the court ruled that Qwest's proposed charges were prohibited as a matter of law. Notably, the Arbitrator's Decision is silent on the fact that the federal court made the following factual findings:

- Universal provides ***telecommunications services*** in Oregon. As the Qwest Court explained, "Universal is a competitive local exchange carrier ("CLEC") which provides ***telecommunication services*** in Oregon." *Qwest v. Universal* at * 1-2 (emphasis added).
- Qwest and Universal ***exchange telecommunications traffic.*** As the Qwest court explained, "Universal provides services to internet service providers ("ISPs") by offering local telephone numbers which the ISPs' customers may call using their computers." *Qwest v. Universal* at * 2. "... Qwest is involved in this process because the calls from the ISPs' customer's computer must pass over Qwest's network to reach Universal's local telephone number. Qwest and Universal have interconnected their networks to ***allow <u>this</u> exchange of telecommunications traffic.*** *Id.* at * 2 (emphasis added).

The Arbitrator's Decision suggests that the traffic at issue in this proceeding is different from the traffic before the federal court in *Universal*. Indeed, the Arbitrator apparently failed to recognize that the same ISP-bound traffic at issue here was also at issue before the federal district court in Oregon. *See* Arbitrator's Decision at 4-5 (Universal "implicitly acknowledge[es] that ISP traffic was ***not an issue*** in either [*Qwest v. Universal* or IC 9]") (emphasis added).

The basis for the Arbitrator's Decision that Universal implicitly acknowledged that ISP-bound traffic was not at issue in *Universal* is unclear. Indeed, it is quite perplexing given that Universal repeatedly made the point in its briefs and other filings in ARB 671 that the very same traffic was at issue both before the federal court and the Oregon Commission.[29] Nevertheless, and despite the federal court's finding that the exact same traffic at issue before the Commission in this proceeding (originating on Qwest's network, terminating to Universal's network and ultimately delivered to the Internet) was telecommunications traffic, the Arbitrator declined to acknowledge that finding.

In addition, the Arbitrator's Decision also fails to acknowledge that (let alone follow) the federal court also considered the very same legal arguments used in this proceeding. Notably, the same Qwest arguments that the Arbitrator accepted without question in this case were expressly rejected by the federal court:

> Qwest argues that *§ 51.703(b)* and *§ 51.709(b)* apply only to telecommunications traffic and that ISP bound traffic is not telecommunications traffic. Therefore, because all of the traffic exchanged between the parties is ISP bound traffic, the restrictions of *§ 51.703(b)*, *§ 51.709(b)*, and TSR Wireless do not apply to facility charges imposed on Universal by Qwest.
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> *Qwest v. Universal* at * 11.

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[29] *See* Universal Statement of Material Facts at ¶¶ 1-6, Pre-filed Testimony of Stephen Roderick on behalf of Universal Telecom, Inc., at 1-4, and Initial Brief of Universal Telecom at 4-6 (all describing the service Universal provides to ISPs, including delivery of telecommunications traffic originating on Qwest's network).

This argument is, of course, at the heart of the Arbitrator's Decision on Issue 1. *See* Decision at 7 ("[s]ince ISP-bound traffic is not telecommunications, it is not subject to the RUF."). The federal court, however, saw things differently than the Arbitrator. Indeed, the Court ruled that, ***as a matter of law***, FCC regulations 51.703(b) and 51.709 do apply to the traffic that Qwest and Universal exchange and that such regulations prohibit Qwest's proposed charges:

> In the instant case, 100% of the traffic exchanged between the parties originated on Qwest's network and terminated on Universal's. ***Under § 51.703(b) and § 51.709(b), Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network*** and terminated on Universal's network. For these reasons, Qwest's claim as to the charges for LIS circuits, DTT, EF, and MUX interconnection facilities fails.

Qwest v. Universal at * 14-15 (emphasis added).

Thus, the federal court in *Universal* construed the same facts and applied the same law to find that Qwest's charges are unlawful. The Arbitrator's Decision, however, declines to acknowledge this decision or to acknowledge that the federal court is the final arbiter of the meaning of federal law.

Of course the Commission is not at liberty to simply ignore the federal court's ruling on matters of federal law. Instead, it must ensure that its ruling meets the requirements of federal law, specifically 47 U.S.C. § 251 and the FCC regulations implementing that statute (including 47 C.F.R. § 51.703(b) and 51.709)). Indeed, as explained above, *see supra* at Section II (Legal Standard), the federal court's ruling as to the specific scope and extent of federal law is binding and something the Commission can not simply ignore.

The *Universal* decision is expressly consistent with the Ninth Circuit Court of Appeals' decision in *Pacific Bell v. PacWest Telecomm., Inc.*[30] In that case the Ninth Circuit considered, *inter alia*, the compensability of ISP-bound traffic under an interconnection agreement that predated the *ISP Remand Order*. Here is how the Ninth Circuit characterized that traffic:

> These three consolidated appeals arise from a dispute over the inclusion of ***telecommunications traffic bound for ISPs*** in the reciprocal compensation provisions of interconnection agreements between ILECs and CLECs.[31]

Pacific Bell tried to raise the ***same*** objections to that characterization before the Ninth Circuit that Qwest raised with the Arbitrator here:

> Pacific Bell also points to the same exceptions listed in § 251(g) that the FCC pointed to in its *Remand Order* to support its argument that the reciprocal compensation requirements of § 251(b)(5) do not apply to ISP calls. This argument, however, was explicitly rejected by the D.C. Circuit. *See WorldCom, Inc.*, 288 F.3d at 430 Although the D.C. Circuit did not vacate the *FCC Remand Order* when it found that the FCC's "reliance on § 251(g) [was] precluded[,]" its explicit rejection of the FCC's use of § 251(g) as a justification for excluding ISP calls from reciprocal compensation provisions ***defeats Pacific Bell's arguments that rely on § 251(g).***[32]

The Ninth Circuit has ruled, as a matter of law, that traffic bound for ISPs is ***telecommunications*** traffic. "In matters of interpretation of federal law, the Ninth Circuit Court of Appeals is the highest authority in the State of Oregon, save the Supreme Court of the United States."[33] This Commission is obligated to follow the Ninth Circuit's finding as a matter of law, and must reverse the Arbitrator's decision on this point.

The Arbitrator's finding that the traffic at issue here is not telecommunications traffic is also contrary to factual evidence in the record. Specifically, Universal presented unrefuted

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30 325 F.3d 1114.

31 *Id.* at 1119 (emphasis added).

32 *Id.* at 1131.

33 *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order No. 03-0552 at 3 (Sep. 16, 2003).

evidence that the traffic Qwest delivers to Universal is delivered over telephone transmission lines, through telecommunications switches, to telephone numbers, and as such is undeniably telecommunications traffic. *See* Qwest Response to Universal Data Request Nos. 006 & 007.[34]

Although acknowledging Universal's evidence, the Arbitrator declines to address the fact that the traffic at issue is delivered through the use of telecommunications facilities, switches and numbers. The Arbitrator's Decision also commits legal error by ruling that Qwest's facilities charges (the RUF) only applies to local traffic. Specifically, the Arbitrator's Decision to adopt Qwest's proposed charges rests upon the Arbitrator's conclusion that "ISP-bound traffic, as defined by the FCC and the Court in Universal, must originate and terminate in the same LCA or EAS area. The RUF only applies to local telecommunications traffic." Arbitrator's Decision at 9.[35]

Here the Arbitrator suggests that FCC regulations prohibiting charges on originating traffic only apply to "local" traffic. In support of this erroneous conclusion the Arbitrator cites portions of the *Universal* decision addressing the other major issue in dispute, the compensation rate for termination of traffic, not the issue of whether Qwest may impose charges on Universal.

As to the erroneous reliance on *Universal*, the Arbitrator's Decision quotes from the portion of the *Universal* decision construing the terms of the Parties contract to determine if non-

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[34] This evidence was entered into the record entered by mutual consent through a letter to ALJ Arlow by Qwest's counsel Alex Duarte. *See* ARB 671 docket entry dated Nov. 14, 2005. Qwest's Responses to Universal's Data Requests were formally filed with Universal Tel.'s Final Brief, (Nov. 18, 2005).

[35] The Arbitrator also failed to apply the actual text of FCC Rule 51.709(b). As Universal explained below, that rule does not say that Qwest is entitled to charge Universal for the facilities and trunking connecting their networks based on how much traffic (local or otherwise) Qwest might send to Universal. Instead, it clearly states that Qwest may ***only*** charge Universal based on how much traffic (local or otherwise) Universal might send to Qwest. For this reason, even if a RUF is, in general, an appropriate means for allocating the cost of facilities and trunking connecting the parties' networks, the ***specific RUF language*** that Qwest proposed was flatly inconsistent with the FCC's rule, since it permits Qwest to charge Universal for capacity above and beyond that which Universal uses to send traffic to Qwest.

local traffic is compensable. *See Qwest v. Universal*, Civil No. 04-6047-AA, Supplemental Opinion of J. Aiken at 2 (D. Or. Sept. 22, 2005). In the Supplemental Order issued by Judge Aiken the Court addressed the scope of "compensable" traffic, *i.e.*, traffic terminated on Universal's network, to include traffic that originates and terminates in the same LCA.

But the fact that certain traffic in certain circumstances is not compensable does not alter the fact that Qwest is prohibited from imposing charges on such traffic. Indeed, the federal court found that only a portion of traffic terminated by Universal was compensable, *see Qwest v. Universal* at *21-*25, but ruled that all of the traffic delivered by Qwest to Universal was subject to the prohibition on charges. *Id.* at *14-15. Thus, the Arbitrator's reliance on the federal court's decision to limit compensable traffic to "local" traffic as a basis to reject the prohibition of charges as not applicable to "local" traffic was in error.

The Arbitrator's Decision to decline to enforce FCC regulations prohibiting charges on originating traffic was also in error because it relied on the mistaken assumption that the ISP Remand Order applies only to local traffic. In fact, in the *ISP Remand Order* the FCC expressly rejected its use of the local/non-local dichotomy as a basis for determining carrier's obligations because its previous use of the dichotomy was a "mistake."

