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BEFORE THE ARIZONA CORPORATION COMM

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Chairman
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Commissioner
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Commissioner
MIKE GLEASON
Commissioner
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Commissioner

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AZ CORP COMMISSION
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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 TELECOMMUNICA-
TIONS ACT OF 1996, AND THE
APPLICABLE STATE LAWS FOR RATES,
TERMS, CONDITIONS OF
INTERCONNECTION WITH QWEST
CORPORATION.

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**QWEST CORPORATION'S
POST HEARING BRIEF**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this proceeding, Level 3 advocates positions on interconnection and intercarrier compensation that are inconsistent with existing law and with decisions of the Arizona Corporation Commission (“Commission”). It is clear that Level 3’s goal is to maximize revenue recovery from Qwest rather than from Level 3’s own customers, while at the same time reducing its costs for use of Qwest facilities by changing long-standing principles of interconnection.

Level 3’s game plan is based fundamentally on four premises.

First, Level 3 creates a one-way traffic flow from Qwest’s network to Level 3’s network by focusing almost exclusively on serving Internet Service Provider (“ISPs”). Under the Act, Level 3 is entitled to interconnect for the purpose of offering “telecommunications services.” Under FCC Rule 51.100, Level 3 may also offer information services over Section 252(c) interconnection facilities, but only “so long as it is offering telecommunications services over the same arrangement as well.” Level 3 stretches these rules beyond their limit. As a result, the traffic flow over the interconnection facilities between Level 3 and Qwest is and will continue to be almost exclusively one way—from customers of ISPs on Qwest’s network to the ISPs on Level 3’s network.

Second, Level 3 games the North American Numbering Plan (“NANP”) by assigning telephone numbers (NPA/NXX) for local calling areas (“LCAs”) in which the ISPs’ callers are located to modem banks of the ISPs located in Phoenix and, in some cases cities outside Arizona. As a result, calls originated from locations in Arizona outside the Phoenix LCA from an ISP customer to the ISP modem bank appear to be, based on the number dialed, local calls. In fact, they are interexchange calls that do not fall under the FCC’s ESP exemption. In its petition and testimony, Level 3 tries to stretch the ESP exemption to accommodate its manipulation of the NANP.

Third, Level 3 advances an intercarrier compensation scheme that would exploit both the one-way traffic flow from ISP traffic and Level 3's manipulation of the NANP. Under this scheme, Level 3 contends that Qwest must pay Level 3 for termination of both local and non-local ISP traffic that it delivers to Level 3 and must also forego the collection of any compensation that is due to Qwest for use of its network where the ESP Exemption, properly interpreted, does not apply. Level 3 bases its intercarrier compensation scheme on incorrect readings of the applicable FCC decisions and orders.

Finally, Level 3 attempts to obtain the use (both for ISP and VoIP traffic) of Qwest's state-wide network for free. It does this by requesting interconnection at only one point per LATA (which Qwest does not oppose), but then arguing—incorrectly—that Qwest must bear all of the interconnection costs incurred on its side of the point of interconnection ("POI"). Under Section 252 of the Act, Qwest is entitled to just and reasonable compensation for the interconnection it provides. This is true regardless of where the interconnection costs are incurred. Nevertheless, by artifice, Level 3 asks the Commission to impose all of the interconnection costs on Qwest.

There are many sub-issues that will be discussed in depth in this brief, but in the end, the essence of Level 3's case is its demand to be given special treatment—treatment far more advantageous than any other carrier in the industry receives. Level 3 attempts to gain this advantage by stretching established rules beyond any reasonable interpretation, and by clever, though ultimately transparent, efforts to establish its positions by proposing definitions that are directly opposite in meaning to the definitions normally used. Chief among these is Level 3's bizarre definition of "section 251(b)(5) traffic."

