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VIA EMAIL (E-Filing) AND U. S. MAIL

September 9, 2005

Ms. Frances. Nichols-Anglin
Administrative Assistant
Administrative Hearings Division
Oregon Public Utility Commission
P. O. Box 2148
Salem, OR 97308-2148

Re: IC 12 (Qwest v. Level 3)- Qwest's Reply to Level 3's Objections to ALJ Ruling

Dear Ms. Nichols-Anglin:

Enclosed with the hard copy of this letter is the original and five copies of Qwest Corporation's Reply to Level 3's Objections to ALJ Ruling that Compensation For VNXX-Routed Traffic is Not Authorized under the Parties' Interconnection Agreement. We have also E-filed the reply this afternoon.

If you have any questions regarding this matter, please feel free to call Carla Butler or me at your convenience. Thank you for your attention to this matter.

Very truly yours,

Alex M. Duarte

cc: Service list (electronically only)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 12

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, Defendant.	QWEST CORPORATION'S REPLY TO LEVEL 3'S OBJECTIONS TO ALJ RULING THAT COMPENSATION FOR VNXX-ROUTED TRAFFIC IS NOT AUTHORIZED UNDER THE PARTIES' INTERCONNECTION AGREEMENT

Pursuant to Administrative Law Judge Samuel Petrillo's August 16, 2005 Ruling: Compensation for VNXX-routed Traffic is Not Authorized under the Parties' Interconnection Agreement ("ALJ Ruling"), which ruling Judge Petrillo automatically certified to the Commission, complainant Qwest Corporation ("Qwest") hereby respectfully replies to the August 30, 2005 objections to the ALJ Ruling that respondent Level 3 Communications, LLC ("Level 3") filed on August 30, 2005 ("Level 3 Objections"). For the reasons set forth below, and in Qwest's July 18, 2005 brief on the issue of the meaning of "ISP-bound traffic" as that term is used in the FCC's ISP Remand Order, Qwest respectfully submits that the ALJ Ruling is correct, and therefore does not err, in ruling that the ISP Remand Order limits the term "ISP-bound traffic" to traffic that is originated and terminated in the same local calling area (LCA). As such, the ALJ correctly rules that Level 3 is not entitled to compensation for VNXX-routed traffic (which, by definition, does not originate and terminate in the same LCA). As Qwest has shown, and as the ALJ Ruling correctly notes, the ISP Remand Order defines ISP-bound traffic to encompass only those situations in which both the customer initiating an Internet call and the ISP equipment (modems, servers, and routers) to which that call is directed (and which controls the end user customer's interaction with the Internet) are located in the same local calling area. Accordingly, Qwest respectfully submits that the Commission should affirm the ALJ Ruling in its entirety, and should deny all relief that Level 3 seeks in its August 30th objections.

ARGUMENT

I. THE ALJ RULING DID NOT ERR IN RULING THAT THE ISP REMAND ORDER DOES NOT APPLY TO VNXX-ROUTED TRAFFIC THAT IS ULTIMATELY DESTINED FOR AN INTERNET SERVICE PROVIDER (ISP)[1]

A. The ISP Remand Order limits the term "ISP-bound traffic" to traffic that originates and terminates within the same local calling area

Preliminarily, Level 3 argues that the ALJ Ruling incorrectly concluded that "the FCC did not mean that it was addressing all traffic delivered to ISPs, but only 'local' traffic delivered to ISPs" in the FCC's ISP Remand Order. (Level 3 Objections, p. 8 (emphasis in original).)[2] Level 3, however, not only mischaracterizes the ALJ Ruling, and thus fails to cite to any part of the ALJ Ruling for its argument, but it essentially complains that the ALJ Ruling somehow fails to prove a negative.

As the ALJ Ruling correctly notes, Level 3 persists with its attempt to "confuse[] the FCC's description of how ISP-bound traffic is provisioned with the agency's conclusions regarding how the traffic should be treated for reciprocal compensation and jurisdictional

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[1] At the outset, Qwest notes that Level 3 includes an "introduction," which includes some policy arguments (Level 3 Objections, pp. 1-2), and a "legal background" (id., pp. 2-8). Qwest does not necessarily agree with Level 3's recitation of the legal background, much of which is selective in nature. Qwest asserts that the ALJ Ruling already has a very detailed and balanced analysis of the legal background regarding these issues. See ALJ Ruling, pp. 2-6; see also pp. 6-9. Thus, Qwest will not specifically respond to these sections, but generally addresses these issues in its specific reply to Level 3's two main arguments and its various sub-arguments.

In addition, with respect to the policy issues, Qwest does not believe they are necessarily pertinent here. Nevertheless, to the extent policy arguments are relevant here, Qwest notes that the public policy considerations favor Qwest's position. As Qwest has noted, sound public policy counsels against permitting Level 3 to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is acting as a customer of the ISP on Level 3's network. If Level 3 were allowed to collect intercarrier compensation for traffic that is properly considered to be Level 3's own toll traffic, the end result is regulatory arbitrage, from which Level 3 would profit at Qwest's expense. If permitted to get away with these arbitrage schemes, Level 3 would collect revenue primarily from other carriers, rather than from its own customers. Such a result would create incentives for inefficient entry of LECs intent on serving ISPs exclusively, and not offering viable local telephone competition, as Congress had intended in the 1996 Telecommunications Act. Moreover, the large one-way flows of cash would make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. See e.g., ISP Remand Order, ¶¶ 70-71, 74-76. In the ISP Remand Order, the FCC sought to curtail these market-distorting incentives, and not to expand them. Id., ¶¶ 4-7. Indeed, these policy issues are in part what has driven the FCC's (and this Commission's) decisions on ISP-bound and VNXX-routed traffic issues.