Specifically, the FCC expressly and completely repudiated the notion that the "local" status of a call has any bearing on whether the call is entitled to reciprocal compensation under Section 251(b)(5).It therefore amended its reciprocal compensation rules to remove all references to "local" traffic. *ISP Remand Order* at ¶¶ 45-46. *Id.* at Appendix B (showing new rules, with the term "local" conspicuous by its absence).

B) Qwest's Proposed Nonrecurring Charges Are Unlawful Under Applicable Precedent and FCC Regulation

In the context of nonrecurring charges, the Arbitrator's Decision again fails to properly

apply, let alone consider, controlling federal law. Specifically, the Arbitrator's Decision simply rejects Universal's assertions that nonrecurring charges are unlawful under FCC regulations by reference to the arguments raised by other parties in Commission proceeding IC 9. Specifically, the Arbitrator's Decision states: "The Commission is again presented with this issue and, for the above reasons just recently enunciated by the Commission, I reject the proposal to allocate the RUF to NRCs. The Qwest language is adopted." Decision at 11.

This ruling ignores the fact that FCC Rule 51.703(b) prohibits ***all*** charges on originating traffic, whether assessed on a recurring or non-recurring basis. Indeed, the federal appeals court for the Fourth Circuit recognized this point, holding that: "FCC Rule 51.703(b) unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, ***admits of no exceptions***." *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003)(emphasis added).

Accordingly, Qwest's non-recurring charges are prohibited by federal law. The Arbitrator's Decision to adopt Qwest's proposed language was therefore in error.

VI) The Arbitrator's Decision Commits Legal Error by Attempting to Rule on the Lawfulness and Validity of Universal's Use of Numbering Resources

The Arbitrator's Decision also commits legal error by addressing, and deciding, a question that was not at issue in this proceeding. Specifically, the Arbitrator's Decision addresses the question of whether Universal is in violation of its certificate, although that issue was never identified in Qwest's petition for arbitration or Universal's response thereto.

The Arbitrator's Decision addresses Universal's alleged use of virtual NXX arrangements and finds (without citing any factual evidence in support of its finding) as follows:

> Universal, in utilizing VNXX arrangements to provide dial-up access to the Internet to its ISPs' customers ... is in violation of Conditions 7 and 8 of its operating Certificate. Consequently, we modify the language of these sections by deleting the sentence "Qwest has never agreed to exchange VNXX traffic with CLEC" and inserting in its place "Qwest and CLEC shall not exchange VNXX traffic."

Arbitrator's Decision at 10.

The use of virtual NXX codes was not an issue identified in Qwest's petition for arbitration, or Universal's response to the petition. There is no complainant in this docket advancing any claim as to the lawfulness of the use of VNXX. There was no evidence presented by either Party as to the lawfulness of Universal's alleged use of virtual NXX codes and neither Party briefed the lawfulness of such practice.

Federal law precludes the consideration of issues that are not identified in a petition for arbitrator, or a response thereto. Specifically, Section 252 of the Act states that: "the State Commission shall ***limit its consideration*** of any petition under paragraph (1) (and any response thereto) to the issues set forth in the [arbitration] petition, and in the response, if any, filed under paragraph (3)." 47 U.S.C. § 252(b)(4)(A) (emphasis added). "It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252 -- that of arbitrating, approving, and enforcing interconnection agreements."[36] The Arbitrator's Decision goes well beyond federal law, or even the enumerated issues of the case, and must be overturned.

For the record, moreover, Universal did not simply rely on the Commission's Order in UM 1058. On or about September 17, 2004 the president of Universal, Jeffry Martin, engaged in both a telephonic and email exchange with Commission staff person Dave Booth. The express purpose of those communications was for Universal to verify that the company was in

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[36] *Pacific Bell v. Pac-West Telecomm., Inc.,* 325 F.3d at 1126.

compliance with its certificate in light of the Commission's Order in UM 1058. Mr. Martin specifically asked Mr. Booth whether the Commission's Order in UM 1058 applied to *only voice* VNXX providers given that the Commission concurrently had found it lacked jurisdiction over ISP-bound VNXX providers. Here is Mr. Booth's reply: "I think that's a fair summary of where [we] are right now." *See* E-mail from D. Booth, Oregon PUC, to J. Martin, Universal Telecom, Inc. (dated Sept. 17, 2004), attached hereto as Attachment 2. Universal has reasonably relied upon Mr. Booth's representation that the company is in compliance with its certificate, and the Arbitrator's Decision is an affront to that reliance and essential principles of due process.

Because the legality of the use of VNXX arrangements was not an issue in either Qwest's petition, or Universal's response thereto, the Arbitrator (and the Commission) is prohibited from considering the matter in this proceeding. The appropriateness or lawfulness of Universal's use of numbering resources is not a proper matter for consideration in this arbitration proceeding. The Commission should therefore reject the Arbitrator's decision on this matter and strike from its final decision the discussion of the lawfulness of Universal's alleged use of VNXX arrangements.[37]

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[37] Because the issue was not identified as in dispute between the parties, Universal did not present either evidence or legal argument with respect to it. The Commission should note, however, that the FCC's clear assertion of jurisdiction over ISP-bound traffic means that this traffic – and the numbering arrangements used to handle it – are federal, not state, issues. Just as this Commission does not control the use of numbers for other jurisdictionally interstate services (such as 8YY services and Feature Group A access), it does not control the use of numbers for ISP-bound calling. Moreover, binding federal numbering regulations forbid the denial of numbering resources on the basis of the "industry segment" seeking the numbers; require that numbers be assigned in a manner to "facilitate entry;" and forbid any preference of one technology over another. *See* 47 C.F.R. 52.9(a). Banning the use of VNXX arrangements for interstate ISP-bound traffic cannot possibly be squared with these requirements.

VII) Conclusion

For the reasons stated herein, the Commission should review and reverse the Arbitrator's Decision and rule that:

(1) as a matter of law Qwest is prohibited from assessing charges, recurring and non-recurring, on facilities used by Qwest to deliver its originating traffic to Universal;

(2) the *ISP Remand Order* does not limit compensation obligations to that traffic which originates and terminates in the same local calling area;

(3) the Arbitrator's Decision addressing the lawfulness of Universal's alleged use of VNXX arrangements is beyond the issues in this proceeding, is not considered by the Commission, and is therefore stricken from the record of this proceeding; and,

(4) Universal's proposed contract language is adopted, and Qwest's proposed language is rejected.

Respectfully submitted,

By: _____

John C. Dodge
K.C. Halm
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., N.W., Suite 200
Washington, D.C. 20006
(202) 659-9750 (phone)
(202) 452-0067 (fax)

Its Attorneys

February 13, 2006

ATTACHMENTS

TO

COMMENTS OF UNIVERSAL TELECOM, INC. TO THE ARBITRATOR'S DECISION

ATTACHMENT 1(A)	Washington UTC Order, Docket No. UT-053039 (Feb. 10, 2006).
ATTACHMENT 1(B)	Washington UTC Order, Docket No UT-053036 (Feb. 10, 2006).
ATTACHMENT 2	Email from Dave Booth, Oregon PUC to Jeff Martin, Universal Telecom., dated September 17, 2004.

ATTACHMENT 1(A) **Washington UTC Order, Docket No. UT-053039 (Feb. 10, 2006).**

[Service Date February 10, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

LEVEL 3 COMMUNICATIONS, LLC,	)	DOCKET NO. UT-053039
	)	
	)	ORDER NO. 05
Petitioner,	)	
	)	ORDER ACCEPTING
v.	)	INTERLOCUTORY REVIEW;
	)	GRANTING, IN PART, AND
QWEST CORPORATION,	)	DENYING, IN PART, LEVEL 3'S
	)	PETITION FOR
Respondent.	)	INTERLOCUTORY REVIEW.
.....	)	

1 ***Synopsis.*** *This Order reverses portions of the administrative law judge's decision, Order No. 03, requires Qwest to compensate Level 3 for ISP-bound traffic under the Federal Communications Commission's (FCC) Core Forbearance Order as of the effective date of that Order, and approves Level 3's proposed amendment language. This Order also affirms the decision in Order No. 03 that ISP-bound VNXX traffic is compensable under the FCC's ISP Remand Order. As a result, the Order dismisses Qwest's counterclaims contesting the use of VNXX arrangements. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue in a petition for enforcement of Level 3's interconnection agreement concerning compensation for ISP-bound VNXX traffic.*

PROCEDURAL BACKGROUND

2 **Nature Of Proceeding.** This proceeding involves a petition filed by Level 3 Communications, LLC (Level 3), seeking enforcement of terms of its interconnection agreement with Qwest Corporation (Qwest) concerning compensation for traffic to Internet service providers (ISPs). Qwest filed counterclaims against Level 3 contesting compensation for ISP-bound traffic and

the propriety of Level 3's use of Virtual NXX, or VNXX, traffic under the parties' interconnection agreement.

3 **Order No. 03 – Order on Motions for Summary Determination.** On August 26, 2005, Judge Rendahl entered Order No. 03 in this proceeding, an order granting certain claims in motions for summary determination filed by Level 3 and Qwest, and denying other claims in their motions.[1] Order No. 03 interpreted the Federal Communication Commission's (FCC) *ISP Remand Order*,[2] and the parties' interconnection agreement, to allow compensation for ISP-bound VNXX traffic, under the compensation scheme established in the FCC's Order. Order No. 03 found the change in compensation for ISP-bound traffic established in the FCC's *Core Forbearance Order*[3] effective following Commission approval of an amendment to the parties' interconnection agreement, and declined to accept either party's proposed amendment language. Order No. 3 also denied, in part, Level 3's motions and Qwest's counterclaims, requiring the parties to develop in a hearing issues of fact and law governing the use of VNXX traffic.

4 **Level 3's Petition for Interlocutory Review.** On September 7, 2005, Level 3 filed with the Commission a Petition for Interlocutory Review, seeking review of portions of the administrative law judge's decision. Qwest filed an answer to Level 3's petition on September 19, 2005.