In this brief Qwest addresses issues by subject matter and thus often combines a major issue with associated sub-issues so that a complete, integrated discussion of an issue may occur in one place in the brief. Thus, Qwest first addresses issues related to ISP Virtual NXX (“VNXX”) traffic and other issues related to ISP traffic. Qwest then turns its attention to VoIP issues, some of which are similar, and in many cases identical, to the ISP VNXX issues. Qwest then addresses the variety of issues that arise under Issues 1 and 2 and their sub-issues. Finally, Qwest separately addresses sub-issues that are largely independent of other issues.

A separate issues matrix is being filed contemporaneous with this brief.

II. ARGUMENT

A. **The Adoption of Level 3’s Language Relating to VNXX ISP Traffic Would Violate Arizona Statutes, Commission Rules and Decisions, Qwest Tariffs, and FCC Rules. Level 3’s Legal Position is Based on a Mischaracterization of the *ISP Remand Order*, and Would Violate Sound Public Policy. (Issues 3a, 3b, 3c, and 4).**

1. **Level 3 is a Wholesale Provider of Internet Functionality to Internet Service Providers (“ISPs”) and Proposes to Use VNXX to Provide Such Functionality in Arizona.**

In the *AT&T Arbitration Decision*,¹ the Commission described VNXX as a service that “assigns an NPA NXX to a customer *physically located outside the rate center* to which the NPA NXX is assigned.” (Emphasis added). Level 3’s service to its ISP customers is a classic use of VNXX.

Level 3 currently serves ISPs in Arizona through a Gateway switch and other equipment located in Phoenix. (Tr. 72). Level 3’s flagship service for ISPs is known as “Connect Modem”

¹ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation, Inc. Pursuant to 47 U.S.C. Section 252(b)*, Docket Nos. T-02428A-03-0553 and T-01051B-03-0553, at 8 (Ariz. Corp. Comm’n, April 6, 2004) (“*AT&T Arbitration Decision*”).

service. (Ex. Q-16). According to the marketing information for Connect Modem on Level 3's website, the service has the following attributes:

It is "an end-to-end, dial-up solution" that "supports the top 10 dial-up ISPs in the U.S."; Level 3 serves "15,500 local calling area rate centers" and provides "local dial-up service covering nearly 90 percent of the U.S. population."

Level 3 "takes care of *setting up a local Internet dial-up network*,² securing local numbers, deploying modems, and staffing a round-the-clock operations center to manage the network and hardware so that you can do what you do best – service your end-users." The monthly charge for this service includes "local dial-in numbers, complete network coverage for a specific region, modems to collect the incoming traffic, and managed routers" and "[t]raffic termination to the Internet."

Finally, Level 3 claims that, via Connect Modem Service, it "processes over 13 billion minutes per month." (*Id.* at 1-2; emphasis added).

Thus, through Qwest's local dial-up network, and through the use of VNXX, Level 3 proposes to gather traffic from throughout Arizona and have it delivered to Level 3's gateway switch in Phoenix and forward the traffic to the Internet on behalf of its ISP customers. (Tr. 72). Mr. Ducloo agreed that "Level 3 is a wholesale provider of the basic functions that some ISPs provide themselves." (Tr. 66). But Level 3 does more than just gather traffic using VNXX and deliver it to ISPs. Level 3 *requires* that ISPs that want to obtain local access telephone numbers from Level 3 also obtain the basic modem functionality from Level 3. In other words, if an ISP wants local telephone numbers from Level 3, it cannot provide its own modem functionality; it

² Level 3's attempt to take credit for "setting up a local Internet dial-up network" for its ISP customers is curious, given that Level 3 has relatively little physical presence in Arizona. While one of Mr. Ducloo's exhibits demonstrates that Level 3 has several points of interconnection ("POIs") in Arizona (Exhibit L-1, at Ex. RRD # 3), Level 3 has built only limited facilities to provide local service. While Mr. Ducloo was not certain, he "believed" that Level 3 had built a fiber ring in Phoenix. (Tr. 36). Assuming the existence of that fiber ring, it and Level 3's fiber backbone network (which is not a local network) are Level 3's only substantial investments in Arizona. Given this, Level 3's use of the phrase "local Internet dial-up network" is an obvious reference to Qwest's network throughout the state; nevertheless, while taking credit for the local network in its advertising material, Level 3 denies any financial responsibility to pay Qwest for using that network. Instead, Level 3 argues that Qwest is responsible for everything on its side of the POI.

must obtain it from Level 3.³ The modems, routers, and servers that Level 3 uses to provide this service for ISPs serving Arizona are located in Phoenix, although Mr. Ducloo suggested that under some circumstances modems located in other states could also handle Arizona traffic. (Tr. 72).

