

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

IC 12

In the Matter of	)	
	)	
QWEST CORPORATION vs. LEVEL 3	)	
COMMUNICATIONS, LLC	)	ORDER
	)	
Complaint for Enforcement of Interconnection	)	
Agreement.	)	

DISPOSITION: RULING AFFIRMED

**Procedural History**

On June 6, 2005, Qwest Corporation (Qwest) filed a complaint against Level 3 Communications, LLC (Level 3), asserting that Level 3 is violating federal law, state law, and terms of the Interconnection Agreement (ICA) executed by the parties. Qwest alleges that Level 3 is assigning local telephone numbers to Internet Service Provider (ISP) customers, even though the ISP’s modem banks (or servers) are not located within the local calling area to which those numbers have been assigned. Qwest asserts that Level 3 improperly seeks payment of reciprocal compensation for such “Virtual NXX” (VNXX) ISP-bound traffic. Qwest further alleges that Level 3 is violating the ICA by obligating Qwest to send non-local ISP traffic over Local Interconnection Service (LIS) trunks.

Level 3 responded to Qwest’s complaint on June 20, 2005. It denies the allegations in the complaint and counterclaims that Qwest is violating the ICA by refusing to compensate Level 3 for the transport and termination of Qwest-originated ISP-bound traffic. Level 3 also counterclaims that Qwest violated the ICA by failing to negotiate an amendment to the agreement reflecting the Federal Communications Commission’s (FCC’s) *Core Communications Order*.<sup>1</sup>

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the Administrative Law Judge (ALJ) issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange

<sup>1</sup> *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (“*Core Communications Order*”).

of VNXX-routed ISP-bound traffic. Because Section 7.3.4.3 of the ICA provides that the parties shall exchange “ISP-bound traffic (as that term is used in the FCC ISP Order),”<sup>2</sup> a central issue in this complaint proceeding is whether the FCC’s use of the term “ISP-bound traffic” in that order encompasses VNXX-routed ISP-bound traffic.<sup>3</sup> The parties filed briefs addressing that issue on July 18, 2005.

On August 16, 2005, the ALJ ruled that compensation for VNXX-routed ISP-bound traffic is not authorized under the ICA because the FCC’s definition of ISP-bound traffic in the *ISP Remand Order* does not encompass VNXX-routed ISP-bound traffic. Because of the significance of the ruling on the outcome of this complaint proceeding, the ALJ certified the matter to the Commission for disposition pursuant to OAR 860-014-0091.

On August 30, 2005, Level 3 filed objections to the ALJ’s ruling. On September 9, 2005, Qwest replied to Level 3’s objections.

On September 29, 2005, Level 3 requested that proceedings in this docket be suspended to allow completion of settlement discussions designed to resolve all issues in this docket and a companion arbitration proceeding, docket ARB 665.

On November 4, 2005, Level 3 notified the Commission that the tentative settlement did not materialize as anticipated. Accordingly, it requested that the Commission resume the schedule in this docket and ARB 665.

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<sup>2</sup> The ‘FCC ISP Order’ is more commonly known as the “ISP Remand Order.” The latter reference is used in this order. See, *In the Matter of 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, para. 81, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2000, *remanded sub nom*, *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh’g en banc denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). (“*ISP Remand Order*.”)

<sup>3</sup> For purposes of this case, “VNXX-routed ISP-Bound traffic” describes a situation wherein a CLEC, such as Level 3, obtains telephone numbers for various locations within a state. Those numbers are assigned by the CLEC to its ISP customers even though the ISP has no physical presence (*i.e.*, does not locate its modem banks or server) within the local calling area (LCA) associated with those telephone numbers. ISP-bound traffic directed to those telephone numbers is routed to the CLEC’s Point of Interconnection (POI) and then delivered to the ISP’s modem bank/server at a physical location in another LCA.<sup>3</sup>

Qwest takes the position that the FCC’s definition of ISP-bound traffic in the *ISP Remand Order*, and therefore Section 7.3.4.3 of the ICA, encompasses only those circumstances where an ISP modem bank/server is physically located in the same LCA as the end-user customer initiating an Internet call.<sup>3</sup> Level 3, on the other hand, maintains that the *ISP Remand Order*, read in conjunction with the *Core Communications Order*, requires that reciprocal compensation must be paid on *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic.

On November 14, 2005, the ALJ convened a telephone conference to discuss procedural and scheduling matters. At the conference, the parties agreed that the Commission should proceed with its review of the August 16, 2005, ruling certified by the ALJ.

The Commission has reviewed the ALJ's ruling, together with the arguments advanced by the parties and the case law cited in support of their respective positions.<sup>4</sup> We hold that the ALJ correctly concluded that the FCC's definition of ISP-bound traffic in the *ISP Remand Order* does not encompass VNXX-routed traffic. The ALJ's decision is consistent with the language of the *ISP Remand Order* and the appellate decisions interpreting that order.<sup>5</sup> It is also in agreement with decisions in several other states.<sup>6</sup> While we acknowledge that some jurisdictions have reached a contrary conclusion, we agree with Qwest that those decisions are unpersuasive.<sup>7</sup>

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<sup>4</sup> The ALJ did not have the opportunity to address the cases cited in Level 3's Objections, because Level 3 did not mention them in its initial brief.

<sup>5</sup> *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000); *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003).

