

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

4  
5       In the Matter of

6       QWEST CORPORATION,

7                                   Complainant

8       v.

9       LEVEL 3 COMMUNICATIONS, LLC,

10                                  Defendant

11       Complaint for Enforcement of Interconnection  
12       Agreement

LEVEL 3 COMMUNICATIONS LLC'S  
BRIEF REGARDING WHETHER THE  
INTERCONNECTION AGREEMENT  
ENCOMPASSES VNXX ISP-BOUND  
TRAFFIC

13                                   **I.       INTRODUCTION**

14               On June 6, 2005, Qwest Corporation ("Qwest") filed a complaint against Level 3  
15       Communications, LLC ("Level 3")<sup>1</sup> asserting that Level 3 is violating federal law, state law, and  
16       the Parties' Interconnection Agreement by assigning local telephone numbers and NPA/NXXs in  
17       calling areas other than the local calling area where the ISP server is located and attempting to  
18       bill Qwest the reciprocal compensation rate set forth in the *ISP Remand Order* for such virtual  
19       NXX ("VNXX") traffic. Qwest also alleges that Level 3 is violating the Interconnection  
20       Agreement by obligating Qwest to send non-local ISP traffic over LIS trunks. Level 3 responded  
21       to Qwest's complaint on June 20 and asserted Counterclaims. Level 3 alleges that Qwest is  
22       violating the Interconnection Agreement by refusing to compensate Level 3 for the transport and  
23       termination of Qwest-originated ISP-bound traffic. Level 3 also alleges that Qwest violated the  
24       Interconnection Agreement by failing to negotiate an amendment to the Interconnection

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<sup>1</sup> Qwest and Level 3 are collectively referred to herein as the "Parties."

1 Agreement reflecting the Federal Communications Commission’s (“FCC”) decision in its *Core*  
2 *Forbearance Order*.<sup>2</sup>

3 During a prehearing conference on June 30, 2005, Administrative Law Judge Sam  
4 Petrillo requested that the Parties provide legal briefing on two discrete issues. In his subsequent  
5 Memorandum, Judge Petrillo limited the briefing to one issue: Does § 7.3.4.3 of the Parties’  
6 Interconnection Agreement require compensation for the exchange of VNXX ISP-bound traffic?  
7 Because this section of the Interconnection Agreement depends on the FCC’s definition of ISP-  
8 bound traffic in the *ISP Remand Order*,<sup>3</sup> the question becomes whether the FCC’s use of the  
9 term “ISP-bound traffic” in that *Order* encompasses VNXX traffic.<sup>4</sup> As this brief shows, the  
10 *Order* supports Level 3’s position that the *ISP Remand Order*, and therefore the Parties’  
11 Interconnection Agreement, encompasses VNXX ISP-bound traffic.

12 It is important to note that considerable common ground exists between Qwest and Level 3.  
13 Qwest does not dispute that under the *Core Forbearance Order*, Qwest must pay Level 3 for  
14 ISP-bound traffic originated by Qwest customers and terminated by Level 3 at the rate of  
15 \$0.0007 per minute of use.<sup>5</sup> But Qwest and Level 3 disagree on one important issue: Qwest  
16 asserts that the customer initiating an Internet call and the ISP server to which that call is  
17 directed must be located in the same local calling area for the FCC’s reciprocal compensation  
18 regime to apply. That position is inconsistent with current law. Under the *ISP Remand Order*,

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20 <sup>2</sup> *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP*  
21 *Remand Order*, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (“*Core Forbearance Order*”).

22 <sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier*  
23 *Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001),  
24 *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (“*ISP Remand*  
25 *Order*”).

26 <sup>4</sup> See *Memorandum* issued by Administrative Law Judge Petrillo, Docket No. IC 12, July 5, 2005, at 2.

<sup>5</sup> Qwest Complaint at ¶ 28. In the *Core Forbearance Order*, the FCC eliminated what is known as the “New  
Market Exclusion”, which provided that incumbents such as Qwest were not required to compensate competitors  
such as Level 3 for ISP-bound traffic when the competitor had not been receiving ISP-bound traffic as of April 21,  
2001.