Level 3 provides dial-up service in LCAs throughout Arizona, with all the traffic from those LCAs being terminated at modems in Phoenix that Level 3 operates on behalf of its ISP customers. It is able to do this because, to the extent it operates as a CLEC, Level 3 has the opportunity to obtain local telephone numbers from the North American Numbering Plan Administrator (“NANPA”), insofar as it conforms to NANPA rules. (Ex. L-1, at 36). Under Level 3’s scheme, the calling parties (who are simultaneously Qwest local exchange customers and customers of an ISP served by Level 3) are physically located throughout Arizona while the called parties (the ISPs) are physically located in Phoenix, where Level 3 modems answer calls directed to the ISP.

The physical end points of the call are not only in different LCAs, but much of it is inter-LATA (e.g., all of the traffic originated in the Tucson LATA (LATA 668) terminates at the modems located in the Phoenix LATA). The only thing remotely “local” about such a call is that the telephone number dialed by the end user for Internet access appears to be local, and the end user does not incur a toll charge.

³ Because of the ambiguity of the testimony of Mr. Ducloo, Qwest offered and the Commission accepted into evidence a short excerpt from the Iowa cross examination of Mr. Mack Greene (who adopted Mr. Ducloo’s testimony in Iowa). (Ex. Q-24). In Iowa, Mr. Greene agreed that “Level 3 will not provide local numbers for ISPs unless it also provides the modem functionality for customers that subscribe to its dial-up access service.” (*Id.* at 255). (3) Connect Modem is the “dial-up access service” to which he was referring. (*Id.*)

2. The Competing Language on ISP VNXX (Issues 3a, 3b, 3c, and 4).

The competing language on these issues (which include Issues 3a, 3b, 3c, and 4) is set forth and discussed in Larry Brotherson's Direct testimony (Ex. Q-1, at 40-62) and Philip Linse's Rebuttal testimony. (Ex. Q-6, at 19-27).

The language defining VNXX (Issue 3b) (Ex. Q-1, at 43-44) highlights the fundamental differences between Qwest and Level 3. Qwest defines VNXX as traffic originated by Qwest customers and terminated to Level 3 customers that *are not* physically located in the same LCA, regardless of the NPA-NXXs of the parties to the call. (*Id.* at 43). Level 3, on the other hand, proposes a complex definition of three kinds of VNXX ("ISP-bound," "VoIP VNXX," and "Circuit Switched VNXX"). Qwest will address the "VoIP VNXX" definition later in the VoIP section of this Brief.⁴ Level 3's definition of "ISP-bound VNXX" would mandate compensation at \$.0007 per minute of use ("MOU") and candidly proposes that such calls be defined by the telephone numbers and not based on the physical location of the parties to the call.⁵ (*Id.* at 44-45).

Issue 3a relates to competing paragraphs 7.3.6.3. (*Id.* at 52). Qwest's language simply states that "Qwest will not pay reciprocal compensation on VNXX traffic," while Level 3 would mandate that all traffic where the parties to the call have the same NPA-NXX qualifies as "251(b)(5) traffic for purposes of compensation."⁶ (*Id.* at 53).

⁴ Presumably any VNXX traffic that is not VoIP is "Circuit Switched VNXX".

⁵ Level 3's definition also contains an erroneous legal conclusion relating to the breadth of the *ISP Remand Order*. That issue is discussed below in section II.A.4, *infra*.

⁶ Qwest discusses the bizarre implications of Level 3's expansive definition of "section 251(b)(5)" traffic in section II.B, *infra*.