[2] Order on Remand, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCCR 9151 (2001) ("ISP Remand Order").

purposes." Compare e.g., ALJ Ruling, at p. 9, and its citation to the Ninth Circuit decision in the Pacific Bell case (fn. 32), with Level 3's arguments at pp. 8-9, 11-12. Thus, Level 3 throughout its objections continues to discuss "local" ISP traffic, and the FCC's "repudiation" of the "local" label, instead of what is really the issue here, which is whether traffic that does not originate and terminate in the same LCA and that is destined for an ISP (i.e., VNXX-routed traffic) is entitled to the ISP Remand Order compensation rate of $0.0007 per minute of use. As the ALJ Ruling correctly notes, and as Level 3 conveniently (once again) ignores, "the FCC's decision to abandon its attempt to categorize ISP-bound traffic as local or long distance for purposes of determining whether reciprocal compensation is due under §251(b)(5), is unrelated to its long-standing definition of ISP-bound traffic." ALJ Ruling, p. 9.[3] Thus, there is simply no merit to Level 3's suggestion that the ALJ Ruling "insert[ed] language into the FCC's ISP Remand Order that simply is not there." (Level 3 Objections, p. 9.)

In addition, Level 3's argument that the ISP Remand Order applies to all ISP traffic (regardless of where the traffic originates and terminates) is, in effect, a claim that the FCC intended in the ISP Remand Order to preempt state commissions with respect to intrastate access charges by requiring them to treat all ISP traffic under the compensation regime of the ISP Remand Order. To reach that conclusion, however, Level 3 is compelled to engage in a tortuous analysis that ignores the explicit language of the order itself, not to mention the language of two federal appellate court

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[3] The ALJ Ruling correctly noted the FCC's consistent recognition and understanding of ISP-bound traffic being originated and terminated in the same LCA in determining whether ISP-bound traffic should be eligible for reciprocal compensation. ALJ Ruling, p. 9, fn. 33 (citing to the ISP Remand Order, ¶¶ 9-16); see also, specifically, ISP Remand Order, ¶¶ 4, 10, 12, 13, 22.) As the ALJ Ruling succinctly notes: "The [FCC] decision to abandon the end-to-end analysis [from the FCC's previous ISP Declaratory Ruling] in the ISP Remand Order did not, however, alter the FCC's understanding of how ISP-bound traffic is provisioned." Id. The ALJ also correctly noted that the Ninth Circuit has recognized the distinction "between the jurisdictional analysis of what constitutes 'intrastate' or 'interstate' traffic, and the analysis of what constitutes 'local' or 'interexchange' traffic for the purposes of reciprocal compensation." See ALJ Ruling, p. 9, fn. 32 (citing to Pacific Bell v. Pac-West Telecom, Inc., 325 F.3d 1114, 1126 (9th Cir. 2003)).

decisions by the D.C. Circuit (WorldCom and Bell Atlantic) that defined the issue before the FCC as whether "local" ISP traffic is subject to the interim regime of the ISP Remand Order.

Indeed, completely absent from that analysis is any explicit FCC statement that it was broadening the scope of its inquiry in such a significant manner. To suggest that this was the FCC's implicit intent would require one to ignore the manner in which the FCC normally preempts state authority on an issue as significant as intercarrier compensation. Typically, when the FCC has preempted state commission authority on an issue, it has been very explicit that (1) it is preempting state action, (2) it is clearly defining the extent of the preemption, and (3) it is engaging in a step-by-step basis for the preemption. The FCC did none of those things in the ISP Remand Order.[4]

B. <u>The Connecticut and Illinois opinions are not precedent and are unpersuasive</u>

Level 3 makes much ado about two almost half-year-old opinions by federal district court judges in Connecticut (Southern New England Tel. Co. v. MCI WorldCom Communications, Inc., 329 F.Supp.2d 229 (D. Conn. 2005) ("SNET")) and Illinois (AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Company, USDC, D. Ill., Case No 04 C 1768, slip op. (March 25, 2005) ("AT&T")). However, neither Connecticut nor Illinois is in the Ninth Circuit, which has ruled on this issue consistently with the ALJ Ruling, as has a federal court in Oregon. Accordingly, it goes without saying that the Connecticut and Illinois judges' opinions are not precedent.

Moreover, for the reasons set forth below, these two judges simply got it wrong, and the opinions represent a demonstrably erroneous reading of the ISP Remand Order and the D.C.

[4] In other words, on an issue that the FCC perceived to be very important, it did not just casually preempt a state commission; instead, it engaged in a disciplined and detailed analysis that led to an explicit decision on the issue. To suggest that in the ISP Remand Order the FCC preempted state commissions on the breadth of the compensation regime that it was imposing on ISP-bound traffic, particularly in light of statements within the order itself suggesting its scope was ISP-bound traffic originated and terminated within the same local calling area (not to mention the D. C. Circuit decision on appeal that the issue before the FCC was ISP traffic within the same local calling area), is completely inconsistent with the process that the FCC follows. It is simply perplexing to suggest that the FCC, which is a very deliberate body with orders that often number hundreds (and even thousands) of paragraphs and pages, would somehow preempt the existing intrastate access charge regime without so much as a discussion of the preemption concept, let alone a clear statement of the parameters of its decision. That makes absolutely no sense.

Circuit's decisions in WorldCom (WorldCom v. FCC, 288 F.3d 429, 430 (D.C. Cir. 2002)) and Bell Atlantic (Bell Atlantic Telephone Companies v. FCC, 206 F.3d. 1, 2 (D.C. Cir. 2000)), which decisions are binding under the Hobbs Act.[5] Indeed, Level 3 ignored the express language in WorldCom. Finally, Qwest finds it rather odd that Level 3 did not cite to these two out-of-state district court opinions in its August 16th brief given that it was (or could have been) aware of these March 2005 opinions when it filed its initial brief. This was so despite that Level 3 now argues this opinion "recently addressed the precise issue." (Level 3 Objections, p. 9 (emphasis added).)

1. The SNET opinion ignores the express WorldCom language

The most fundamental error in the SNET opinion is the cavalier manner in which the court pays lip service to, but in reality ignores, the WorldCom court's conclusion that the ISP Remand Order "held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area." 288 F.3d at 430. SBC had argued that that language defined the breadth of the ISP Remand Order. In response, the SNET judge quoted the foregoing language but, without saying so, substituted his own judgment for that of the D. C. Circuit. The SNET judge's ultimate conclusion directly contradicts the D.C. Circuit's WorldCom description of the issue decided in the ISP Remand Order.