1 reciprocal compensation applies to all locally dialed ISP-bound traffic regardless of the location  
2 of the ISP server to which that call is directed, and therefore encompasses VNXX ISP-bound  
3 traffic.<sup>6</sup>

## 4 II. ARGUMENT

### 5 A. The ISP Remand Order Applies to All ISP-bound Traffic, Including VNXX 6 ISP-bound Traffic

#### 7 1. The ISP Remand Order is Not Limited to “Local” Traffic

8 Qwest’s position is that the *ISP Remand Order* limits Qwest’s obligation to pay  
9 reciprocal compensation for ISP-bound traffic to “local” traffic (where the customer initiating the  
10 Internet call and the ISP server to which it is directed are in the same local calling area). In other  
11 words, Qwest asks the Commission to abandon the statutory analysis of Sections 251(b)(5) and  
12 251(g) adopted in the *ISP Remand Order*,<sup>7</sup> and to re-adopt the view – expressly repudiated by  
13 the *ISP Remand Order* – that Section 251(b)(5) only applies to “local” telecommunications  
14 traffic. The *ISP Remand Order* applies to all locally dialed ISP-bound traffic, regardless of the  
15 geographic location of the ISP server to which the call is directed. The FCC’s reasons for  
16 repudiating the “local”/“long distance” distinction in this context three years ago remain valid.  
17 Most importantly, the express language of Section 251(b)(5) applies on its face to *all*  
18 telecommunications traffic, not just “local” telecommunications traffic. Qwest’s position is not  
19 supported by the express terms of the *ISP Remand Order*.

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23 <sup>6</sup> As an initial matter, Level 3 believes that the legal and factual issues in this case are intertwined and that the  
24 Administrative Law Judge should forbear from issuing a ruling on any one issue before the factual record is fully  
25 developed.

26 <sup>7</sup> *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, 16 FCC Rcd 9151 (2001) (“*ISP  
Remand Order*”).

1                           **a. History of the ISP Remand Order**

2             In its 1996 *Local Competition Order*, the FCC found that Section 251(b)(5) applies only  
3 to local telecommunications traffic.<sup>8</sup> The FCC applied that rule to ISP-bound traffic in its *ISP*  
4 *Declaratory Ruling*, which relied on the traditional “end-to-end” jurisdictional analysis to  
5 conclude that ISP-bound traffic is not “local” because “a substantial portion of Internet traffic  
6 involves accessing interstate or foreign websites.”<sup>9</sup> The D.C. Circuit reversed and remanded that  
7 decision saying that the FCC had failed to “provide an explanation why this [end-to-end  
8 jurisdictional analysis] is relevant to discerning whether a call to an ISP” should, for intercarrier  
9 compensation purposes, “fit within the local call model of two collaborating LECs or the long-  
10 distance model of a long-distance carrier collaborating with two LECs.”<sup>10</sup>

11             In the resulting *ISP Remand Order*, the FCC reconsidered whether Section 251(b)(5), by  
12 its terms, applies to ISP-bound communications.<sup>11</sup> The FCC repudiated its earlier ruling that the  
13 provision is limited to the termination of “local” telecommunications, finding that it had “erred  
14 in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of  
15 interpreting the relevant scope of section 251(b)(5),” rather than looking to the language of the  
16 statute itself.<sup>12</sup> Specifically, the FCC found that, “[o]n its face,” Section 251(b)(5) requires  
17 “local exchange carriers . . . to establish reciprocal compensation arrangements for the transport  
18 and termination of *all* ‘telecommunications’ they exchange with another telecommunications  
19 carrier, without exception.”<sup>13</sup> The FCC emphasized that, “[u]nless subject to further limitation,  
20 section 251(b)(5) would require reciprocal compensation for transport and termination of *all*

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22 <sup>8</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,  
First Report and Order, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996); see also *In the Matter of Implementation of the*  
23 *Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound*  
*Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3693 (¶ 7) (1999) (“*ISP Declaratory Ruling*”).