Issue 3c relates to competing paragraphs 7.3.6.1. (*Id.* at 58). Qwest and Level 3 agree that “ISP-bound traffic” (which is properly defined as ISP traffic that originates and terminates in the same LCA) shall be subject to terminating compensation at the \$.0007 per MOU rate.⁷ However, Qwest disagrees Level 3’s language that inserts additional types of traffic for which it wants to receive reciprocal compensation at the \$.0007 rate. Level 3 seeks a decision from this Commission that access charges do not apply to any Level 3 traffic in Arizona.

Issue 4 relates to competing paragraphs 7.3.4.1, and 7.3.4.2. (*Id.* at 61). Qwest’s language states that local and EAS traffic (where calling and called party are both in the same LCA) will be billed at a rate of \$.00097 and that no terminating compensation applies to VNXX traffic. As Mr. Brotherson explained, the purpose of this language is to recognize that the *voice rate* set by the Commission is different than the ISP rate of \$.0007. (*Id.* at 62). Level 3 proposes only paragraph 7.3.4.1, wherein it repeats its proposal that all “251(b)(5) traffic” will be subject to terminating compensation at the \$.0007 rate.

Three core issues emerge from the competing language:

Whether the Commission’s voice rate of \$.00097 should apply for local voice calls, including local VoIP calls.

Whether the *ISP Remand Order*⁸ relates only to ISP traffic that originates and terminates at physical locations in the same LCA, or whether it applies to all ISP traffic, no matter where it originates or terminates.

Whether terminating compensation should be determined on the basis of the physical location of the parties to the call or whether it should be based on whether their respective NPA-NXXs are associated with the same LCA.

⁷ Consistent with the *ISP Remand Order*, Qwest’s language also indicates that if the state-ordered rate is lower than \$.0007, that lower rate shall be the rate applied under the agreement.

⁸ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

As Qwest will demonstrate, the answers to these questions are clear.

Subject to Level 3's election under the mirroring rule,⁹ Qwest will exchange all appropriate traffic at the FCC ISP rate (currently \$.0007 per MOU) that applies to local ISP traffic¹⁰; if Level 3 has not or does not make the election to exchange all traffic at the FCC ISP rate, then the Arizona voice rate of \$.00097 should apply to voice traffic exchanged by Level 3 and Qwest (including VoIP traffic). The *ISP Remand Order* relates only to ISP traffic that originates and terminates at physical locations in the same LCA. Finally, Arizona law mandates that the physical location of the parties to a call determine whether the call is local or interexchange.¹¹

3. Qwest's Proposed Language for Compensation for Voice Traffic, Including VoIP Traffic, Properly Reflects Federal and Arizona Law. (Issue 4)

At its core, Issue 4 is a dispute over the treatment of VNXX calls. Qwest agrees to pay reciprocal compensation on *local VoIP calls* where the end user customers are physically located in the same LCA. (Ex. Q-1, at 60-62). Level 3 proposes language that would require the payment of terminating compensation based on the NXX codes. Acceptance of Level 3's language would reject Arizona's long-standing access charge practices and impose the obligation on Qwest to pay reciprocal compensation for calls that originate and terminate in different LCAs. Qwest's objections to this VNXX scheme are set out in detail in sections II.A.5-11 below.

⁹ *ISP Remand Order* ¶ 8.

¹⁰ By "all appropriate traffic," Qwest means local ISP traffic and all other voice traffic subject to section 251(b)(5). VNXX traffic is not "appropriate traffic."

¹¹ The term "interexchange" is synonymous with two other terms that may be used herein: "long distance" and "toll."

Issue 4 also concerns the rate to be paid for reciprocal compensation. Qwest's proposed rate of \$.00097 was established by the Commission for voice traffic. (Ex. Q-1, at 62). The FCC in the *ISP Remand Order* took no action to eliminate the Commission's right to set the voice rate for reciprocal compensation. However, the FCC's mirroring rule requires that, at the election of the CLEC, an ILEC must exchange local ISP traffic and all other traffic subject to section 251(b)(5) at the ISP rate set in the *ISP Remand Order* (currently \$.0007 per MOU). *ISP Remand Order* ¶ 8. Although Level 3's proposed contract language requires all traffic to be exchanged at the \$.0007 rate, Qwest is not aware that Level 3 has explicitly stated that its language constitutes its election under the mirroring rule. If, in fact, Level 3 is making such an election, then Qwest agrees to exchange all appropriate traffic at the FCC ISP rate, i.e., at \$.0007 and this rate should replace the \$.0097 voice rate in Qwest's language.