<sup>6</sup> 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, Dec. 22, 2004); Arbitrator's Order No. 10, *Re Level 3 Communications, LLC*, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, ¶ 271 (Kan. SCC, Feb. 7, 2005); Order, *Petition of Global NAPS, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc., d/b/a Verizon Massachusetts, f/k/a New England Telephone & Telegraph Co., d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45 at 24, 33 (Mass. Dep't of Tel and Energy, Dec. 12, 2002); Order, *Petition of Global NAPS, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742 at 16-17, 41-45 (Vt. PSB, Dec. 26, 2002); Order, *Re Adelpia Business Solutions, Inc.*, Docket No. 6566 at 38 (Vt. PSB, July 16, 2003); Opinion and Order, *Petition of Global NAPS South, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 at 45, 48 (Pa. PUC, Apr. 21, 2003); *In the Matter of the Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C), Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application 02-03-059, Decision 03-05-031, 2002 at 7-10 (Cal. PUC, May 8, 2003); *Re Verizon California, Inc.*, Application 02-06-024, Decision 03-12-021 at 7-9 (Cal. PUC, Dec. 4, 2003); Recommended Decision, *Re Complaint of Level 3 Communications, LLC, against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Docket No. C-05-721, State of Minnesota Office of Administrative Hearings for the Public Utilities Commission (Jan. 18, 2006).

<sup>7</sup> For discussion of these cases, see, *Qwest Corporation's Reply to Level 3's Objections to ALJ Ruling*. Similar issues were addressed recently in Order No. 05-1219 in docket IC 9.

In addition, shortly after the ALJ's ruling in this matter, the United States District Court for the District of Oregon entered its supplemental order in *Qwest v. Universal Telecom*.<sup>8</sup> In that decision, the Court clarified that telecommunications traffic subject to reciprocal compensation under §251(b)(5)<sup>9</sup> includes:

. . . traffic that originates in one LCA or EAS area and “terminates” in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. *In other words, ‘the termination point’ is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the ISP Remand Order.*<sup>10</sup> (Emphasis added.)

Consistent with the ALJ ruling in this case, the Court recognized that the *ISP Remand Order* does not contemplate that ISP-bound traffic will be provisioned through VNXX arrangements, but rather requires that an ISP's modem must be located in the same local calling area as customers originating in the Internet-bound call in order for the traffic to be compensable.<sup>11</sup> Thus, the Court's holding contradicts Level 3's claim that the *ISP Remand Order* requires payment of reciprocal compensation for VNXX-routed ISP-bound traffic.

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<sup>8</sup> *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Sept. 22, 2005) (*Universal*).

<sup>9</sup> As noted, Level 3 asserts that the reciprocal compensation requirements of §251(b)(5) apply to VNXX-routed ISP-Bound traffic. See Level 3 Brief, dated July 18, 2005. As noted by the ALJ, however, both the *ISP Remand Order* and current FCC rules exclude ISP-bound traffic from the realm of “telecommunications” subject to §251(b)(5). See, ALJ Ruling at 5. Instead, the FCC held that the interim compensation regime established for ISP-bound traffic is governed by its §201 authority. See, *ISP Remand Order* at para 82. Notwithstanding the FCC's revised jurisdictional analysis, the fact remains that VNXX-routed ISP-bound traffic is not encompassed by the term “ISP-bound traffic” used by the FCC in the *ISP Remand Order*.

<sup>10</sup> Citing the Commission's decision *In the Matter of the Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996*, ARB 91 (March 17, 1999), and *ISP Remand Order*. In ARB 91, the Commission affirmed an arbitrator's determination that “to the extent 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 at 9.

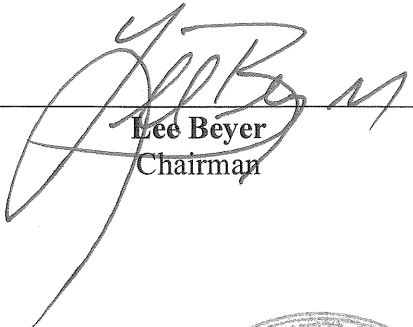
<sup>11</sup> As we recognized in Order No. 05-1219 in docket IC 9, the *ISP Remand Order* specifically preempts States from regulating ISP-bound traffic. *ISP Remand Order* at para. 82. At the same time, the FCC's *Notice of Proposed Rulemaking* in its Intercarrier Compensation proceeding (released on the same date as the *ISP Remand Order*) acknowledges that States may reject VNXX arrangements as a misuse of numbering resources. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket 01-92, FCC 01-132, rel. April 27, 2001, para. 115. If VNXX is included in the definition of ISP-bound traffic (as Level 3 alleges) and therefore preempted from State regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources. The logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order*.

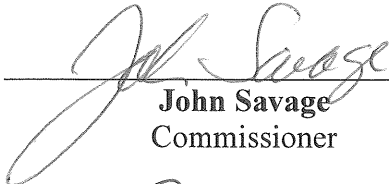


**ORDER**

IT IS ORDERED that the ruling issued by the Administrative Law Judge on August 16, 2005, in this proceeding is affirmed.

Made, entered, and effective JAN 30 2006

  
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**Lee Beyer**  
Chairman

  
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**John Savage**  
Commissioner

  
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**Ray Baum**  
Commissioner