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[1] On August 23, 2005, Administrative Law Judge Karen M. Caillé entered a recommended decision on similar issues in Docket No. UT-053036, involving an enforcement petition filed by Pac-West Telecomm, Inc. (Pac-West), granting Pac-West's petition.

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

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

5 **Request for Delay in Ruling on Level 3's Petition.** On September 28, 2005, Level 3 and Qwest requested the Commission defer ruling on Level 3's petition until after November 30, 2005, while the parties engaged in settlement discussions. On December 1, 2005, counsel for Level 3 advised the Commission the parties had not resolved the disputed issues through settlement discussions. Level 3 requested the Commission enter an order on its petition for interlocutory review, and stay the procedural schedule until after the order is entered. On December 8, 2005, the Commission notified the parties it would enter an order on Level 3's petition by February 10, 2006, and stayed the procedural schedule until the Commission entered its order.

6 **Commission Decision.** We accept Level 3's petition for interlocutory review of Order No. 03, granting in part, and denying in part, Level 3's petition. We reverse the administrative law judge's decisions concerning the *Core Forbearance Order*, require Qwest to compensate Level 3 for ISP-bound traffic under the FCC's *Core Forbearance Order* as of the effective date of that Order, with interest, and approve Level 3's proposed amendment language. We also dismiss Qwest's counterclaims concerning the use of VNXX arrangements, finding Qwest's claims about use of VNXX not material or necessary to deciding the issue of compensation for ISP-bound traffic under the FCC's *ISP Remand Order*. Finally, we affirm the finding in Order No. 03 that the Commission has not approved or rejected the use of VNXX arrangements in interconnection agreements, denying Level 3's petition on this issue.

7 **Appearances.** Gregg Strumberger and Victoria Mandell, Regulatory Counsel, Broomfield, Colorado, and Rogelio E. Peña, Peña & Associates, Boulder Colorado, represent Level 3. Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, and Alex M. Duarte, Corporate Counsel, Portland, Oregon, represent Qwest.

MEMORANDUM

A. Background Information

8 In this proceeding, Level 3 seeks to enforce provisions of its interconnection agreement with Qwest concerning compensation for ISP-bound traffic. Specifically, Level 3 asserts the FCC's *ISP-Remand Order* requires compensation for ISP-bound VNXX traffic. A VNXX traffic arrangement "converts what would otherwise be toll calls into local calls."[4] Level 3 also requests the Commission order Qwest to amend its interconnection agreement with Level 3 to reflect a recent FCC decision governing compensation for ISP-bound traffic, referred to as the *Core Forbearance Order*.

9 In its counterclaims, Qwest asserts VNXX traffic violates federal and state law, as well as provisions of the parties' interconnection agreement. Qwest also seeks to amend the parties' agreement to reflect the *Core Forbearance Order*, excluding compensation for VNXX traffic and applying the Relative Use Factor (RUF) calculation such that Level 3 is responsible for all ISP-bound traffic originated by Qwest end user customers.

10 Order No. 03 in this proceeding interpreted the FCC's *ISP-Remand Order* to allow compensation for ISP-bound VNXX traffic. The decision denied Level 3's requests to order Qwest to amend the parties' agreement to reflect the *Core Forbearance Order*, and to require a change in compensation levels as of October 8, 2004, the effective date of the *Core Forbearance Order*. The Order also deferred

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[4] *Global Naps, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 295 (D. Vermont, 2004). Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix, or number that identifies the specific telephone company central office serving the line. *Qwest Motion for Summary Determination*, ¶ 19. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers have the same NXX as the local calling area of an end-user customer, but may terminate in a different calling area, local access and transport area (LATA), or state. *Id.*, ¶¶ 4, 23.

Qwest's counterclaims for hearing to develop a more complete record on VNXX traffic, denying in part, and granting in part, Qwest's counterclaims and Level 3's motions concerning Qwest's counterclaims.

11 Level 3 seeks interlocutory review of five specific decisions in Order No. 03. We consider Level 3's request for interlocutory review and claims of error, as well as the issue of compensation for ISP-bound VNXX traffic, in Sections B through H, below.

B. Interlocutory Review.

12 Level 3 seeks interlocutory review of several decisions in Order No. 03, asserting review will save the Commission and the parties substantial effort or expense. Level 3 objects to certain decisions on its motion for summary determination. Level 3 asserts the issues in this proceeding are issues of law and that, contrary to the findings in Order No. 3, there are no issues of fact requiring a hearing. Level 3 asserts the burden of a hearing outweighs the costs and delay of exercising interlocutory review. Level 3 further asserts interlocutory review is appropriate to resolve inconsistencies within Order No. 3, as well as inconsistencies between Order No. 03 in this proceeding and the Recommended Decision in the Pac-West proceeding in Docket No. UT-053036.

13 Qwest argues interlocutory review is not warranted. Qwest asserts that disrupting the schedule imposes greater costs in time and delay than holding a hearing. Qwest asserts preparing for hearing imposes only a slight burden on the parties, i.e., preparing and filing testimony. Qwest asserts similar proceedings are underway in other states, lessening the burden of preparing testimony. Qwest also asserts interlocutory review resolves some of the issues in the proceeding, and Qwest would still request review of the decision in Order No. 3 concerning compensation for ISP-bound traffic. In the event the

Commission accepts interlocutory review and reviews all issues resolved in Order No. 03, Qwest requests permission to supplement its answer concerning whether VNXX traffic is compensable under the FCC's *ISP Remand Order*.

14 ***Discussion and Decision.*** Interlocutory review involves Commission review of interim decisions, i.e., orders that are not dispositive of all the issues in the proceeding. The order at issue in Level 3's petition, Order No. 03, is an interim order resolving the parties' motions for summary judgment, and is not a recommended decision resolving all of the issues presented by the parties.

15 The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2).* Pursuant to WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds that:

> (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
>
> (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
>
> (c) A review could save the commission and the parties substantial effort or expense or some other factor is present that outweighs the costs in time and delay of exercising review.

16 We find interlocutory review appropriate under WAC 480-07-810(2)(c) and accept interlocutory review of Order No. 03. Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding. It is more efficient for the Commission and the parties to address the disputed issues on interlocutory review than to decide the issues after the Commission holds a hearing and the administrative law judge enters a recommended decision. While Qwest focuses solely on the burden of the *parties* in preparing for a hearing, our

rule addresses whether review would save the parties *and the Commission* substantial effort or expense.

17 In addition, we find the contested issues in this proceeding significantly similar to those presented in the Pac-West proceeding in Docket No. UT-053036. Both proceedings concern interpretation of the FCC's *ISP Remand Order* and *Core Forbearance Order*, and compensation for ISP-bound VNXX traffic. Qwest made the same counterclaims concerning VNXX in the two proceedings. Accepting interlocutory review is an appropriate way resolve all the issues in this proceeding simultaneously with the Commission entering a final order in the Pac-West proceeding. We reject Qwest's request for additional briefing on the issue of compensation for VNXX traffic under the *ISP Remand Order*, finding the parties provided sufficient briefing on the issue in their motions for summary determination.

C. Compensation for VNXX Traffic under the *ISP Remand Order*.

18 The primary issues Level 3 raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively in their motions for summary judgment. We will not repeat the arguments in this Order, as the administrative law judge's decision, Order No. 03, adequately summarizes the arguments.

19 Order No. 03 interprets the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*. *Order No. 03, ¶ 28*. The Order also interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located. *Id., ¶ 34*. Thus, the Order required

Qwest to compensate Level 3 under the parties' agreement for ISP-bound VNXX traffic. *Id., ¶ 35.* We affirm these decisions.

20 We provide a brief history and analysis of the FCC's decisions concerning compensation for ISP-bound traffic as support for our decision: The FCC has entered several orders on the issue, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."[5] The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.[6]

21 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.[7] The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.[8] The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).[9] Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.[10] On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding the FCC

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].
[6] *Id.*, ¶¶ 1034-35.
[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter "*Declaratory Ruling*"].
[8] *Id.*, ¶¶ 12, 18.
[9] *Id.*, ¶ 26.

had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were "local" for purposes of reciprocal compensation.[11]

22 In April 2001, the FCC released its *ISP Remand Order*. In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.[12] The FCC also modified its decision in the *First Report and Order* that only "transport and termination of local traffic" is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[13] The FCC established a separate interim compensation regime for all ISP-bound traffic until the FCC finalizes the structure and rates for a new intercarrier compensation system.[14] The FCC's interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.[15]

23 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.[16] The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."[17]

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[10] *Id.*, ¶¶ 26-27.
[11] *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)
[12] *ISP Remand Order*, ¶¶ 3, 35.
[13] *Id.*, ¶ 46.
[14] *Id.*, ¶ 77.
[15] *Id.*, ¶¶ 78, 81, 89. The rate applicable to day to minutes of use for ISP-bound traffic is $0.0007 per minute.
[16] *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).
[17] *Id.*

24 Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order*, the FCC cases preceding the *ISP Remand Order*, the Commission's orders in the *Level 3/CenturyTel* arbitration,[18] and recent district court decisions in Vermont[19] and Connecticut[20] support the decision in Order No. 03 and our decision today.

25 We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic.[21] Under this compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area.

26 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic culminating in the interim approach in the *ISP Remand Order* applicable to all types of traffic and interconnection arrangements. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that ISP-bound traffic is jurisdictionally interstate, as a call terminating to the internet could

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

[19] *Global Naps*, 327 F.Supp.2d at 300.