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[5] Under the Hobbs Act, the federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here. Thus, the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders.

Further, as state entities implementing a federal act, state commissions must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act. See 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n, 827 F.2d 1264, 1266 (9th Cir. 1987); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984) vacated on other grounds, 476 U.S. 1167 (1986); Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n, 812 F. Supp. 706, 708 (W.D. Tex. 1993). Thus, this Commission, the courts, and the parties in this case are bound by the WorldCom court's characterization of the breadth of the ISP Remand Order.

The SNET judge's alternative analysis begins with his agreement that the FCC "began by addressing" the question whether ISP-bound traffic that would typically be referred to as "local" was subject to reciprocal compensation. 359 F.Supp.3d at 231. However, the judge concluded that "these statements, taken by themselves, do not reveal how the FCC proceeded to answer the question." Id. at 231-232. The SNET judge stated (id. at 232) that the FCC did the following in the ISP Remand Order to answer the question:

- disclaimed the use of the term "local;"
- held that all traffic is subject to reciprocal compensation unless exempted;
- held that all ISP traffic is exempted from reciprocal compensation because it is "information access;"
- held that all ISP traffic is subject to FCC jurisdiction under section 201; and
- proceeded to set the compensation rates for all ISP traffic.

Thus, the SNET judge concluded that, even though the FCC started with the question whether local ISP traffic is subject to reciprocal compensation, it answered the question "no" on the ground that all ISP traffic is in a category by itself. Id.

As will be discussed below, the SNET judge misunderstands the ISP Remand Order's decision not to use the term "local" in its analysis. It is true, of course, that the FCC did some of the things listed above. That, however, does not explain, nor even address, the WorldCom language, which cannot be read consistently with the SNET judge's conclusion that the ISP Remand Order really addresses all ISP traffic, regardless of the origination and termination points of a call. The SNET judge's attempt to justify his conclusion by stating that the FCC "began" with the question of local ISP traffic, but then expanded its decision to cover all ISP traffic, is clearly odd. This is particularly so given the fact that the D.C. Circuit's characterization of the issue in WorldCom does not describe the "beginning" of the process, but explicitly describes the end of the process (i.e., it does not purport to be a description of the

initial issue being considered in the ISP Declaratory Order;[6] rather, the language specifically describes the holding of the ISP Remand Order). There is simply no way to reconcile the SNET judge's conclusion with the WorldCom language.

2. The SNET opinion misconstrues the FCC's decision not to rely on the word "local" in its analysis

Another fundamental error of the SNET opinion is the mischaracterization of the FCC's decision not to use of the term "local" in its ISP Remand Order analysis. The SNET judge characterized this as the FCC's "express disavow[al of] the term 'local.'" 359 F.Supp.2d at 231. That is not what the FCC did in the ISP Remand Order, however. In the ISP Remand Order, the FCC was responding to the D.C. Circuit's decision in Bell Atlantic, which had criticized the FCC's use of the local/long distance distinction in the ISP Declaratory Order. Thus, in paragraph 34, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)." ISP Remand Order, ¶ 34.

The SNET opinion's error is that it leaps from this statement to the conclusion that by not using the term "local," the FCC was completely abandoning the historical distinction between calling within a LCA and interexchange (toll) calling. Far from it, the FCC was simply shifting its analysis for "local," a term not statutorily defined, to statutory terms, in this case the phrase "information access" in section 251(g). Thus, the SNET opinion transforms the FCC's shift to an emphasis of defined terms into a complete abandonment of all distinctions between local and interexchange calling. Instead of analyzing the subtle shift that actually took place, the Connecticut judge leaped to this conclusion: "Put simply, the language of the ISP Remand Order is

[6] Declaratory Ruling, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd. 3689 (February 26, 1999) ("ISP Declaratory Order").

unambiguous—the FCC concluded that section 201 gave it jurisdiction over all ISP traffic, and proceeded to set the intercarrier compensation rates for such traffic." 359 F.Supp.2d at 231. There is nothing, however, to suggest the FCC completely abandoned the concept of local service, nor does the Act. Instead, as it clearly stated, the FCC based the ISP Remand Order on statutorily-defined terms, in this case focusing on the "information access" category as the rationale for its decision to develop a separate compensation regime for ISP traffic that originates and terminates within the same local calling area.

It is also critical to note that, while focusing its decision on the "information access" category of section 251(g), the ISP Remand Order did not address whether other categories in section 251(g), specifically the "exchange access" category, would justify its decision. In remanding, but not vacating, the ISP Remand Order, the WorldCom court made it completely clear that it was not ruling on whether reliance by the FCC on the "exchange access" category could serve as justification for the decision.[7] If, for example, the FCC were to rely on the "exchange access" category, and the court were to uphold it, such a decision would have the effect of explicitly continuing the distinction between local and interexchange traffic, but would instead rely on statutorily-defined terms.

3. The "exchange access" category could easily justify the ISP Remand Order's decision to limit its scope to ISP traffic that is within an LCA

The SNET opinion likewise ignores paragraph 42 of the ISP Remand Order: "[W]e conclude that this traffic, at a minimum, falls under the rubric of 'information access,' a legacy term imported into the 1996 Act from the MFJ, but not expressly in the Communications Act." Thus, given the WorldCom court's refusal to decide whether ISP traffic falls in the "exchange access" category, which is "the offering of access to telephone exchange services or facilities for

[7] See WorldCom, supra, 288 F.3d 434 ("[W]e do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act), . . . or neither, or whether those terms cover the universe to which such calls might belong").

the purpose of the origination or termination of telephone toll services," the FCC could very well rule that VNXX thus falls directly into the "exchange access" category of 251(g), and therefore is not subject to reciprocal or compensation under the current version of FCC Rule 51.701(b) (which limits reciprocal compensation to "telecommunication traffic," and which is defined to exclude "interstate and intrastate exchange access)". In stating that it was not deciding the "scope of 'telecommunications' covered by section 251(b)(5)" (288 F.3d at 434), the WorldCom court did not overturn Rule 701(b). In a post-ISP Remand Order, the FCC Wireline Competition Bureau, sitting in place of the Virginia Commission, stated that "[t]elecommunications traffic excludes, inter alia, 'traffic that is interstate or intrastate exchange access" (citing Rule 701(b) and noting that it had not been overturned).[8] The point here is that, in the event the FCC were to find that VNXX traffic falls into the "exchange access" category, such a ruling would plainly justify the creation of a distinction between local and non-local ISP traffic.