24 <sup>9</sup> See *ISP Declaratory Ruling* at 3701-02 (¶ 1); see also *Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000) (“*Bell*  
*Atlantic*”).

25 <sup>10</sup> *Bell Atlantic*, 206 F.3d at 5.

26 <sup>11</sup> See *ISP Remand Order* at 9152 (¶ 1).

<sup>12</sup> *Id.* at 9164 (¶ 26) (emphasis added).

<sup>13</sup> *Id.* at 9165-66 (¶ 31) (emphasis in original).

1 telecommunications traffic—*i.e.*, whenever a local exchange carrier exchanges  
2 telecommunications traffic with another carrier.”<sup>14</sup>

3 The FCC went on to find that Section 251(b)(5) is “subject to further limitation”—  
4 specifically, that certain types of traffic enumerated in Section 251(g) are “carve[d]-out” of  
5 Section 251(b)(5).<sup>15</sup> That conclusion did not, however, affect the FCC’s determination as to the  
6 scope of Section 251(b)(5) absent the “limitation” that the FCC believed to be imposed by  
7 Section 251(g). Subsequently, the D.C. Circuit’s *WorldCom* decision rejected the FCC’s view  
8 that Section 251(g) contains a “limitation” on Section 251(b)(5) with respect to ISP-bound  
9 traffic.<sup>16</sup> The court found that Section 251(g) permits only “continued enforcement” of pre-1996  
10 Act requirements, rather than conferring independent authority on the Commission to adopt new  
11 intercarrier compensation rules inconsistent with Section 251(b)(5). The court further found that  
12 there were no pre-1996 Act rules for ISP-bound traffic that 251(g) could possibly prescribe, and  
13 that therefore ISP-bound traffic exchanged between LECs did not constitute “information  
14 access” traffic subject to 251(g), as the FCC had asserted.<sup>17</sup> The D.C. Circuit did *not*, however,  
15 cast any doubt on the Commission’s express finding that Section 251(b)(5) applies, “on its face,”  
16 to *all* telecommunications traffic, whether local or otherwise. Indeed, in deciding not to vacate  
17 the FCC’s order, the D.C. Circuit found that there was a non-trivial likelihood that the  
18 Commission could adopt its rules pursuant to Section 251(b)(5). Accordingly, Qwest’s claim  
19 that the *ISP Remand Order* applies only to “local” traffic is incorrect and inconsistent with the  
20 history of the *ISP Remand Order*.

21 Sections 251(b)(5) and 252(d)(2) govern ISP-bound traffic and are not limited to “local”  
22 termination. Further, the terms “originate” and “terminate” in Sections 251(b)(5) and 252(d)(2)  
23 do not exclude traffic delivered to non-local end-points. Qwest adds a new limitation to Sections

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<sup>14</sup> *Id.* at 9166 (¶ 32) (emphasis in original).

25 <sup>15</sup> *Id.* at 9169 (¶ 38).

26 <sup>16</sup> See *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (“*WorldCom*”).

<sup>17</sup> *Id.*

1 251 and 252: “*within the same local calling area.*” By their plain terms, however, Sections 251  
2 and 252 contain no such limitation on the geographic scope of calls. They refer simply to the  
3 “transport and termination of telecommunications” and the “transport and termination...of  
4 calls.”<sup>18</sup> Congress chose the broad term “telecommunications” and not the much narrower term  
5 “telephone exchange service” to describe the scope of the LECs’ termination obligations under  
6 Section 251(b)(5).<sup>19</sup>

7 Nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic  
8 exchanged within the same calling area. Indeed, while Qwest relies on background statements in  
9 the *ISP Remand Order* that discuss ISPs “typically” establishing points of presence in the same  
10 local calling area, the FCC’s decision was in no way dependent upon the geographic location of  
11 the ISP. To the contrary, the FCC concluded that ISP-bound traffic was interstate based on its  
12 end-to-end analysis of the entire media stream, all the way to the server on which the actual  
13 content was located.<sup>20</sup>

14 It is worth noting that in its *ISP Remand Order*, the FCC noted that a number of CLECs  
15 had negotiated interconnection agreements with RBOCs that reduced the compensation rate for  
16 ISP-bound traffic when it adopted the new rate structure.<sup>21</sup> Each of those agreements cited by  
17 the FCC, including Level 3’s agreements with Verizon and SBC, provided for the payment of  
18 compensation for VNXX ISP-bound traffic.