[20] *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter "*SNET v. MCI*"], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

[21] *ISP Remand Order*, ¶ 77.

terminate in a different state or country.[22] In describing how ISP customers access the internet, the FCC noted that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."[23] The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhanced Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.[24] Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

27 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,[25] the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to "local" traffic.[26] Although the D.C. Circuit rejected the FCC's findings concerning Section 251(g), the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.[27]

28 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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[22] *Declaratory Ruling*, ¶¶ 13, 18.
[23] *Id.*, ¶ 4; *see also* ¶ 7.
[24] *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.
[25] *Bell Atlantic*, 206 F.3d 1.
[26] *ISP Remand Order*, ¶ 46.
[27] *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,[28] this discussion does not represent the FCC's decision in the *ISP Remand Order*. The FCC describes ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.[29] The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[30] The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."[31]

29 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.[32] Our decision is consistent with this Commission's decision in arbitrating a recent agreement between CenturyTel and Level 3,[33] and recent decisions by the District Courts of Connecticut and Vermont.[34] These decisions all find that the *ISP Remand Order* addresses *all* ISP-bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."[35]

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[28] *ISP Remand Order*, ¶¶ 9-13.
[29] *Id.*, ¶ 44.
[30] *Id.*
[31] *Id.*, n.82.
[32] *Id.*, ¶ 58; *see also* ¶ 61.
[33] *CenturyTel-Level 3 Arbitration,* Seventh Supplemental Order, ¶¶ 7-10.
[34] *Global Naps*, 327 F.Supp.2d at 300; *SNET v. MCI*, 353 F.Supp.2d at 296-97, 299.
[35] *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *CenturyTel-Level 3 Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.

30 The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.[36] States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Level 3 for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the parties' interconnection agreement, which adopts the *ISP Remand Order.*

D. Approval of VNXX arrangements in Interconnection Agreements.

31 Level 3 asserts the administrative law judge erred, in part, in deciding Qwest's Counterclaim No. 2. In that counterclaim, Qwest alleges Level 3 violated state law by billing Qwest the federal reciprocal compensation rate for all VNXX ISP-bound traffic. Level 3 assigns error to Order No. 03's finding at paragraph 42 that the Commission has "not approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in the state," and to the parallel Conclusion of Law No. 8 at paragraph 76.[37]

32 Level 3 asserts the Commission's prior decision in the Level 3/Century Tel Arbitration proceeding in Docket No. UT-023043 contradicts this decision in Order No. 3. In the arbitration decision, the Commission determined that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[38] Level 3 asserts that the Commission approved payment of reciprocal compensation for VNXX ISP-bound traffic in approving an interconnection agreement between Level 3 and

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[36] *ISP Remand Order*, ¶ 77.
[37] *Level 3 Communications LLC v. Qwest Communications*, Docket No. UT-053039, Order No. 03, August 26, 2005, ¶¶ 42, 76.
[38] *CenturyTel-Level 3 Arbitration,* Seventh Supplemental Order, ¶¶ 1, 35.

CenturyTel. Level 3 also asserts the Commission approved Level 3's transport and termination of VNXX traffic in its agreement with Qwest, approved soon after the agreement with CenturyTel.

33 Level 3 also asserts the decision in paragraph 42 of Order No. 03 is inconsistent with the Recommended Decision in the Pac-West proceeding, in which the assigned judge rejected Qwest's counterclaim on the basis of the Level 3 /CenturyTel Arbitration.

34 Qwest asserts the Commission's Level 3/CenturyTel Arbitration Order did not decide the propriety of VNXX traffic, but simply decided the issue of compensation for VNXX ISP-bound traffic. Qwest asserts that the parties disputed only the proper compensation for VNXX traffic, not whether its use under the interconnection agreement was proper. Qwest also asserts the Commission did not approve the use of VNXX routing for ISP-bound traffic in the Level 3/Qwest arbitration, noting that the only issue for decision was whether ISP-bound traffic should be included in the Relative Use Factor.

35 ***Discussion and Decision.*** In our prior decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, we have not considered the propriety of VNXX arrangements, but instead focused specifically on compensation for these arrangements. We have understood that Level 3 intended to use VNXX arrangements, but no party in the arbitration proceedings raised the issue of whether these arrangements are appropriate or within the law. We do not find the finding reached in paragraph 42 or Conclusion of Law No. 8 in Order No. 03 in error. We deny Level 3's petition for interlocutory relief on this issue.

E. Qwest's Counterclaim No. 4: Obligation to Administer NXX Codes.

36 Level 3 asserts Order No. 03 erred in denying Level 3's motion on Qwest's Counterclaim No. 4. In its counterclaim, Qwest asserts Level 3 is obligated under Section 13.4 of the parties' interconnection agreement to administering NXX codes, and that use of VNXX arrangements violates this provision of the agreement. In paragraph 44 of the Order, the administrative law judge denied both parties' motions for summary judgment on this counterclaim, finding there were disputed issues of material fact. In the Order, the administrative law judge directed the parties to develop a record on the issue through prefiled testimony and hearing to allow a Commission decision on the issue.

37 Level 3 asserts that no factual issues exist. Level 3 asserts that Section 13.4 of the agreement merely identifies administrative responsibilities for assigning NXX codes and does not address the physical location of ISP servers. Level 3 asserts the industry guidelines Qwest cites do not support Qwest's argument, and are insufficient to preclude summary judgment in favor of Level 3.

38 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that there remain factual issues, such as whether industry guidelines should be used to interpret the parties' agreement, and the interpretation of the guidelines. Qwest asserts that the proper use and legality of VNXX arrangements should be addressed in hearing before the Commission enters a decision on its counterclaim.

39 ***Discussion and Decision.*** We grant Level 3's petition for interlocutory relief on this issue, and dismiss Qwest's counterclaims in this proceeding. It is not necessary for us to decide in this proceeding whether VNXX arrangements, generally, are appropriate or within the law. The only material issue in this

proceeding is whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic. Having resolved this issue above, there is no need to address Qwest's counterclaims.

40 Qwest's counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650.* Qwest has not met its burden to demonstrate breach of provisions in the interconnection agreement. Qwest's counterclaims address the use of VNXX arrangements generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

F. Qwest's Counterclaim No. 5: Authority to Exchange VNXX ISP-bound Traffic on LIS Interconnection Trunks.

41 Level 3 also asserts the administrative law judge erred in Order No. 03 in denying Level 3's motion on Qwest's Counterclaim No. 5. In its counterclaim, Qwest asserts the parties' interconnection agreement does not permit Level 3 to exchange VNXX ISP-bound traffic on local interconnection service (LIS) interconnection trunks. In paragraph 46 of Order No. 03, the administrative law judge granted Level 3's motion on Qwest's claim and denied Qwest's motion. However, the Order also directed the parties to develop a complete record on the issue before deciding whether Level 3 may exchange VNXX traffic over LIS trunks, effectively denying Level 3's motion. Level 3 asserts the administrative law judge's ruling is inconsistent, and in error.

42 Qwest requests the Commission deny Level 3's petition on this issue and allow the parties to develop the issues further in hearing. Qwest asserts that factual issues concerning the routing of VNXX traffic over LIS trunks should be

addressed in hearing before the Commission enters a decision on its counterclaim.

43 ***Discussion and Decision.*** Based on our discussion in Section E above, we grant Level 3's petition on this issue, and dismiss Qwest's counterclaims 1, 2, 4 and 5. There is no need to develop in hearing in this proceeding whether VNXX arrangements are appropriate or within the law. Having resolved above the only material issue in this proceeding – compensation for ISP-bound traffic, there is no need to address Qwest's counterclaims or to address Qwest's claims more fully in hearing.

G. Implementing the Core Forbearance Order.

44 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*. The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.[39]

45 While Level 3 and Qwest agree that the *Core Forbearance Order* results in a change in law governing compensation for ISP-bound traffic, the parties disagree over how to implement these changes. Level 3 seeks additional compensation for ISP-bound traffic from Qwest back to October 8, 2004, the effective date of the *Core Forbearance Order*, and has billed Qwest for these amounts. Qwest asserts that it may only pay the additional amounts after the Commission approves an amendment to the parties' agreement. Level 3 has proposed language to amend the parties' interconnection agreement to reflect the *Core Forbearance Order*, but Qwest and Level 3 continue to dispute the appropriate language.

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[39] *Core Forbearance Order*, ¶27.

46 In paragraph 52 of Order No. 03, the administrative law judge determined that Level 3 may not bill Qwest for additional compensation for ISP-bound traffic under the *Core Forbearance Order* until the Commission approves an amendment to the parties' interconnection agreement implementing the change in law. Level 3 asserts the administrative law judge erred in finding Level 3 in violation of the change of law provisions of the interconnection agreement by billing Qwest for compensation for ISP-bound traffic back to the effective date of the *Core Forbearance Order*.

47 Level 3 requests the Commission reverse the administrative law judge's decision. Level 3 asserts the decision in Order No. 03 is inconsistent with the parties' interconnection agreement, the Recommended Decision entered in the Pac-West proceeding, and creates a perverse incentive for ILECs to delay negotiating agreements to reflect changes in law. Level 3 asserts it has followed the change of law provisions in the agreement by attempting to negotiate an amendment to the parties' interconnection agreement. Level 3 asserts it has followed the dispute resolution provisions of the agreement by requesting the Commission resolve the issues in this proceeding. Level 3 has billed Qwest for the amounts it believes are due under the *Core Forbearance Order* in order to perfect and maintain its claim to the amounts.

48 Level 3 asserts that the *Core Forbearance Order* merely changes the amount of compensable traffic. Level 3 asserts that the issue is not whether Level 3 is entitled to additional compensation under the *Core Forbearance Order*, but when Qwest's obligation to compensate Level 3 began. Level 3 asserts that the change in compensation under the *Core Forbearance Order* begins as of the effective date of the FCC's order.

49 Qwest asserts the parties have not reached agreement on amendment language, and have not filed language with the Commission. Qwest asserts the

Commission has consistently held that interconnection agreements and changes to agreements are not effective until the agreement has been filed with and approved by the Commission. Qwest further asserts there is nothing in the *Core Forbearance Order* to support the argument that the change in law is retroactive to the effective date of the FCC's order.

50 ***Discussion and Decision.*** Consistent with our prior orders on this issue, changes in law are generally not effective under an interconnection agreement until the parties modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. However, there are circumstances where the FCC has determined a change in law is effective on a certain date regardless of whether the parties have modified their interconnection agreements. For example, in the FCC's *Triennial Review Remand Order*,[40] the FCC required changes in access to unbundled network elements as of March 11, 2006, without requiring carriers to modify their amendments to interconnection agreements to implement the change in law.