4. The SNET opinion ignores references in the ISP Remand Order to the FCC's desire not to interfere with existing access charge mechanisms

In SNET, the ILEC correctly argued (citing paragraph 37, footnote 66) that the ISP Remand Order discloses the FCC's intent not to require that ISP traffic already subject to a compensation regime other than reciprocal compensation (i.e., access charges) be subject to the interim regime.[9] The SNET opinion dismissed this argument, however, stating instead that the quoted language only indicates that the FCC did not want to disturb its regulation of access charges. That, of course, is a misreading, since the quoted language also made it clear that the

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[8] Memorandum Opinion and Order, Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al., CC Dkt. Nos. 00-218, 00-249, & 00-251, DA 02-1731 (Wireline Competition Bureau, rel. July 17, 2002) ("Virginia Arbitration Order"), ¶ 549.

[9] SNET, supra, 359 F.Supp.2d at 232. Footnote 66 of the ISP Remand Order states: "[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about effects on analogous intrastate mechanisms'" (quoting Local Competition Order, 11 FCC Rcd at 15869).

FCC did not want to interfere with intrastate access charges either. If that were not enough, the judge's conclusion demonstrates the apparently results-oriented desire to sweep non-local ISP calls into the ISP Remand Order:

> . . . this quotation [footnote 66] only indicates the FCC's view that Congress did not want to disturb the FCC's regulation of access charges. It does not support the conclusion that the FCC did not want its own regulations to affect calls that are subject to the access charge regime. Even if it did support such a conclusion, it is not clear that a general indication of an agency's intent could override the clear language of the agency's order." 359 F.Supp.2d at 232.

In other words, while acknowledging that the FCC intended to avoid creating impacts on access charges, the SNET judge reached the conclusion that the FCC really must have actually intended to create such impacts because it requires, under the literal terms of the order, that all ISP traffic be subject to the order. One can only ask why, if that were truly the FCC's intent, it would have gone to the trouble to describe the fact that it did not intend to create such impacts. Rather than the SNET opinion's strained and illogical reading of the ISP Remand Order, the only way to rationalize footnote 66 with the holding is to conclude, as the WorldCom court did, that the order applies only to ISP traffic that originates and terminates within the same LCA.

It is also worth noting that footnote 66 is not the only part of the ISP Remand Order that the SNET judge had to ignore in order to reach his conclusion. There are several others, not the least of which are the last two sentences of paragraph 37, where the FCC, referring to the three traffic categories of section 251(g) (which the FCC characterized as having one thing in common: "they are all access services or services associated with access"), stated: "It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such traffic from the purview of section 251(b)(5)." ISP Remand Order, ¶ 37.

Other portions of the ISP Remand Order track the principles stated in paragraph 37 and footnote 66. These too were ignored by the SNET opinion. The ISP Remand Order states:

> Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g). These services remain subject to [FCC] jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions). This analysis properly applies to the access services that incumbent LECs provide . . . to connect subscribers with the ISPs for Internet-bound traffic. ISP Remand Order, ¶ 39.

Further still, footnote 70 of the order states: "We believe that the most reasonable interpretation of that sentence [the first sentence of section 251(g)], in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated categories of carriers, rather than requiring disparate treatment . . . ." ISP Remand Order, fn. 70.

In light of this language which clearly states the FCC's intent not to alter pre-existing access charge mechanisms, one can only ask why, if the FCC had intended such language to be meaningless in the ISP Remand Order, it would have bothered to include it. If the FCC had intended the FCC to include all ISP traffic (regardless of such traffic's origination and termination points), it could have simply said so, instead of including so much discussion in the order that leads to the direct opposite conclusion.

5. The SNET opinion demonstrates a fundamental misunderstanding of intercarrier compensation regimes

Perhaps the SNET judge's most telling statement is his response to the ILEC's argument that, if the ISP Remand Order were to apply to all ISP traffic, the result would be the elimination of access charges on that traffic and the opportunity for far greater arbitrage opportunities (which, after all, was the primary reason for the FCC's decision to phase out terminating compensation on ISP traffic in the first place). In response, the SNET judge stated:

> Assuming, without deciding, that SBC is correct that application of the ISP Remand Order to all ISP-bound traffic will result in a change of the access charges applicable to such calls and that such a change would give rise to arbitrage opportunity, that is not a sufficient reason to amend the Decision. This court must apply the clear language of an FCC order, even if the result of that application might be harm to certain elements of the telecommunications industry. 359 F.Supp.3d at 232-233.

The irony of this statement is the incongruity that the judge acknowledges would not exist if he were simply to apply the ISP Remand Order with the proper definition of ISP traffic.[10]

6. Level 3's reliance on the Illinois AT&T opinion is also misplaced

Level 3 also cites the AT&T federal court opinion in Illinois for the proposition that "the ISP Remand Order requires that the rate charged for all ISP-bound traffic, whether VNXX traffic or otherwise, must be the same as for traffic under Section 251(b)(5)." (Level 3 Objections, p. 12.) Then, in a footnote, Level 3 states that in the AT&T case, "the court referred to VNXX traffic as 'ISP-bound FX [foreign exchange] service.'" (Id., p. 12, fn. 43.)