4. The *ISP Remand Order* Applies Only to ISP Traffic that Originates and Terminates in the Same LCA.

Level 3 claims that the *ISP Remand Order* applies to all traffic destined for ISPs, (including the VNXX ISP traffic generated in Arizona by Level 3 and its ISP customers), and that the FCC has preempted state commissions on that issue. (Level 3 Petition, at 27-31).

a. Level 3's Interpretation of the *ISP Remand Order* is Demonstrably Incorrect. The *ISP Remand Order* Applies Only to ISP Traffic that is Local in Nature (i.e., Traffic that Originates and Terminates in the Same LCA).

Level 3's fundamental argument is that in the *ISP Remand Order*, the FCC preemptively required that terminating intercarrier compensation be paid on *all* ISP traffic, including VNXX ISP traffic. However, the *ISP Remand Order* addressed compensation only for ISP traffic,¹²

¹² The FCC has repeatedly ruled that ISP traffic is interstate in nature because the ultimate end points of the calls are at websites across the country or in many cases in other parts of the world. Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications*

where the ISP is physically located in the same LCA as the customer placing the call, and did not address the treatment of VNXX traffic.

In order to understand these issues, and the FCC's ruling, it is important to place the *ISP Remand Order* in its proper context. Qwest will briefly address four critical decisions: the FCC's *ISP Declaratory Order* and *ISP Remand Order*, and two decisions of the Court of Appeals for the D.C. Circuit, in particular *WorldCom, Inc. v. FCC*.¹³

b. The *ISP Remand Order*, the *WorldCom* Decision, and Other Relevant Authority Demonstrate That Level 3's Interpretation is Wrong.

Administrative orders such as the *ISP Remand Order*, like statutes, should be interpreted by reading them in a consistent manner, giving meaning to all parts thereof, and reading them in the context in which they were decided by the agency. A corollary principle is that an administrative order should not be read so as to ignore or obviate substantive portions of the order. The clear statements of the FCC and the Circuit Court identifying the breadth of the issue decided in the *ISP Remand Order* demonstrate that it applies only to local ISP traffic (which the FCC, in the *ISP Remand Order*, refers to by the phrase "ISP-bound traffic"). Any other reading of the order violates these interpretive principles. Furthermore, courts and state commissions are bound by the federal Hobbs Act to follow the rulings of the federal appellate court reviewing FCC decisions. Here, the reviewing court concluded that the *only* issue decided in the *ISP Remand Order* is the proper compensation regime to be applied to *local* ISP traffic.

Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, ¶¶ 1, 10-20 (1999) ("*ISP Declaratory Order*"); *ISP Remand Order*, ¶¶ 14, 58-62. Nonetheless, for intercarrier compensation purposes, the relevant end points are the physical location of the calling party and the physical location of the ISP's modem banks and servers.

¹³ 288 F.3d 429 (D.C. Cir. 2002).

The starting point for analysis is the FCC's 1996 *Local Competition Order* (also often referred to as the *First Report and Order*), in which the FCC concluded that reciprocal compensation under Section 251(b)(5) applies only to "traffic that originates and terminates within a local calling area as defined by the state commissions."¹⁴ Thus, from the inception of the Act, the FCC defined the reciprocal compensation obligation in terms of local calls. This, of course, was entirely rational because other compensation mechanisms had long been in place for interexchange calls (*i.e.*, the intrastate and interstate access charge regimes). Since 1984, state commissions (for intrastate interexchange calls) and the FCC (for interstate interexchange calls) have implemented and continue to follow tariffs that govern the appropriate compensation for interexchange traffic. This is consistent with Section 251(g) of the Act, which explicitly preserved pre-existing compensation mechanisms.