51 We find a similar effect in the FCC's decision in the Core *Forbearance Order*, requiring the change in compensation rate as of the effective date of the order, October 8, 2004. In the Order, the FCC provides "Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 8, 2004."[41] There is no discussion in the order requiring carriers to implement the decision under change of law provisions in parties' interconnection agreements. We find the FCC intended the *Core Forbearance Order* to have immediate effect, and grant Level 3's petition for interlocutory relief on this issue.

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[40] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "*Triennial Review Remand Order*"].
[41] *Core Forbearance Order*, ¶ 28.

52 Further, we find that Level 3 is not prohibited from *billing* Qwest for the amounts it alleges Qwest owes under the *Core Forbearance Order*, but that Qwest is not obligated under its interconnection agreement to pay the amounts due until the Commission approves an amendment to the parties' agreement. Given our decision above concerning the effective date of the *Core Forbearance Order*, we require Qwest to compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order. We reject the argument that payment back to the effective date is a retroactive application of rates: We are simply implementing the FCC's intent that the *Core Forbearance Order* apply to all carriers on the effective date of the order. We grant Level 3's petition on this issue, finding Level 3 in compliance with the change of law provisions in its interconnection agreement

53 We agree with Level 3's assertion that the administrative law judge's decision on this issue creates an incentive for ILECs to delay implementing amendments to their interconnection agreements. To deter incentives for delay and encourage prompt compliance with FCC Orders, it is appropriate to require Qwest to pay Level 3 late payment fees, as described in Section 5.4.4.1 of the parties' interconnection agreement filed with the Commission on March 7, 2003, on the amounts owing since October 8, 2004. Qwest must make the payments after our approval of an amendment to the parties' agreement consistent with this Order.

H. Approval of Proposed Amendment Language.

54 Level 3 and Qwest agree that the *Core Forbearance Order* results in a change of law, and that they must amend their interconnection agreement to implement the change in law. They disagree, however, about the appropriate amendment language. In paragraph 55 of Order No. 03, the administrative law judge did not recommend approval of either party's language, denied Level 3's motion to

require Qwest to execute Level 3's proposed amendment, and suggested the parties use the decisions in the Order as guidance for further negotiations.

55 Level 3 asserts the administrative law judge erred in denying its motion. Level 3 requests the Commission reverse the administrative law judge's decision and require Qwest to execute Level 3's proposed amendment. Level 3 asserts that Qwest's proposed language is contrary to the Commission's decision in the Level 3/CenturyTel Arbitration Order and the administrative law judge's decision in Order No. 03 governing compensation for ISP-bound traffic. Level 3 asserts that its proposed language, attached to its Motion for Summary Determination as Exhibit B to the Affidavit of Mack Greene, is consistent with these decisions and would accurately implement the *Core Forbearance Order*.

56 Qwest objects to Level 3's proposed amendment as allowing the exchange of VNXX traffic. Qwest asserts that the issue of the propriety of VNXX traffic should be fully litigated before the Commission decides on the appropriate amendment language to implement the *Core Forbearance Order*.

57 **Discussion and Decision.** We grant Level 3's petition for interlocutory relief on this issue, and reverse the decision in paragraph 55 in Order No. 03. Level 3 complied with the dispute resolution provisions in its interconnection agreement with Qwest by filing an enforcement petition with this Commission. Level 3 appropriately sought a Commission decision on the parties' competing amendment language. It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.

58 Upon review, we find Level 3's proposed amendment language appropriate to implement the changes in law as a result of the *Core Forbearance Order*. Level 3's language is limited to the changes to the *ISP Remand Order* identified in the *Core*

Forbearance Order, and is consistent with our decisions in this Order. Qwest's language seeks to exclude VNXX traffic from compensation for ISP-bound traffic, contrary to our decision. In addition, Qwest's proposed language improperly seeks to relitigate the issue of how to apply the Relative Use Factor, which we decided in Level 3's favor in the Level 3/Qwest Arbitration Order. We require Qwest and Level 3 to execute Level 3's proposed amendment to the interconnection agreement, and file the agreement with the Commission within 15 days of the effective date of this Order.

FINDINGS OF FACT

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

60 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

61 (2) Level 3 Communications, LLC is authorized to operate in the state of Washington as a competitive local exchange carrier.

62 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies

within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

63 (4) The Commission approved an interconnection agreement between Qwest and Level 3 in March 2003, allowing Level 3 to exchange ISP-bound traffic with Qwest.

64 (5) The interconnection agreement between Qwest and Level 3 provides that the parties will exchange ISP-bound traffic, as that term is used in the FCC's *ISP Remand Order*.

65 (6) The FCC entered its *Core Forbearance Order* in October 2004, changing the effect of certain provisions of the *ISP Remand Order*.

CONCLUSIONS OF LAW

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

67 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

68 (2) The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2).*

69 (3) Accepting interlocutory review will save the parties and the Commission substantial effort in this proceeding compared to addressing the issues after holding a hearing and entering a recommended decision. As the issues in this proceeding are similar to those in the Pac-West proceeding in Docket No. UT-053036, interlocutory review appropriately resolves all issues in the two proceedings simultaneously.

70 (4) The FCC's *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. In the *ISP Remand Order*, the FCC creates a separate compensation category for all ISP-bound traffic, regardless of the nature of the traffic. *ISP Remand Order*, ¶ 77.

71 (5) In decisions approving arbitrated agreements between Level 3 and CenturyTel and Qwest, the Commission has addressed and approved compensation for VNXX arrangements, but has not considered the propriety of these arrangements.

72 (6) Qwest's counterclaims are not appropriate for this proceeding, where the only pertinent and material issues are the interpretation and enforcement of the interconnection agreement, and whether the parties' interconnection agreement requires Qwest to compensate Level 3 for the transport and termination of all ISP-bound traffic originated by Qwest's end user customers, including VNXX traffic.

73 (7) In general, the Commission recognizes that changes in law are generally not effective under an interconnection agreement until carriers modify their agreements to reflect the change in law, file the agreement with the Commission and the Commission approves the agreement. The FCC has made exceptions to this general rule, for example in its *Triennial Review Remand Order*.

74 (8) The FCC intended the *Core Forbearance Order* to have immediate effect, as of the effective date of the Order, October 8, 2004.

75 (9) Given the FCC's decision concerning the effective date of its *Core Forbearance Order*, Qwest must compensate Level 3 under the *Core Forbearance Order* back to the effective date of the FCC's order.

76 (10) It is not necessary for Level 3 to initiate an arbitration proceeding for this Commission to resolve a dispute about amendment language.

77 (11) Level 3's proposed amendment language implements the changes in law as a result of the *Core Forbearance Order*, is limited to the changes to the *ISP Remand Order* identified in the *Core Forbearance Order*, and is consistent with our decisions in this Order.

78 (12) Qwest's proposed amendment language is not consistent with our decision in this Order, and seeks to exclude VNXX traffic from compensation for ISP-bound traffic. Qwest's proposed language also seeks to relitigate the issue of how to apply the Relative Use Factor, an issue resolved in the Level 3/Qwest Arbitration Order in Docket No. UT-023042.

ORDER

THE COMMISSION ORDERS:

79 (1) Level 3 Communications, LLC's, Petition for Interlocutory Review is accepted.

80 (2) Paragraphs 73, 74, 83, and 84 of Order No. 03 in this proceeding, interpreting the FCC's *ISP Remand Order* to address all ISP-bound traffic and establish a compensation regime for all ISP-bound traffic, are affirmed.

81 (3) Issue No. 1 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the finding in paragraph 42 and Conclusion of Law No. 8 in paragraph 76 in Order No. 03 that "the Commission has not approved or rejected the use of VNXX arrangements or other traffic in interconnection agreements in the state," is denied.

82 (4) Issue No. 2 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 52 of Order No. 03 prohibiting Level 3 Communications, LLC, from billing Qwest Corporation for amounts allegedly owed under the FCC's *Core Forbearance Order* , is granted.

83 (5) Issue No. 3 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to the decision in paragraph 55 of Order No. 03 to deny Level 3 Communications, LLC's, motion seeking approval of its proposed amendment language, is granted.

84 (6) Issue Nos. 4 and 5 raised in Level 3 Communications, LLC's, Petition for Interlocutory Review, assigning error to decisions in paragraphs 44 and 46 of Order No. 03 to deny Level 3 Communications, LLC's, motion for summary judgment on Qwest counterclaims asserting breach of the parties' interconnection through the use of VNXX arrangements, is granted.

85 (7) Upon the Commission's approval of an amendment to the parties' agreement consistent with this Order, Qwest Corporation must pay Level 3 Communications, LLC, late payment fees, as described in Section 5.4.4.1 of the March 7, 2003, interconnection agreement between Level 3 Communications, LLC, and Qwest Corporation, on the amounts owing since October 8, 2004, under the *Core Forbearance Order*.

86 (8) Level 3 Communications, LLC, and Qwest Corporation must file with the Commission within 15 business days after the effective date of this Order an amendment to their interconnection agreement complying with the provisions of this Order.

Dated at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

ATTACHMENT 1(B) **Washington UTC Order, Docket No. UT-053036 (Feb. 10, 2006).**

[Service Date February 10, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.,	)	DOCKET NO. UT-053036
	)	
Petitioner,	)	
	)	ORDER NO. 05
v.	)	
	)	
QWEST CORPORATION,	)	FINAL ORDER AFFIRMING AND
	)	CLARIFYING RECOMMENDED
Respondent.	)	DECISION
. . . . .	)	

1 ***Synopsis:*** *This Order affirms and clarifies a recommended decision that grants Pac-West's petition to enforce its interconnection agreement with Qwest. The Order requires Qwest to comply with the FCC's ISP Remand Order and fulfill its contractual obligation to compensate Pac-West for all ISP-bound traffic, including VNXX traffic. The Commission interprets the interim compensation mechanism in the ISP Remand Order to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. This Order also affirms the recommended decision's disposition of Qwest's counterclaims. The Order finds Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.*

2 **Nature of Proceeding.** This proceeding involves a petition filed by Pac-West Telecomm, Inc. (Pac-West), pursuant to WAC 480-07-650, for enforcement of its interconnection agreement with Qwest Corporation (Qwest). In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement relating to payment to Pac-West for terminating traffic. The dispute centers on

whether Pac-West is entitled to compensation for "VNXX"[1] ISP-bound traffic. Qwest filed an answer and counterclaims to the petition.