Qwest acknowledges that the term "ISP bound FX traffic" (as used in the Illinois opinion) refers to "long-distance traffic that uses a virtual number so the party making the call is not charged a toll" (which sounds very much like VNXX), and, at least implicitly, that the Illinois judge ruled that ISP-bound FX is subject to the $.0007 ISP Remand Order rate. However, the judge there never explicitly addressed the question of the breadth of the ISP Remand Order, and thus it is a far leap for Level 3 to argue or imply that the judge made a conscious decision on this issue. The judge did use the generic term "ISP-bound traffic," but he did not (as far as can be seen) ever explicitly state how broadly he was construing that term. In the ISP Remand Order, the FCC likewise used the same term, but in context, and as explained in the D.C. Circuit decision in WorldCom, the FCC's use of the term was limited only to ISP traffic that originated and terminated in the same LCA.

Level 3 also states that "the court [in AT&T] could not have reached this determination without also concluding that the ISP Remand Order applies to all ISP-bound traffic, specifically

[10] Finally, in a footnote to the quoted language, the SNET judge demonstrates a near-total lack of understanding of the telecommunications industry and the compensation mechanisms that govern it:

> I confess that I am not sure why SBC believes the ISP Remand Order would relieve ISPs of the obligation to pay access charges. . . . The order imposes a cap on compensation; it does not eliminate compensation. 359 F.Supp.2d at 233, fn. 3.

To the extent the judge believes that access charges and terminating compensation can simultaneously apply to traffic, the judge is hypothesizing an incredible result.

including VNXX." (Level 3 Objections, p. 12.) That may or may not appear to be an underlying assumption of the opinion, but since the judge never explicitly addressed the question of the breadth of the ISP Remand Order, it is impossible to conclude that this was the result of a conscious decision to do so. Moreover, one cannot know how the parties briefed the case, but it certainly does not appear that the "breadth" issue was ever explicitly raised. In other words, the premise of the AT&T opinion may have simply been a given that was not specifically briefed, but when examined, as the ALJ Ruling here did (particularly in light of the WorldCom characterization of the issue decided in the ISP Remand Order), it is clear that the ALJ Ruling is the most consistent with the ISP Remand Order. Given that the D.C. Circuit in WorldCom is the reviewing court of FCC decisions under the Hobbs Act, the D.C. Circuit's conclusion that the only issue decided related to ISP traffic within the same local calling area is not only correct, but it is also binding. (See fn. 4.)

C. The other states' decisions are irrelevant given the precedent in the Ninth Circuit and in Oregon

Level 3 also relies on several other decisions from Washington, New Hampshire, as well as the FCC's purported silence on VNXX issues in other rulings (like its Intercarrier Compensation NPRM,[11] the Core Forbearance Order,[12] and the Wireline Competition Bureau's Virginia Arbitration Order). (See Level 3 Objections, pp. 12-15.) These decisions likewise are not precedent and are not persuasive, or, in the case of the FCC orders that Level 3 cites, are simply not on point or are attempts to make Qwest proof a negative.

Likewise, the Core Forbearance Order (see Level 3 Objections, p. 13) does not change anything. That order dealt with the application of the ISP Remand Order, and specifically addressed whether certain provisions in the ISP Remand Order should continue to apply to ISPs.

[11] In the Matter of Developing A Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM").

[12] Order, Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order, Order FCC 04-241 WC Docket No. 03-171 (rel. October 18, 2004) ("Core Forbearance Order").

Because the ISP Remand Order did not address non-local ISP traffic, the Core Order did not address the issue either. The ALJ Ruling therefore correctly noted that "there is nothing in the Core Communications Order that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic." ALJ Ruling, p. 11. The ALJ Ruling also correctly agreed with Qwest that "it would be highly unusual for the FCC to invoke a policy that would impact state authority (i.e., regulation of intrastate access charges) without making some mention of that fact." Id., pp. 11-12.[13]

Further still, Level 3's reliance on the FCC Wireline Competition Bureau's Virginia Arbitration Order is equally misplaced. In its Objections, Level 3 argues that the Bureau never gave any indication that the scope of the ISP Remand Order extended only to "local" ISP calls, rather than all ISP calls regardless of where the call originated and terminated. (Level 3 Objections, p. 13.) A complete reading of the referenced discussion, however, reveals that the issue before the Bureau was whether it could determine the rates that CLECs charged for transporting Verizon's telecommunications traffic on CLEC-provided transport facilities. Although the issue before the Bureau dealt principally with the issue of a CLEC's chosen Point of Interconnection (POI), the Bureau recognized that "Verizon raised serious concerns about the apportionment of costs caused by competitive LECs' choice of points of interconnection," but determined that it did not have authority to determine CLEC rates sitting as an arbitrator on behalf of the Virginia Corporation Commission. In short, the proposition that Level 3 argues has nothing to do with the issue in dispute here. In fact, Level 3 ignores the only relevant portion of the Virginia Arbitration Order, the FCC's statement "that ISP-bound traffic is not subject to [reciprocal compensation under] section 251(b)(5)." Virginia Arbitration Order, ¶¶ 245, 256.

[13] As Qwest notes (see pp. 4-5 and fn. 4, supra), it would not be reasonable to argue that the FCC would make such a significant decision without a disciplined and detailed analysis that led to an explicit decision on the issue.