Within two years of the Act's passage, the FCC had received many requests to clarify whether "local" traffic bound for ISPs, given its unique one-way nature and longer hold times, should be subject to reciprocal compensation under Section 251(b)(5). The FCC opened a docket (CC Docket No. 99-68) to address this question, which it combined with its original docket to implement the local competition provisions of the 1996 Act (CC Docket No. 96-98). In February 1999, the FCC entered its *ISP Declaratory Order*, wherein it concluded that ISP traffic is interstate in nature, based on the fact that the ultimate destinations of ISP calls are websites scattered across the country and the world. It is critical to understand the situation that faced the FCC:

ISPs purchase analog and digital lines from local exchange customers to connect to their dial-in subscribers. Under one typical arrangement, *an ISP customer dials a seven-digit*

¹⁴ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 1034 (1996) ("*1996 Local Competition Order*") (emphasis added); *see also* *ISP Remand Order* ¶ 12.

number to reach the ISP server in the same local calling area. The ISP, in turn, combines ‘computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.’ *ISP Declaratory Order*, ¶ 4 (emphasis added).

The focus of the FCC was entirely on local ISP calls.

In *Bell Atlantic Telephone Cos. v. FCC*,¹⁵ the D.C. Circuit vacated and remanded the *ISP Declaratory Order* on the ground that the FCC had failed to adequately explain why the end-to-end jurisdictional analysis was relevant to deciding if ISP calls fit into the local/long distance model. The court could hardly have been more clear in describing the issue the FCC had addressed: “In the [*ISP Declaratory Order*], [the FCC] considered whether calls to internet service providers (“ISPs”) *within the caller’s local calling area are themselves ‘local.’*”¹⁶ There is nothing to suggest in *Bell Atlantic* that either the FCC or the court was addressing anything other than the proper treatment of *local* ISP traffic.

On remand, the FCC considered the proper treatment of ISP traffic in light of the *Bell Atlantic* decision. Instead of relying again on the end-to-end analysis, the FCC held that Section 251(g) allowed it to carve out the ISP traffic under consideration from the provisions of Section 251(b)(5). (*ISP Remand Order* ¶¶ 42-47). The FCC held that the traffic in question “*at a minimum*, falls under the rubric of ‘information access,’ a legacy term imported in the 1996 Act from the MFJ” (*Id.* ¶ 42; emphasis added). On the basis of this analysis, the FCC concluded that the traffic does not fall under Section 251(b)(5); therefore, the FCC determined that it could define a separate compensation regime for such traffic. The FCC then defined the interim compensation regime applicable to the traffic in question, which it stated applied to “ISP-bound traffic.” (*e.g., Id.* ¶ 7). The critical issue, then, is what traffic the FCC intended to include

¹⁵ 206 F.3d 1, 5 and 8 (D.C. Cir. 2000).

¹⁶ *Id.* at 2. (emphasis added).

within “ISP-bound traffic” for purposes of the interim compensation regime: Was it local ISP traffic or all ISP traffic?

The first place to look is the *ISP Remand Order* itself. The context of the order makes it clear that the only traffic being considered was ISP traffic that originates and terminates in the same local calling area – in other words, local ISP traffic (or, to use the FCC’s phrase, “ISP-bound traffic”). For example, the FCC commences its background discussion by reiterating its statement from the *ISP Declaratory Order* that:

an ISP’s end-user customers typically access the Internet through an ISP server *located in the same local calling area*. Customers generally pay their LEC a flat monthly fee *for the use of the local exchange network*, including connections to their local ISP. They also generally pay their ISP a flat monthly fee for access to the Internet. ISPs then combine ‘computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.’” (*Id.* ¶ 10, footnotes omitted; all footnotes cite to *ISP Declaratory Order*; emphasis added).