3 **Recommended Decision.** Administrative Law Judge Karen Caillé entered a recommended decision on August 23, 2005, proposing to grant Pac-West's petition and ordering Qwest to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including FX/VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the parties' interconnection agreement.[2] The recommended decision proposed that Qwest's payment include all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest.

4 **Exceptions to Recommended Decision.** Qwest asks the Commission to review the recommended decision, contending that the recommended decision erred in (1) concluding that VNXX traffic is "ISP-bound traffic" as that term is used in the *ISP Remand Order* and the parties' interconnection agreement, (2) failing to decide the counterclaims raised by Qwest in its answer, and (3) concluding that the amount due on VNXX traffic is the full $637,389.90 claimed by Pac-West.

5 **Commission decision.** We affirm the recommended decision with the following clarification regarding the scope of the *ISP Remand Order*. The *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic. Therefore, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We also affirm the recommended disposition of

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[1] "VNXX" or "Virtual NXX" refers to a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number.

[2] On August 26, 2005, Administrative Law Judge Ann Rendahl entered an order in Docket No. UT-053039 that addresses similar issues, granting and denying certain claims in motions for summary determination filed by Level 3 and Qwest.

Qwest's counterclaims in the recommended decision, finding Qwest's claims about the use of VNXX neither material nor necessary to decide the issue of compensation for ISP-bound VNXX traffic in a petition for enforcement of Pac-West's interconnection agreement.

6 **Appearances.** Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents the petitioner, Pac-West. Lisa Anderl, attorney, Seattle, Washington represents the respondent, Qwest.

I. MEMORANDUM

A. Introduction.

7 This matter involves a petition by Pac-West for enforcement of its interconnection agreement with Qwest. In particular, Pac-West asks the Commission to enforce the terms of the interconnection agreement, as amended by the "ISP Amendment," relating to payment for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.

8 A VNXX arrangement "converts what would otherwise be toll calls into local calls."[3] Traditionally, whether a call is billed as a local call or toll call depends on the location, or local calling area, in which the telephone call originates and terminates. Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix or number that identifies the specific telephone company central office serving the line. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers are telephone numbers that have the same NXX as the local calling area of an end-user customer. The numbers are "virtual" as the dialing pattern tells callers that it is made within the callers' local calling area,

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

rather than the called party's local calling area, when in fact the call may terminate in a different calling area, Local Access and Transport Area (LATA), or state.[4]

9 The parties in this proceeding requested that the matter proceed on a paper record with briefing and oral argument, followed by a recommended decision. The Administrative Law Judge entered a recommended decision on August 23, 2005, resolving the issues in the petition in favor of Pac-West. Qwest seeks review of the recommended decision. Pac-West responds, supporting the initial order.

B. Background

1. History of Intercarrier Compensation for ISP-Bound Traffic

10 The definition of ISP-bound traffic and proper compensation for ISP-bound traffic are two of the primary issues in this proceeding. The Federal Communications Commission (FCC) has entered several orders addressing these issues, which orders have been reviewed by the federal courts. When the FCC first adopted rules implementing the 1996 Telecommunications Act, the FCC determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."[5] The FCC further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through existing access charges, and that state commissions had authority to identify the geographic areas of a local calling area.[6]

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[4] Qwest Opening Brief, ¶¶ 19-21.
[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) [Hereinafter "*First Report and Order*"].
[6] *Id.*, ¶¶ 1034-35.

11 The FCC first addressed the nature of reciprocal compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling*.[7] The FCC determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC, not states.[8] The FCC further determined that because ISP calls were interstate calls jurisdictionally, they are not local calls subject to the reciprocal compensation obligations of Section 251(b)(5).[9] Because the FCC had not adopted a rule governing intercarrier compensation for ISP-bound traffic, the FCC allowed states to consider the issue in arbitrating agreements among carriers.[10] On appeal, the D.C. Circuit Court of Appeals vacated the decision, finding that the FCC had not explained why ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were "local" for purposes of reciprocal compensation.[11]

12 In April 2001, the FCC released its *ISP Remand Order*.[12] In that Order, the FCC determined that Section 251(g) excludes ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), and found that ISP-bound traffic is not subject to reciprocal compensation obligations.[13] The FCC also modified its decision in the *First Report and Order* that only "transport and termination of local traffic" is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[14] The FCC established a separate interim compensation regime for all ISP-bound traffic until

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-988 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) [Hereinafter "*Declaratory Ruling*"].
[8] *Id.*, ¶¶ 12, 18.
[9] *Id.*, ¶ 26.
[10] *Id.*, ¶¶ 26-27.
[11] *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000)
[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) [Hereinafter "*ISP Remand Order*"].
[13] *Id.*, ¶¶ 3, 35.
[14] *Id.*, ¶ 46.

the FCC finalizes the structure and rates for a new intercarrier compensation system.[15] The FCC's interim regime includes specific minutes-of-use, or MOU, rates that decline over a three year period, rate caps, growth caps, a requirement that LECs mirror or charge the same rates for ISP-bound traffic as Section 251(b)(5) traffic, and an exception for carriers serving in new markets.[16]

13 In May, 2002, the D.C. Circuit Court of Appeals rejected the FCC's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the FCC.[17] The Court did not vacate the order, finding that "there may well be legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs."[18]

14 In October, 2004, the FCC entered its *Core Forbearance Order*, in which the FCC chose to forbear from enforcing the growth caps and new market provisions of the *ISP Remand Order*.[19] The FCC, on its own motion, extended the grant of forbearance with respect to those rules to all telecommunications carriers.[20]

2. Pac-West's Petition and Qwest's Answer

15 In its petition, Pac-West alleges that Qwest is in breach of the interconnection agreement, as well as the underlying federal law, in refusing to compensate Pac-West for all local and ISP bound traffic, including calls from Qwest customers to an ISP that obtains FX/VNXX service from Pac-West. [21]

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[15] *Id.*, ¶ 77.
[16] *Id.*, ¶¶ 78, 81, 89.
[17] *WorldCom, Inc., v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).
[18] *Id.*
[19] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171, FCC 04-241 (rel. Oct. 18, 2004) [Hereinafter "*Core Forbearance Order*"].
[20] *Id.*, ¶ 27.
[21] Pac-West Petition, ¶ 12.

16 Pac-West alleges that the interconnection agreement requires the parties to compensate each other for terminating "Exchange Service (EAS/Local) traffic." Pac-West asserts that FX/VNXX service is "Exchange Service" provided to a customer physically located in a different exchange. According to Pac-West, the industry has recognized this fact by rating and routing calls within the customer's local calling area as local calls, regardless of the physical location of the customer.

17 Pac-West references the *ISP Remand Order* and asserts, "[s]pecifically with respect to ISP-bound traffic, the FCC has concluded that 'traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic."[22] Pac-West states that the compensation requirements of the *ISP Remand Order* are incorporated in the interconnection agreement through the ISP Amendment. According to Pac-West, nothing in the *ISP Remand Order* or the interconnection agreement limits compensable traffic to ISPs that are physically located in the same local calling area as the calling party.[23]

18 Pac-West seeks an order from the Commission requiring that Qwest comply with the interconnection agreement, specifically that Qwest compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms, and conditions in the ISP Amendment to the interconnection agreement. The compensation requested by Pac-West includes all amounts Pac-West has billed Qwest for traffic terminated since January 1, 2004, plus interest for all overdue payments at the interest rate specified in the interconnection agreement.[24]

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[22] *ISP Remand Order*, ¶ 1.
[23] Pac-West Petition, ¶ 12.
[24] *Id.*, p. 6.

19 Countering Pac-West's position that all calls to an ISP server are to be treated pursuant to the *ISP Remand Order*, no matter where the server is physically located, Qwest points to FCC precedent requiring that a call to a computer (such as an ISP server) be treated exactly the same as other end-user customers in determining whether the call is treated as a toll or local call. In other words, a call originated from one local calling area to an ISP server physically located in another local calling area is treated as a toll call.[25]

20 Qwest denies Pac-West's allegations about the compensation for traffic that Pac-West has terminated. Qwest counters Pac-West's claim that there is approximately $637,389.90 in dispute from January 1, 2004 through March 31, 2005, asserting that the maximum amount is approximately $401,736.[26]

21 Qwest counterclaims that Pac-West's assignment of local telephone numbers and NPA/NXXs in local calling areas other than the local calling area where its customer's ISP server is physically located constitutes misuse of telephone numbering resources, and billing Qwest the *ISP Remand Order* rate for such VNXX traffic violates federal law (Count 1) and WAC 480-120-021, which establishes definitions of local calling areas and exchange access areas (Count 2). Qwest also asserts that Pac-West violates the parties' interconnection agreement, which provides that each party is responsible for administering NXX codes (Section 13.4), and by improperly routing VNXX ISP-bound traffic over Qwest's local interconnection service (LIS) trunks (Counts 3 and 4).[27]

22 Qwest requests that the Commission enter an order requiring Pac-West to refrain from assigning NPA/NXXs in local calling areas other than the local calling area where the ISP server is physically located, to cease its misuse of telephone numbering resources and to properly assign telephone numbers based on the

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[25] Qwest Answer, ¶¶ 8-11.
[26] *Id.*, ¶ 49.
[27] *Id.*, ¶¶ 57-66.

actual physical location of its customer's ISP server. Qwest asks for a finding that the parties' interconnection agreement does not require any compensation for Pac-West's VNXX traffic and that Pac-West be directed to follow the change of law procedures contained in the interconnection agreement to implement the *Core Forbearance Order.* Qwest seeks to invalidate all Pac-West invoices charging reciprocal compensation at the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic described above and to stop routing VNXX traffic to Pac-West utilizing LIS facilities.[28]

C. Review of the Recommended Decision.

1. The recommended decision.

23 The recommended decision adopted Pac-West's interpretation of "ISP-bound" traffic described in the *ISP Remand Order*, specifically finding that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. The decision recognized that "[t]his interpretation is consistent with the Commission's decision in the *Level 3 Arbitration*, as well as a recent decision of the U.S. District Court for the District of Connecticut."[29]

24 The recommended decision also acknowledged Qwest's counterclaims concerning the legality and propriety of VNXX service, but declined to address

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[28] *Id.*, ¶ 67.