19 ***b. The FCC’s ISP Remand Order Rules Also Rejected Any***  
20 ***Distinction Between “Local” and Non-local ISP-bound Traffic***

21 The rule changes adopted by the FCC in the *ISP Remand Order* demonstrate the FCC’s  
22 repudiation of its earlier view that Section 251(b)(5) applies only to “local” termination of

23 <sup>18</sup> 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i).

24 <sup>19</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier*  
25 *Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Section 251(b)(5) Applies to ISP-Bound  
26 *Traffic*, at 2 (*ex parte* submission of AT&T Corp.)(filed May 28, 2004).

<sup>20</sup> See *ISP Remand Order* at 9186-9193 (¶¶ 77-88).

<sup>21</sup> See *ISP Remand Order* at (¶84).

1 telecommunications. In the *ISP Remand Order*, the FCC amended its reciprocal compensation  
2 rules (47 C.F.R. Part 51, Subpart H) in two key respects. First, it eliminated the word “local” in  
3 each place it appeared. This is consistent with the FCC’s confession that it had “erred” when it  
4 had previously interpreted Section 251(b)(5) to apply to “local” traffic only.<sup>22</sup> Second, in so  
5 doing, the Commission expanded the scope of “telecommunications traffic” under the reciprocal  
6 compensation rules to cover *all* “telecommunications traffic exchanged between a LEC and a  
7 telecommunications carrier other than a CMRS provider” except for traffic “that is interstate or  
8 intrastate exchange access, information access, or exchange services for such access”, which are  
9 the specific categories of traffic enumerated in Section 251(g). And, as discussed above, the  
10 D.C. Circuit rejected the FCC’s argument that ISP-bound traffic was information access  
11 excluded from Section 251(b)(5) by operation of Section 251(g).

## 12 **2. The *ISP Remand Order* Applies to VNXX ISP-bound Traffic**

13 Qwest contends that the Commission’s *ISP Remand Order* only applies to traffic  
14 delivered to ISPs within the same local calling area as the called party, which would preclude its  
15 application to VNXX traffic. However, as explained above, this assertion is contradicted by the  
16 express terms of the *ISP Remand Order* itself.<sup>23</sup> The FCC repudiated its earlier ruling from the  
17 *Local Competition Order* that the provision is limited to the termination of “local”  
18 telecommunications. In *WorldCom*, the D.C. Circuit Court clarified that ISP-bound traffic does  
19 not fall within Section 251(g) because there are no pre-1996 Act rules that Section 251(g) could  
20 possibly preserve. This same analysis is equally applicable to VNXX traffic bound for an ISP,  
21 for which there was also no pre-1996 Act rule governing the exchange of traffic between LECs.  
22 Accordingly, the ILECs’ claim that ISP-bound traffic which does not originate and terminate  
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24 <sup>22</sup> See *ISP Remand Order* at 9164 (¶ 26).

25 <sup>23</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier*  
26 *Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-96 and 99-68, Sections 251(b)(5) and Section 252(d)(2)  
Govern ISP-Bound Traffic and Are Not Limited to “Local” Termination (*ex parte* submission of Level 3  
Communications, LLC) (filed June 23, 2004).

1 within the same local calling area falls outside the scope of Section 251(b)(5) is inconsistent with  
2 both the *ISP Remand Order* and judicial interpretations of the 1996 Act.