Finally, the other state commission decisions that Level 3 cites (Level 3 Objections, pp. 14-14) are either not final (as in Washington, where full Commission decisions and consolidation are being sought), and where Level 3 itself seeks a reversal of the interlocutory ruling affecting it, or they are simply outlier cases. There are numerous state commission decisions throughout the country that are far better reasoned and that hold that VNXX schemes are not subject to reciprocal compensation or the ISP Remand Order compensation rate.[14]

D. The Ninth Circuit Pacific Bell and the Oregon Universal, Level 3 and GTE/ELI decisions apply

Level 3 conveniently argues that the Oregon district court's decisions in Qwest Corporation v. Universal Telecom, Inc., Civil No. 04-6047-A. (2004), and its appeal of the previous Level 3/Qwest arbitration (Level 3 Communications v. Pub. Util. Comm'n of Oregon, Docket No. CV 01-1818-PA (Nov. 22, 2002)), do not "compel a contrary conclusion" (contrary to the SNET and AT&T and similar opinions), and that these decisions do "not provide any support for the [ALJ Ruling]". (Level 3's Objections, pp. 15-16.) Level 3 is simply wrong, however. Level 3 also ignores (indeed, it never once mentions) the Ninth Circuit decision in the Pacific Bell case, and it fails to discuss (other than a grudging passage in an early footnote) the Commission's VNXX traffic decision (Order No. 04-504) in docket UM 1058, which was specifically its generic proceeding about VNXX schemes. In short, Level 3's arguments are without merit, and its ignoring of this Oregon and Ninth Circuit precedent (or, in the case of Universal and the Level 3 decision, its attempts to distinguish them) is fatal to its case.

For example, in Pacific Bell, which was issued after the D.C. Circuit decision in WorldCom, the Ninth Circuit questioned whether the reciprocal compensation requirements of section 251(b)(5)

[14] See e.g., In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a SBC Indiana, Cause No. 42663 INT-01, at 81 (Ind. Util. Reg. Comm'n, December 22, 2004); Arbitrator's Order No. 10, Re Level 3 Communications, LLC, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, ¶ 271 (Kan. SCC, February 7, 2005).

apply to all respondent, and whether ISP traffic qualifies as "telecommunications." Thus, the Ninth Circuit stated that "[b]ecause the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of § 251, the [California Commission's] decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with §251." See 325 F.3d at 1130; see also ALJ Ruling, p. 10, fn. 38.

In Oregon, the court in Universal was emphatic that VNXX is, by definition, not local traffic because it originates and terminates in different local calling areas. Specifically, the court ruled:

> VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. See Universal, mimeo at 24; see also ALJ Ruling, p. 10, fn. 38.

Thus, what is important here is that the Oregon court recognized that, by definition, VNXX-routed traffic (whether destined for an ISP or a voice call destined to a calling center or any other recipient) is not a local call. As the Universal court held, VNXX traffic is not local "whether it was ISP-bound or not." See Universal, mimeo at 24; see also ALJ Ruling, p. 10, fn. 38. As the ALJ Ruling noted,"[t]he WorldCom, PacBell and Universal decisions disclose that there remains considerable uncertainty regarding the future application of the 'local v.. interstate' analysis, as well as the scope of 'telecommunications' under §251(b)(5) of the Act." ALJ Ruling, p. 10, fn. 38.

Finally, the same holds true for the federal court decision in Level 3's appeal of the Commission's Order Nos. 01-809 and 01-968 in docket ARB 332, an interconnection arbitration between Qwest and Level 3. Although the issue there involved reciprocal compensation rules for the cost of interconnection trunks and facilities, nevertheless, the court cogently discussed the arbitrage problems with ISP traffic ("who pays for it"), stating as follows:

> But, there is a catch. Most of Level 3's customers are Internet Service Providers (ISPs), which act as gateways to the Internet. ISPs receive vast quantities of incoming local calls from persons trying to access the Internet, but ISPs make few (if any) outgoing local calls. As a result, telephone traffic flows almost exclusively one-way. Qwest customers are expected to place many calls to Level 3 customers, but very little traffic will flow in the opposite direction. If the cost of the equipment at issue is allocated based

> on the relative percentage of calls originated on each network, then Qwest will have to pay virtually the entire cost. Opinion and Order, p. 6.

Thus, although the Level 3 court was addressing the relative use of interconnection facilities, the analysis is similar, especially since it affirmed the Commission's decision in Order No. 01-801, in which the Commission quoted the Arbitrator's Decision as follows:

> The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes of use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the ISP Remand Order is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensation interconnecting carriers transporting Internet-related traffic. Order No. 01-809, p. 4, fn. 3, quoting from Arbitrator's Decision, p. 8. (Emphasis added.)[15]

Finally, Level 3 completely ignores the Commission's decision in the GTE/ELI arbitration (docket ARB 91) in 1999 (GTE/ELI Decision).[16] As Qwest noted in its July 18, 2005 brief, the Commission ruled that the terminating end of an ISP call for reciprocal compensation purposes is where the ISP modems are located.[17] The Commission agreed with the Arbitrator's

[15] The Arbitrator had found that it is the FCC's interpretation of sections 251(b)(5) and 251(g) that largely governed the result reached on this issue. Arbitrator's Decision, p. 7. He went on to quote from the FCC's ISP Remand Order (paragraphs 21 and 23), in which the FCC discussed the distortions of traditional traffic assumptions, regulatory arbitrage and uneconomic results as a result of Internet usage, and concluded that ISP-bound traffic is not subject to reciprocal compensation. Id., pp. 7-8. Thus, the Arbitrator concluded that the language that Qwest had proffered most closely reflected "the policies of both the FCC and the Commission by removing the incentives for uneconomic behavior in the provision of telecommunications services to Internet Service Providers." Id., p. 9.

[16] Commission Decision, In the Matter of the Petition ofElectric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996, Order No. 99-218, docket ARB 91 (March 17, 1999) ("GTE/ELI Decision").

[17] In that arbitration, the ILEC (GTE) relied on an end-to-end analysis for its argument that the websites should be considered the end points for reciprocal compensation purposes. The Arbitrator, Administrative Law Judge Sam Petrillo, rejected that argument, however, and ruled that it is the "ISP modems" that constitute the termination point for reciprocal compensation purposes, but also ruled that GTE was liable for reciprocal compensation on traffic only when the ISP modems were within the same local calling area as the calling party. The language that the Arbitrator used could not be more clear:

> GTE raises concerns that some calls from end users to ISPs are actually routed to ISP modems located outside the local calling area. GTE contends that traffic that does not attach to local call scope ISP modems should not be eligible for reciprocal compensation because these services are properly interstate or intrastate intraLATA toll calls. Because the record in this case does not discuss the methods used to distinguish local calls from toll calls, there is no way to know whether there are problems identifying this type of traffic. Assuming the traffic can be identified, it should be possible to ascertain whether calls from end users are directed to ISP modems located within the local exchange calling area. To the extent that

findings and affirmed that portion of the Arbitrator's Decision. Order No. 99-218. Thus, the Commission ruled that the ISP modems are the terminating point for calls for reciprocal compensation purposes, and that only if those modems were in the same local calling area as the calling party would the payment of reciprocal compensation be required. Thus, the Commission's decision directly supports the underlying reasoning of the ISP Remand Order.