[29] Recommended Decision, ¶ 37; *In the Matter of the Petition for Arbitration of an Interconnection agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) [Hereinafter *"Level 3/CenturyTel Arbitration"*], *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003); *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005) [Hereinafter *"SNET v. MCI"*], recons. denied, *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F.Supp.2d 229 (D. Conn. 2005).

them on the basis that the counterclaims addressed matters outside the parties' interconnection agreement, that there was no law regarding VNXX to be violated, or that Qwest's claims were resolved by the recommended outcome, i.e., compensation for ISP-bound traffic via VNXX service.[30]

2. Qwest's exceptions to the recommended decision.

25 Qwest objects to and seeks review of nearly all of the issues decided in the recommended decision, including whether the decision: (a) properly interpreted the FCC's *ISP Remand Order*, (b) erred in determining the amounts due Pac-West, and (c) erred in not deciding Qwest's counterclaims regarding the propriety of VNXX traffic generally, and whether the parties' agreement prohibits use of local interconnection service (LIS) trunks for exchanging VNXX traffic.

26 We will address each of the challenged rulings in light of the record, and the parties' pleadings.

a. Did the recommended decision err in holding that the *ISP Remand Order* applies equally to VNXX traffic?

27 The primary issues Pac-West raises in its enforcement petition, and which Qwest contests, are legal questions: The definition of ISP-bound traffic and proper compensation for ISP-bound traffic. The parties argued these issues extensively on brief. We will not repeat the arguments in this Order, as the recommended decision, Order No. 03, adequately summarizes the arguments.

28 The recommended decision interpreted the parties' interconnection agreement to exchange ISP-bound traffic, and requires compensation for such traffic as required by the FCC's *ISP Remand Order*.[31] The recommended decision also

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[30] *Id.*, ¶ 40.
[31] Order No. 03, ¶ 37.

interpreted the *ISP Remand Order* to require compensation for all ISP-bound traffic, regardless of where an ISP server or modem is located.[32] Thus, the recommended decision required Qwest to compensate Pac-West under the parties' agreement for ISP-bound VNXX traffic.[33]

29 **Commission decision.** We deny Qwest's exception and affirm and clarify the recommended decision on this issue. Our review of the *ISP Remand Order*, the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, the FCC cases preceding the *ISP Remand Order*, our Order in the *Level 3/CenturyTel Arbitration*, and recent district court decisions in Vermont and Connecticut support our conclusion.

30 We interpret the *ISP Remand Order* to apply to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. Under the *ISP Remand Order*, the FCC created a separate compensation category for all ISP-bound traffic.[34] According to the FCC's compensation scheme for ISP-bound traffic, it is irrelevant for purposes of determining compensation whether the traffic is local, toll, or via VNXX arrangements. We reject Qwest's interpretation of the *ISP Remand Order* as limited to calls between a customer and an ISP modem physically located within the same calling area, as well as Pac-West's interpretation that the *ISP Remand Order* applies to all ISP-bound traffic between parties whose numbers are assigned to the same local calling area.

31 Our review of the FCC's decisions preceding the *ISP Remand Order* reveals an evolution in intercarrier compensation mechanisms for ISP-bound traffic that culminates in the unified interim approach applicable to all types of traffic and interconnection arrangements set forth in the *ISP Remand Order*. In its *Declaratory Ruling*, the FCC used an end-to-end analysis of ISP-bound traffic, finding that

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[32] *Id.*
[33] *Id.*, ¶ 38.
[34] *ISP Remand Order*, ¶¶ 66, 67, 77, 78.

ISP-bound traffic is jurisdictionally interstate, as the call terminating to the internet could terminate in a different state or country.[35] In describing how ISP customers access the internet, the FCC noted that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."[36] The FCC described the historical nature of compensation for local and access, or toll traffic, explaining that it has treated ISP-bound traffic as if it were local through its decisions to exempt Enhance Service Providers, or ESPs, from payment of interstate access charges and other decisions governing access charges.[37] Qwest relies on this discussion in the *Declaratory Ruling*, describing the historical compensation scheme for local and exchange access traffic, as the basis for its argument that the FCC did not change the historical scheme in the *ISP Remand Order*.

32 After the D.C. Circuit Court vacated the *Declaratory Ruling* in the *Bell Atlantic* decision,[38] the FCC entered the *ISP Remand Order*. As described above, the FCC not only reevaluated the treatment of ISP-bound traffic, but also reconsidered its analysis of reciprocal compensation in the *First Report and Order*. The FCC determined that *all* telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, rejecting the notion that reciprocal compensation is limited to "local" traffic.[39] Although the D.C. Circuit rejected the FCC's findings concerning Section 251(g) as both Qwest and Pac-West argue, the court did not vacate the decision or rules for compensating ISP-bound traffic adopted in the *ISP Remand Order*.[40]

33 In addition, while the FCC described in the *ISP Remand Order* its analysis and decisions reached in the *Declaratory Ruling*, including the discussion of the nature

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[35] *Declaratory Ruling*, ¶¶ 13, 18.
[36] *Id.*, ¶ 4; *see also* ¶ 7.
[37] *Id.*, ¶¶ 5, 23. The FCC considers ISPs a subset of ESPs.
[38] *Bell Atlantic*, 206 F.3d 1.
[39] *ISP Remand Order*, ¶ 46.
[40] *WorldCom*, 288 F.3d at 430.

of ISP-bound traffic,[41] this discussion does not represent the FCC's decision in the *ISP Remand Order*. In the Order, the FCC described ISP-bound traffic as "traffic destined for an information service provider," and as "information access" traffic.[42] The FCC defines "'information access' ... to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[43] The FCC further held that "the definition does not require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic."[44]

34 The above summary of the FCC's discussion in the *ISP Remand Order* demonstrates that the FCC did not intend to limit ISP-bound traffic only to traffic originating and terminating in the same local calling area where the ISP server is located. In describing the nature of Internet-bound traffic in the *ISP Remand Order*, the FCC did not address where an ISP server or modem is located.[45] Thus, we reject Qwest's interpretation of the *ISP Remand Order*. Likewise, the FCC did not limit ISP-bound traffic only to traffic between parties whose numbers are assigned to the same calling area. Thus, we reject Pac-West's interpretation of the *ISP Remand Order* on this point as well. Our decision is consistent with the Commission's decision in arbitrating a recent agreement between Level 3 and CenturyTel,[46] and recent decisions by the District Courts of Connecticut and Vermont.[47] These decisions all find that the *ISP Remand Order* addresses *all* ISP-

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[41] *ISP Remand Order*, ¶¶ 9-13.
[42] *Id.*, ¶ 44.
[43] *Id.*
[44] *Id.*, n.82.
[45] *Id.*, ¶ 58; *see also* ¶ 61.
[46] *Level 3/CenturyTel Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 33-35 (Jan. 2, 2003) , *affirmed* Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043, ¶¶ 7-10 (Feb. 28, 2003).
[47] *Global Naps*, 327 F.Supp.2d 290, 300 (D. Vermont, 2004); *SNET v. MCI.*, 353 F.Supp.2d 287, 296-97, 299 (D. Conn. 2005), recons. denied, 359 F.Supp.2d 229 (D. Conn. 2005).

bound traffic, and that "[t]he FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area."[48]

35 In particular, the Vermont and Connecticut decisions identify that the FCC has preempted state commissions from determining the jurisdiction and compensation of ISP-bound traffic.[49] The FCC has established an interim compensation regime for ISP-bound traffic until it determines a different regime for intercarrier compensation.[50] States and carriers must abide by the FCC's interim compensation regime for ISP-bound traffic until the FCC adopts different rules. Thus, Qwest must compensate Pac-West for all ISP-bound traffic, including VNXX traffic, according to the rates, terms and conditions in the ISP Amendment to the parties' interconnection agreement, which adopts the *ISP Remand Order*.

b. Did the recommended decision err in determining the charges in dispute?