In the next paragraph, the FCC’s focus remains on ISP connections to LCAs. The FCC notes that ISPs qualify for the Enhanced Services Provider (“ESP”) exemption, which allows them to be “treated as end-users for the purposes of applying access charges and are, therefore, entitled to pay local business rates for *their connection to LEC central offices* and the public switched telephone network (PSTN).” (*Id.* ¶ 11; emphasis added). This language is critical because it demonstrates that the FCC’s attention was fixed solely on local ISP traffic. In the next paragraph, the FCC retains its focus on “*local* competition,” and the role that reciprocal compensation plays in its development. (*Id.* ¶ 12).

Having articulated the foregoing as background, the FCC then identified its reason for opening the ISP traffic docket: “[T]he question arose whether reciprocal compensation obligations apply to the delivery of calls *from one LEC’s end-user customer to an ISP in the same local calling area that is served by the competing LEC.*” (*Id.* ¶ 13; emphasis added). Thus,

nothing in the FCC's analysis of the nature of the traffic or its implementation of the interim regime suggests that the FCC had broadened the scope of its inquiry in the *ISP Remand Order*. The FCC's silence on the subject is noteworthy.

For purposes of the issue before the Commission, the most critical statement on the question of the breadth of the *ISP Remand Order* comes in the D.C. Circuit's review of the *ISP Remand Order* in the *WorldCom* decision. There, the D.C. Circuit was clear in its characterization of the issue that was addressed in the *ISP Remand Order*: "In the order before us the [FCC] 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.*"¹⁷ This is not a casual background statement; this plain and unequivocal language is the reviewing court's express statement that the *holding* of the *ISP Remand Order* relates *solely* to local ISP traffic.

The *WorldCom* court found that Section 251(g) did not provide the FCC with a basis for its action, but, at the same time, the court made it clear that it was not deciding other issues that may be determinative and that would justify the FCC's decision, including: (1) whether ISP calls are "telephone exchange service" or "exchange access," or neither; (2) the scope of "telecommunications" under Section 251(b)(5); or (3) whether the FCC could adopt a bill and keep regime.¹⁸ Furthermore, because there was a "non-trivial likelihood that the Commission has authority to elect such a system,"¹⁹ the court remanded, *but did not vacate*, the *ISP Remand*

¹⁷ 288 F.3d at 430 (emphasis added).

¹⁸ *Id.* at 434.

¹⁹ *Id.*

Order. Thus, properly interpreted in light of *WorldCom*, the *ISP Remand Order* is the applicable law for the treatment of local ISP traffic.

Just as the *ISP Remand Order* remains in effect, the *WorldCom* court's declaration that the FCC's holding applies only to local ISP traffic is binding on all other courts and commissions because the *WorldCom* court is the Hobbs Act reviewing court for the *ISP Remand Order*. Under the Hobbs Act, 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."²⁰ Thus, the Hobbs Act grants exclusive interpretive 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 to apply and abide by the appellate court's interpretation of FCC rules and orders. Further, state commissions, under authority delegated by the Act, must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act.²¹

²⁰ 2 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.

²¹ 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).

c. Qwest's Interpretation of the *ISP Remand Order* is Consistent with Two Recent Oregon Decisions and with Other Authority.

Qwest's interpretation of the *ISP Remand Order* is directly supported by a recent decision of an Oregon ALJ on the identical issue ("*Oregon ALJ Decision*").²² In that case, Level 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision, the *ISP Remand Order*, and the *WorldCom* decision that interpreted the *ISP Remand Order* as relating to only local ISP traffic, were mere "background statements." The ALJ rejected that argument:

First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending that it have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Order* and the *ISP Remand Order* that make it clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer initiating the call. Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes." The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-users initiating the call. (*Oregon ALJ Decision* at 9-10; footnotes omitted).

Judge Petrillo cited five paragraphs from the *ISP Declaratory Order* and three from the *ISP Remand Order*, all of which characterize the ISP-bound traffic at issue as traffic originating and terminating in the same LCA.²³ Judge Petrillo's decision is consistent with the language of the *ISP Remand Order* and the *WorldCom* court's explicit description of the holding of the *ISP Remand Order*. Any other interpretation requires the decision maker to ignore major portions of the *ISP Remand Order*, not to mention substitute its judgment for that of the *WorldCom* court,

²² Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Oreg. PUC, ALJ Petrillo, August 16, 2005) ("*Oregon ALJ Decision*") (A copy is attached as Attachment A).