3 In addition, the D.C. Circuit’s decision in *Bell Atlantic v. FCC* rejected the end-to-end  
4 analysis of ISP-bound traffic<sup>24</sup> upon which Qwest relies to argue that VNXX calls should be  
5 subject to access charges and not reciprocal compensation.<sup>25</sup> As the D.C. Circuit explained in  
6 *Bell Atlantic*, the end-to-end analysis is used to determine the *jurisdiction* of a call, not the  
7 compensation that is due. Thus, when the FCC relied on the “end-to-end” analysis to determine  
8 that ISP-bound traffic is not “local,” the D.C. Circuit reversed and remanded the decision. And  
9 on remand, the FCC did not explain how the end-to-end analysis was relevant to determining the  
10 appropriate compensation model; instead, it relied on Section 251(g) to carve out certain traffic  
11 from the reciprocal compensation provisions of Section 251(b)(5). As a result, Qwest cannot  
12 rely on the end-to-end analysis to determine which form of intercarrier compensation (access or  
13 non-access) should apply to VNXX traffic bound for an ISP.

14 **3. Level 3’s VNXX ISP-bound Traffic is not “Exchange Access”**

15 Contrary to Qwest’s assertions, VNXX service is not exchange access.<sup>26</sup> The 1996 Act  
16 defines exchange access as “the offering of access to telephone exchange services or facilities for  
17 purposes of origination and termination of telephone toll services.”<sup>27</sup> “Telephone toll service” is  
18 defined as “telephone service between stations in different areas for which there is a separate  
19 charge not included in contracts with subscribers for exchange service.”<sup>28</sup> Qwest, however, is  
20 unable to point to a “separate charge” levied by Level 3 when it offers ISP-bound VNXX  
21 service. The statutory definition plainly contemplates a traditional interexchange call, in which  
22 an interexchange carrier charges the end user for interexchange transport separately from that  
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24 <sup>24</sup> 206 F.3d 1 (D.C. Cir. 2000).

25 <sup>25</sup> *Bell Atlantic* at 4-9.

26 <sup>26</sup> *Id.*

27 <sup>27</sup> 47 U.S.C. § 153(16).

28 <sup>28</sup> 47 U.S.C. § 153(48).



1 end user's local service. Level 3 offers a tariffed local service called Direct Inward Dialing.  
2 This service allows ISPs, or any other customer who wishes to receive inbound calls, to obtain  
3 numbers associated with certain local calling areas. When an end user dials that local number,  
4 that end user is not billed for making a toll call because the originating caller pays Qwest through  
5 its local phone service to be able to make that call. As a result, there is no "separate charge not  
6 included in contracts with subscribers for exchange access" and ISP-bound calls to VNXX  
7 numbers cannot satisfy the definition of exchange access. Very few – if any – customers of a  
8 dial-up ISP would intentionally incur per minute of use charges by placing a toll call to reach  
9 that ISP.

10 **C. Treating VNXX IPS-bound Traffic Differently than "Local" ISP-bound**  
11 **Traffic is Inefficient**

12 Forcing Level 3 to mimic Qwest's historical network architecture needlessly introduces  
13 inefficiency that raises the ISP's costs (and resulting rates) to provide dial-up Internet access to  
14 end user customers. VNXX arrangements, by contrast, impose no greater obligation on Qwest—  
15 *i.e.*, Qwest must carry traffic to the same point of interconnection with Level 3 regardless of  
16 where the traffic is routed after it reaches the point of interconnection. As a result, Qwest's  
17 position regarding VNXX arrangements will limit the availability of affordable Internet access  
18 for end user customers and reduce Internet usage.

19 Significantly, VNXX arrangements do not generate additional costs for Qwest beyond  
20 those associated with interconnection for any other ISP-bound traffic. All traffic generated by  
21 Qwest end users to Level 3's customers is exchanged between the Qwest and Level 3 networks  
22 at a point of interconnection ("POI") within a LATA or as negotiated by the Parties in their  
23 Interconnection Agreement. Qwest has the obligation to bring its traffic to the POI, regardless of  
24 where it originated within the LATA. From that point, Level 3 is responsible for all the transport  
25 associated with delivering the call to the called party. Thus, Qwest's transport cost is solely  
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1 determined by the location of the POI at which Qwest hands off the traffic to Level 3, and not by  
2 whether the ISP server is located within Qwest's local calling area, or in a different local calling  
3 area or state, as those transport costs are borne by Level 3. Importantly, Level 3 is not seeking  
4 any additional compensation from Qwest for transport and termination when the ISP's server is  
5 not located in the calling party's local calling area. Thus, to the extent that Qwest has complaints  
6 about transport costs, that is an issue related to the single POI per LATA rule, not the intercarrier  
7 compensation for ISP-bound VNXX traffic.