Level 3's ignoring of all of this Oregon and Ninth Circuit precedent on VNXX traffic and ISP traffic, especially given that this case involves precisely the issue of VNXX-routed traffic that is destined for an ISP, is telling. Qwest respectfully submits this Oregon and Ninth Circuit authority is not only better-reasoned than the Connecticut and Illinois federal court opinions, but that it is binding (as is the D.C. Circuit decisions in Bell Atlantic and WorldCom under the Hobbs Act), and thus that the Commission should completely disregard the two new non-binding out-of-state opinions that Level 3 now raises.[18]

E. The ALJ Ruling is not an impermissible alteration of the FCC's interim Intercarrier Compensation regime

Level 3 also argues that the ALJ Ruling is an impermissible alteration of the FCC's interim Intercarrier Compensation regime. (Level 3 Objections, pp. 16-17.) Not only is this "no state jurisdiction" argument without merit, but it is likewise hypocritical given that Level 3 has filed complaints against Qwest in several states (including the case in Washington that it cites in

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calls to ISP providers are not directed to an ISP modem within the local calling area, they are not local calls and should not be eligible for reciprocal compensation. See Order No. 99-218, p. 9.

[18] Finally, Level 3 completely ignores the Commission's decision in the UM 1058 VNXX docket, as well as in the AT&T arbitration docket (ARB 527). In UM 1058, the Commission ruled that a CLEC engaging in VNXX traffic would be violating two of the standard conditions in their certificates of authority (pertaining to local exchange boundaries and EAS routes to distinguish between local and toll services, and limiting NXX codes to a single local exchange or rate center). See Order No. 04-504. Specifically, the Commission ruled::

> A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA in its Petition would clearly be in violation of its certificate. Therefore, rather than requesting a declaratory ruling or a generic investigation, the most appropriate means for dealing with allegations relating to such activity would be in the context of a complaint or a request for arbitration. Order No. 04-504, p. 5. (Emphasis added.).

In ARB 527, the Commission adopted the Arbitrator's Decision rejecting AT&T's attempt to define a local calling area to include VNXX traffic. See Order No. 04-262, adopting Arbitrator's Decision (April 19, 2004), pp. 5-7.

its objections) seeking state commissions to order Qwest to pay Level 3 compensation that Level 3 now argues, from the other side of its mouth, has been preempted by the FCC.

The biggest weakness in Level 3's argument is its suggestion that the ALJ Ruling attempts to "establish intercarrier compensation rates for ISP-bound traffic that are inconsistent with the interim pricing rules." (Level 3 Objections, p. 16.) The ALJ Ruling does nothing of the sort. The ALJ Ruling does not set any rates for ISP traffic; it merely provides that a VNXX-routed call, whether it is destined for an ISP, a call center or any other destination, is toll traffic, and thus not eligible for any type of section 251(b)(5) compensation. Given that the distinction between local (e.g., non-VNXX) calls and toll or long distance (e.g., VNXX) calls are uniquely state commission responsibilities, and that this Commission has already determined several times that VNXX-routed calls are toll calls, there is nothing that the ALJ Ruling does that conflicts with or is preempted by the FCC or its ISP Remand Order. Significantly, the ALJ Ruling does not affect non-VNXX calls destined for an ISP (i.e., a call that is destined for the Internet that originates and terminates within the same local calling area). As such, the New Hampshire, Washington and Illinois decisions are not on point, or are not applicable here. Qwest respectfully submits that the Commission should disregard Level 3's jurisdictional argument.

II. THE ALJ RULING DID NOT ERR BY RULING ON THIS PURELY LEGAL ISSUE WITHOUT DEVELOPING A "FACTUAL RECORD"

In seeming desperation, Level 3 now argues that the ALJ Ruling erred by failing to give the parties an opportunity "to develop the factual record." (Level 3 Objections, pp. 16-17.) Thus, like a party opposing a motion to dismiss or a motion for summary judgment, Level 3 throws the proverbial factual issues against the wall in hopes that some will stick in its desperate attempt to create material issues of disputed fact, and thus to avoid an adverse ruling on this purely legal issue. However, try as it might, there is simply no merit to Level 3's tactics, especially where the issue that the Commission has decided is a pure issue of law, based on the

language of the ISP Remand Order, the parties' ICA, and the various Oregon (Commission and court) and Ninth Circuit precedent that the ALJ Ruling relied upon. Indeed, Level 3's counsel agreed that there did not need to be any kind of factual development prior to addressing the legal issue that the Administrative Law Judge requested that the parties brief.[19] Level 3 cannot now be heard of complaining about the ALJ proceeding to decide dispositive legal issues simply because it does not agree with them or such rulings were unfavorable to its case.

A. The ALJ Ruling did not err by relying on an incorrect assumption about a "typical' ISP call

First, Level 3 argues that the ALJ Ruling erred by relying on an incorrect assumption about the "typical" ISP call. (Level 3 Objections, pp. 17-20.) There are several problems with Level 3's sleight-of-hand argument, not the least of which is that it subscribes to the ALJ Ruling an "assumption" that the FCC itselfraised, but not the ALJ Ruling. Thus, while it cites from the ALJ Ruling (Level 3 Objections, pp. 11-12, and fn, 66), the bottom line is that the ALJ Ruling simply quoted from the ISP Remand Order. See e.g., ALJ Ruling, p. 7 (quoting from paragraph 10 of the ISP Remand Order).