36 The recommended decision acknowledged that the parties are not in agreement on the amount that Qwest owes Pac-West, and recommended that the Commission use Pac-West's total of $637,389.90, which is based on spreadsheets provided by Qwest.[51] Qwest contends that the recommended decision erred by deciding a disputed issue of material fact without testimony or hearing.[52] Qwest claims that a substantial portion of the disputed amount is "due to a volume

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[48] *Global Naps*, 327 F.Supp.2d at 300; *see also SNET v. MCI*, 353 F.Supp.2d at 299; *SNET v. MCI*, 359 F.Supp.2d, 230-232; *Level 3/CenturyTel Arbitration*, Seventh Supplemental Order, ¶¶ 7-10.
[49] *Global Naps*, 327 F.Supp.2d, 300; *SNET v. MCI*, 353 F.Supp.2d, 295, 299; *SNET v. MCI*, 359 F.Supp.2d, 231.
[50] *ISP Remand Order*, ¶¶ 66, 67, 77, 78.
[51] Recommended Decision, ¶ 38.
[52] Qwest Exceptions, ¶ 98.

dispute regarding transiting traffic."[53] Qwest acknowledges that it was aware of the Pac-West figure at the outset of this case, but asserts that "it was not clear to Qwest that this material fact was in dispute until the briefs were filed."[54] Qwest argues that Pac-West has the burden of establishing that all of the disputed minutes are VNXX minutes, and that they are Qwest-originated traffic. Qwest maintains that the recommended decision erred in accepting Pac-West's figure.[55]

37 Pac-West responds that the recommended decision reached the only conclusion possible based on the record evidence.[56] Pac-West argues that Qwest had every opportunity to submit evidence to support its claim that a significant portion of the compensation that Qwest had been withholding since January 1, 2004, was attributable to some other dispute. Pac-West states that it presented evidence of the number of minutes of use and total compensation that Pac-West billed for the amount of traffic it received from Qwest over their interconnection facilities. Pac-West states that Qwest did not dispute this total.[57] Pac-West argues that "it was incumbent upon Qwest to produce evidence to prove that any subset of the traffic Qwest delivered to Pac-West should be excluded from the traffic for which Pac-West is entitled to compensation."[58]

38 **Commission decision.** We deny Qwest's exception and affirm the recommended decision on this issue. The recommended decision determined the amount owed based on spreadsheets provided by Qwest to Pac-West. Qwest had several opportunities to provide information about disputed amounts due to transit traffic, but did not. There is no apparent reason why this issue could not have been identified prior to the record closing and no persuasive reason to allow the record to be reopened at this late date. Accordingly, Qwest is required

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[53] *Id.*, ¶ 96.
[54] *Id.*, ¶ 100.
[55] *Id.*, ¶ 104.
[56] Pac-West Response, ¶32.
[57] *Id.*, ¶ 31.
[58] *Id.*

to pay Pac-West all compensation that it has withheld based on the evidence submitted by Pac-West.

c. Did the recommended decision err in not deciding Qwest's counterclaims?

39 The recommended decision acknowledged Qwest's counterclaims, but declined to address them, finding that Qwest's claims of violations of state and federal standards are matters outside the parties' interconnection agreement, that there are no laws to be violated, or that having held compensation is required for all ISP-bound traffic, including VNXX service, Qwest's counterclaims are resolved.[59]

40 Qwest contends that by not addressing its counterclaims, the recommended decision failed to decide all material issues of fact and law contrary to the requirements of RCW 34. 05.461(3).[60] According to Qwest, the three undecided counterclaims address two essential issues – whether VNXX is permissible at all (counterclaims 2 and 3) and whether VNXX traffic, if permitted, can be carried over LIS trunks (counterclaim 4).[61] Qwest claims that "[t]he issue of whether VNXX is permissible at all under state law and the parties' interconnection agreement is a necessary predicate to determining whether ISP-bound traffic must be compensated on a going forward basis under the interconnection agreement."[62]

41 Pac-West responds that the recommended decision properly disposes of Qwest's counterclaims. According to Pac-West, "Qwest's second counterclaim that 'VNXX' is unlawful under state law does not involve any provision of the parties' interconnection agreement, and Qwest has failed to identify any state

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[59] Recommended Decision, ¶ 40.
[60] Qwest Exceptions, ¶ 5.
[61] *Id.*, ¶ 8.
[62] *Id.*

law that Pac-West has violated."[63] "Qwest's third and fourth counterclaims arise out of language in the ICA[64] but essentially make the same contention that 'VNXX' is improper that the remainder of the decision rejects."[65]

42 **Commission decision.** We deny this exception and affirm the recommended decision on this issue. The only material issue in this proceeding is whether the parties' interconnection agreement requires Qwest to compensate Pac-West for the transport and termination of all ISP-bound traffic originated by Qwest, including VNXX traffic. The recommended decision interpreted the scope of "ISP-bound" traffic described by the FCC in the *ISP Remand Order* and concluded that ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.

43 Qwest's counterclaims are beyond the scope of this proceeding, where the issues are the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650.* Qwest has not met its burden to demonstrate that its counterclaims involve breach of provisions in the interconnection agreement. Moreover, Qwest's counterclaims address the use of VNXX service generally, not the specific issue of compensation for VNXX ISP-bound traffic. Should Qwest wish to pursue the broader issue of VNXX generally, it may file its own complaint about specific carriers and their behavior regarding intercarrier compensation methods.

II. FINDINGS OF FACT

44 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters and having stated findings and conclusions upon issues in dispute among the parties and the reasons and bases

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[63] Pac-West Response, ¶ 5.
[64] Interconnection agreement.
[65] Pac-West Response, ¶ 5.

for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by this reference.

45 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.

46 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

47 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.

48 (4) Pac-West is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.

49 (5) Pac-West and Qwest have negotiated an interconnection agreement that was approved by the Commission on February 14, 2001, in Docket No. UT-013009.

50 (6) Pac-West and Qwest executed an ISP Amendment to the interconnection agreement, incorporating the *ISP Remand Order*, that the Commission approved on March 12, 2003, in Docket No. UT-013009.

51 (7) In early 2004, Qwest began to withhold payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded the growth ceilings

for ISP-bound traffic described in section 3.2.2 of the ISP Amendment. This matter was ultimately decided by a private arbitrator who ruled in Pac-West's favor based on the FCC's *Core Forebearance Order*.

52 (8) In December 2004, Qwest notified Pac-West that Qwest intended to withhold compensation for alleged "VNXX" traffic retroactive to the beginning of 2004.

53 (9) In April 2005, Qwest notified Pac-West that Qwest had decided to withhold 68.3% of Pac-West's "billed ISP minutes" in Washington in the second quarter of 2005.

54 (10) Pac-West filed its Petition for Enforcement of Interconnection Agreement on June 9, 2005, alleging that Qwest refused to compensate Pac-West for all local and ISP-bound traffic, including calls from Qwest customers to an ISP that obtains foreign exchange service from Pac-West.

55 (11) Administrative Law Judge Karen M. Caillé entered her Recommended Decision, Order No. 03 in this proceeding, on August 23, 2005, recommending that Pac-West's petition for enforcement be granted and that Qwest be ordered to compensate Pac-West for transport and termination of all local and ISP-bound traffic originated by Qwest, including VNXX traffic.

56 (12) On September 9, 2005, Qwest filed Exceptions to the Recommended Decision. On September 30, 2005, Pac-West filed Response to Qwest's Exceptions to the Recommended Decision.

57 (13) Qwest seeks review of the following issues: (a) whether the decision properly interpreted the FCC's *ISP Remand Order*, (b) whether the decision erred in determining the amounts due Pac-West, and (c) whether the decision erred in not deciding Qwest's counterclaims.

58 (14) Based on our discussion herein, we affirm the recommended decision's factual determination that the amount owed to Pac-West is $637,389.90, based on the spreadsheets provided Pac-West by Qwest.

III. CONCLUSIONS OF LAW

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

60 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.

61 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunication Act of 1996 as the agency responsible for arbitrating, approving and enforcing interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.

62 (3) The FCC did not limit ISP-bound traffic in its *ISP Remand Order* to traffic originating and terminating in the same local calling area where the ISP server is located, or to traffic between parties whose numbers are assigned to the same calling area.

63 (4) The FCC has established a separate interim compensation regime for all ISP-bound traffic until the FCC finalizes the structure and rates for a new intercarrier compensation regime.

64 (5) Pursuant to the parties' interconnection agreement as modified by the ISP Amendment, which incorporates the *ISP Remand Order*, and specifically the FCC's description of "ISP-Bound" traffic, Pac-West is entitled to compensation from Qwest for transport and termination of all ISP-bound traffic originated by Qwest, including VNXX traffic, according to the rates, terms and conditions in the ISP Amendment.

65 (6) Pursuant to the *Core Forebearance Order* and the Private Arbitrator's decision Pac-West is entitled to compensation described in Conclusion (5) from January 1, 2004.

66 (7) Qwest owes Pac-West $637,389.90, based on spreadsheets provided by Qwest to Pac-West.

67 (8) Qwest's counterclaim requesting Pac-West be directed to follow the change of law procedures contained in the interconnection agreement to implement the *Core Forebearance Order* is denied.

68 (9) Qwest's counterclaim regarding VNXX compensation is denied as it is resolved by Conclusion (5).

69 (10) Qwest's counterclaims regarding VNXX in general are denied as they are beyond the scope of this proceeding and not material to the interpretation and enforcement of the interconnection agreement. *WAC 480-07-650.*

IV. ORDER

THE COMMISSION ORDERS:

70 (1) Qwest's exceptions to the Recommended Decision are denied.

71 (2) The Recommended Decision is affirmed as clarified herein.

DATED at Olympia, Washington, and effective this 10th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

ATTACHMENT 2 — **Email from Dave Booth, Oregon PUC to Jeff Martin, Universal Telecom., dated September 17, 2004.**

From: BOOTH Dave [mailto:dave.booth@state.or.us]
Sent: Friday, September 17, 2004 4:57 PM
To: 'Jeff Martin'
Subject: RE: UM 1058

I think that's a fair summary of where are right now.

-----Original Message-----
From: Jeff Martin [mailto:martinj@uspops.com]
Sent: Friday, September 17, 2004 4:15 PM
To: Dave.Booth@State.Or.Us
Subject: UM 1058

Dave –

Thank you for taking the time to discuss the UM 1058 ruling.

As I understand it the OR PUC had decided that they do not have jurisdiction on Internet traffic and all other voice "VNXX" should comply with the existing rules. The Commission would be open to hearing specific complaints about violations but the Internet issue remains outside of their jurisdiction.

Thanks for the clarification

Jeff Martin

CERTIFICATE OF SERVICE

I, Gina Lee, hereby certify that on 13th day of February 2006, I caused copies of Comments of Universal Telecom, Inc. to the Arbitrator's Decision to be sent by first class mail to the following parties:

Department of Commerce
Attn: Linda Chavez
85 Seventh Place East
Suite 500
St. Paul, MN 55101-2198

Kenneth Kohnstamm
Attorney Generals Office
102 State Capitol
St. Paul, MN 55155

Carrie Cox
Charter Communications
12405 Powerscourt Drive
St. Louis, MO 63131

David C. Schroeder
Ace Communications Group
207 East Cedar
P.O. Box 360
Houston, MN 55943-0360

Cynthia Sweet
Ace Communications Group
207 East Cedar
P.O. Box 360
Houston, MN 55943-0360

Gina Lee