8 VNXX arrangements create economies of scale and scope for ISPs. This, in turn, reduces  
9 the cost of, and promotes competition for, dial-up Internet access. First, VNXX arrangements  
10 allow ISPs to serve an entire LATA from a single server (or even multiple LATAs or multiple  
11 states), reducing the costs of serving larger geographic areas by allowing those areas to share  
12 economies of scale and scope. Second, VNXX arrangements enable Level 3 to consolidate  
13 switching into regional switching centers that allow Level 3 to take advantage of the decreased  
14 cost of processing calls. This is vastly different from Qwest's network, which has multiple  
15 switches in small rate centers because it was largely constructed in a monopoly environment that  
16 guaranteed return on investment. However, an open question in this proceeding is whether  
17 Qwest also chooses to use the same efficient network architecture that Level 3 uses when  
18 providing network facilities and services for its wholesale ISP customers. Another factual issue  
19 that may need development is whether a VNXX ISP-bound call is a "typical" ISP-bound call.  
20 Efficient distribution enables more consumers to benefit from low-priced dial-up Internet access,  
21 expanding the availability and usefulness for those consumers who are not ready to make the  
22 jump to broadband or for whom broadband is not yet affordable.

23 Qwest's position would force ISPs that are not customers of Qwest to divide their  
24 operations according to the antiquated system of geographic exchange boundaries. Indeed, if  
25 Qwest had its way, the only way for competitors to operate a dial-up Internet access service  
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1 would be to forego regional servers, and locate a server in every Oregon local calling area. This  
2 type of backward-looking industrial policy would particularly harm consumers.

3 **D. The Core Forbearance Order Requires that the Definition of ISP-bound**  
4 **Traffic Include VNXX Routing**

5 The *Core Forbearance Order* reaffirms that a CLEC using local dialing patterns for ISP-  
6 bound traffic is entitled to receive intercarrier compensation for terminating such ISP-bound  
7 traffic. The FCC’s retention of the Rate Cap and Mirroring rules and forbearance from the New  
8 Markets and Growth Cap rules has made it clear that ISP-bound traffic encompasses traffic that  
9 is terminated to an ISP by means of VNXX routing.

10 The Growth Caps rule imposed a cap on the total ISP-bound minutes for which a LEC  
11 could receive compensation.<sup>29</sup> The New Markets rule provided that if two carriers were not  
12 exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP*  
13 *Remand Order*, the two carriers must exchange this traffic on a bill-and-keep basis.<sup>30</sup>

14 The FCC in the *Core Forbearance Order* recognizes that the ISP dial-up market since the  
15 issuance of the *ISP Remand Order* has changed, thereby requiring reassessment of the *ISP*  
16 *Remand Order* adopted rules. In analyzing the *ISP Remand Order* rules, the FCC focused on the  
17 potential for arbitrage of transport and termination rates between local voice traffic and ISP-  
18 bound traffic.<sup>31</sup> Also, the rationale embraced by the FCC was to promote *efficient investment* in  
19 telecommunications services and facilities.<sup>32</sup>

20 In affirming the goal of establishing efficient network investment signals, the FCC does  
21 not set forth a requirement for a CLEC to establish a local presence in order to receive  
22 intercarrier compensation for ISP-bound traffic. Rather, the focus is on cost equivalency—with  
23 the statement that because delivery costs between ISP-bound traffic and local voice traffic are

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25 <sup>29</sup> *ISP Remand Order* at 9191 (¶ 78).

26 <sup>30</sup> *Id.* at 9188-89 (¶ 81).