Accordingly, Level 3 is left with assuming that "inherent" in the ALJ Ruling is an assumption [apparently by the ALJ] about what constitutes the "typical" ISP call. Level 3 therefore argues that if it had only been allowed to "develop the factual record," it would have been able to prove that "the relied upon description of the typical call" (presumably relied upon by

[19] Specifically, Qwest's counsel has reviewed the Commission's cassette tape of the June 30, 2005 prehearing conference in which Judge Petrillo first inquired about what he viewed as purely legal and dispositive issues. Judge Petrillo asked the parties to "see if you agree with me that dealing with certain of these issues upfront might make some sense." The judge then discussed what he viewed as two legal and potentially dispositive issues (which in his July 5, 2005 memo was reduced to the one issue that the parties briefed). At the hearing, Level 3's counsel agreed that while Level 3 wanted some factual development for the complaint, she stated that "we do agree that briefing on the legal issues you raised with regard to the complaint is appropriate." (Emphasis added.) Shortly thereafter, Judge Petrillo asked Level 3's counsel whether there were any outstanding disputes (because he did not observe that there were likely to be factual disputes), and Level 3's counsel replied: "No, I agree, I agree Your Honor. I didn't mean to imply that we needed to do any kind of factual development prior to addressing these issues you wanted us to address- the legal issues you are talking about." (Emphasis added.)

Qwest has not had an opportunity to have the cassette tape, a copy of which is available to Judge Petrillo and Level 3 from the Administrative Hearings Division, transcribed, but Qwest would be pleased to do so if necessary.

the ALJ, but in actual fact, by the FCC if there were any such reliance) is "incorrect" and "simply an artifact of earlier descriptions of ISP-bound calls." (Level 3 Objections, p. 18.) Level 3 then goes on to blow irrelevant smoke about what is allegedly today the "typical" ISP call through the affidavit of one of its employees, and with purported similarities between Level 3's VNXX service and other Qwest services that Level 3 claims are "essentially identical" to its VNXX service. (Level 3 Objections, pp. 18-19.)[20] However, these are merely desperate attempts to create confusion and "factual issues" to convince the Commission that perhaps the ALJ Ruling hastily ruled against Level 3 on these (legal) issues. This argument is completely irrelevant, however, because the ALJ Ruling correctly addressed pure issues of law that are fundamental to the case and that were appropriately resolved with legal briefing at the beginning of the case.[21] Moreover, as Qwest notes, this argument is not credible given that Level 3 itself agreed that no "factual development" was needed to decide the legal issues that Judge Petrillo wanted the parties to brief.

B. The ICA does not confirm any intent to apply the ISP Remand Order to any traffic to an ISP that does not originate and terminate in the same LCA

Finally, again in desperation, Level 3 argues that a developed factual record would have revealed that the parties' ICA would have shown that they intended the ISP Remand Order compensation rate of $0.0007 to apply to all traffic destined to an ISP, whether or not the traffic

[20] It appears that Level 3 is attempting to bait Qwest into defending and distinguishing between Level 3's VNXX services and Qwest's Wholesale Dial service, in an attempt to show that there are factual disputes, and thus that further proceedings and an evidentiary hearing are necessary. Qwest does not intend to fall into that trap however, especially because, even though its Wholesale Dial service is very different from Level 3's VNXX services (not the least of which is that Qwest's Wholesale Dial does not attempt to obtain free transport, or to collect reciprocal compensation, at the expense of another carrier), ultimately, all of this argument is completely irrelevant because these are pure issues of law. Indeed, if Level 3 truly believed that Qwest's Wholesale Dial services were directly harming it, or that Qwest was attempting to obtain free transport or reciprocal compensation from Level 3, it presumably could choose to file a complaint against Qwest on this issue. Instead, Level 3 attempts to cloud the issues in the hopes of persuading the Commission to reverse the ALJ Ruling in favor of a "complete factual record." The Commission should see through this obvious tactic.

[21] Of course, whether or not the "majority of ISP-bound traffic" is now provisioned through VNXX service is completely irrelevant to the legal issue here. Moreover, even if true, or relevant, the mere fact that a number of CLECs have attempted to jump on the bandwagon of a new regulatory arbitrage scheme to essentially obtain free transport from an ILEC, to lower their trunking costs, and indeed, to obtain reciprocal compensation payments to boot, is not an appropriate basis to undo what the FCC meant by the term "ISP-bound traffic" in its ISP Remand Order.

originated and terminated within the same LCA. (Level 3 Objections, pp. 20-21.) Once again, Level 3's desperate attempts to create a factual record to convince the Commission to reverse the ALJ Ruling on this legal issue, in favor of an evidentiary hearing to "develop a factual record," should be seen for what it is-- a desperate attempt to cloud the issues and turn a straight question of law into a disputed factual issue. The Commission should decline this invitation, especially since the issue here is a pure legal question of contract interpretation, and the terms of the ICA, as with any other contract, and the terms of the ISP Remand Order, speak for themselves. Moreover, Level 3 itself agreed that these were legal issues that did not require any kind of factual development. There is simply no factual record that needs to be developed on this issue.

CONCLUSION

For the foregoing reasons, Qwest respectfully submits that the Commission should deny each and every Level 3 objection to the ALJ Ruling, and thus should affirm the ALJ Ruling that found that the FCC's ISP Remand Order defines "ISP-bound traffic" to encompass only those situations in which both the customer initiating an Internet call and the ISP equipment (modems, servers, and routers) to which that call is directed are located in the same local calling area, and thus that Level 3 is not entitled to compensation for such traffic.

DATED this 9th day of September, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE VIA E-MAIL

IC 12

I hereby certify that on the 9th day of September, 2005, I served the foregoing QWEST CORPORATION'S REPLY TO LEVEL 3'S OBJECTIONS TO ALJ RULING THAT COMPENSATION FOR VNXX-ROUTED TRAFFIC IS NOT AUTHORIZED UNDER THE PARTIES' INTERCONNECTION AGREEMENT in the above entitled docket on the following persons via e-mail transmission at their e-mail addresses as listed below.

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