<sup>31</sup> *Core Forbearance Order* at ¶¶ 18, 19, 20, 21.

<sup>32</sup> *Id.* at ¶ 19.

1 equivalent, CLECs are entitled to receive intercarrier compensation for transport and termination  
2 of ISP-bound traffic<sup>33</sup>. Of note is that the FCC did not state that ISP-bound traffic that originates  
3 and terminates locally should be compensated in the same manner as local voice traffic. Instead,  
4 the FCC retains the functional and jurisdictional distinction between ISP-bound traffic and local  
5 voice traffic, at the same time adhering to the goal of uniform intercarrier compensation, (*i.e.*,  
6 that transport and termination of ISP-bound traffic and local voice traffic be compensated at the  
7 same rate).<sup>34</sup>

8 To preclude VNXX from the definition of ISP-bound traffic would require significant  
9 and unnecessary incremental network investment expense and two separate compensation  
10 constructs. One compensation construct would be based upon cost equivalency between local  
11 voice calls and ISP-bound traffic and the other scheme would be non-cost based between the two  
12 types of calls. If VNXX were not included within the definition of ISP-bound traffic, the  
13 resulting two-tiered compensation approach undercuts both the principle of efficient network  
14 architecture and investment and the goal of a uniform intercarrier compensation framework. A  
15 two-tiered compensation scheme contradicts the FCC's stated goals in the *Core Forbearance*  
16 *Order*.

17 If Qwest were permitted to benefit from a rate differential for VNXX ISP-bound calls,  
18 the central goal of the FCC to prevent arbitrage would be eviscerated. Rather than encouraging  
19 an efficient network architecture that supports dial-up access to the internet to continue to  
20 evolve, Qwest would have significant incentive to retain the arbitrage opportunity inherent in  
21 paying a low rate for termination of ISP-bound traffic that it originates, and at the same time  
22 receive a higher rate for ISP Bound traffic that merely uses network routing table efficiencies by  
23 means of VNXX dialing.

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25 <sup>33</sup> *Core Forbearance Order* at ¶ 24

26 <sup>34</sup> *Id.*

1 **III. CONCLUSION**

2 For the foregoing reasons, it is clear that the *ISP Remand Order* requires reciprocal  
3 compensation for all types of ISP-bound traffic, including VNXX ISP-bound traffic.  
4 Accordingly, Section 7.3.4.3 encompasses VNXX ISP-bound traffic and requires Qwest to pay  
5 Level 3 reciprocal compensation for such traffic. As previously mentioned, however, Level 3  
6 believes that the legal and factual issues in this case are intertwined and that a ruling on this issue  
7 at this time is inappropriate, and requests the opportunity to more fully develop the factual record  
8 in this case before the Administrative Law Judge rules on any particular issue.

9 Respectfully submitted this 18<sup>th</sup> day of July, 2005.

10 ATER WYNNE, LLP

11  
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July 18, 2005

VIA E-MAIL AND US MAIL

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Re: IC 12 - Level 3 Communications LLC's Brief Regarding Whether the  
Interconnection Agreement Encompasses VNXX ISP-Bound Traffic

Dear Sir or Madam:

Enclosed for filing please find Level 3 Communications LLC's Brief Regarding Whether  
the Interconnection Agreement Encompasses VNXX ISP-Bound Traffic. Please contact me with  
any questions.

Very truly yours,



Jessica A. Centeno

Enclosure

cc: IC 12 Service List

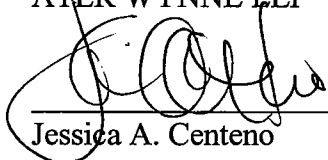
**CERTIFICATE OF SERVICE  
IC 12**

I hereby certify that a true and correct copy of **LEVEL 3 COMMUNICATIONS LLC's BRIEF REGARDING WHETHER THE INTERCONNECTION AGREEMENT ENCOMPASSES VNXX ISP-BOUND TRAFFIC** was served via U.S. Mail on the following parties on July 18, 2005:

Alex M. Duarte  
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Jessica A. Centeno