²³ *Id.* at 10, n. 36, citing paragraphs 4, 7, 8, 12, 24 (n. 77) and 27 from the *ISP Declaratory Order*, and paragraphs 10, 13, and 24 of the *ISP Remand Order*.

and thus violate the law that requires that deference be granted to the decisions of the Hobbs Act court. The Indiana commission, consistent with the *Oregon ALJ Order*, likewise concluded that the *ISP Remand Order* is limited to local ISP traffic.²⁴

Another Oregon decision is also relevant on this issue. The VNXX issue was also addressed in a recent federal district court decision in Oregon, *Qwest Corp. v. Universal Telecom, Inc.*²⁵ In that case, the CLEC (whose business plan is virtually identical to Level 3's) argued that Qwest should pay reciprocal compensation on VNXX traffic. The Court first discussed the definition of "local traffic" as contained in Qwest's Oregon tariff and the parties' ICA, which is consistent with the definition of local traffic in this case. The Court concluded:

[F]or a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS²⁶ and terminated at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP. 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. *Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation.* (2004 WL 2958421 at *10; emphasis added).

²⁴ Order, *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 Co. d/b/a SBC Indiana*, Cause No. 42663 INT-01, 2004 WL 3140675, at *63 (Indiana Utility Reg. Comm'n, December 22, 2004) ("It is clear that the *ISP Remand Order's* rates plan for ISP-Bound traffic applies only to ISP-Bound traffic that terminates at an ISP in the same local exchange in which the call originates. The issue addressed by the FCC in the *ISP Remand Order* was whether, as the CLECs contended, traffic bound to an ISP 'in the same local calling area' was local traffic subject to reciprocal compensation under Section 251(b)(5). The FCC did not address traffic bound to an ISP in a different local calling area.").

²⁵ 2004 WL 2958421 (D. Ore. 2004).

²⁶ The court defined EAS "as essentially a large LCA, which is used to allow local calling within a metropolitan area." *Id.* at *9, n. 3. Thus, LCA and EAS are synonymous in the *Universal* decision.

Thus, a clear underlying assumption of the *Universal* decision is that ISP VNXX traffic is not preempted by the *ISP Remand Order*.

5. VNXX is Inconsistent With Arizona Law.

It is striking that neither Level 3's Petition nor any of its testimony contains any analysis whatsoever of Arizona statutes, Commission rules and decisions, or Qwest tariffs approved by the Commission. In fact, Level 3 witness Gates acknowledged that he had not reviewed or considered Arizona Commission rules or Commission decisions before formulating his conclusions. (Tr. 233-36). There is a good reason for Level 3's silence: Arizona law overwhelmingly and explicitly rejects Level 3's argument that local calling is based on the NPA-NXXs of the parties to the call, and directly requires that the local/interexchange distinction be determined by the relative physical location of the parties to the call. (Ex. Q-2, at 39-43).

a. Arizona Statutes.

Arizona Code § 4-329 (a statute that long preceded the 1996 Act) grants the Commission authority to require that two telephone corporations connect to each other. The statute contains an exception "where the purpose of the connection is primarily to secure transmission of *local messages or conversations between points within the same city, or town.*" The importance of this section to the present issue is not that Qwest could refuse interconnection for local messages (that issue having been resolved by section 252(c)(2) of the 1996 Act), but rather the fact that Arizona statutes define local messages as taking place "between points within the same city, or town." This statute defines local calling in terms of the geographical proximity of the parties to the call. This concept of the local calling provides a fundamental building block to telecommunications in Arizona. The Arizona Commission has consistently taken an active role in the definition of LCA's based primarily on the existence or non-existence of a community of interest among the residents and businesses of specific geographical locations. (Ex. Q-2, at 36.)

A good example is the 1995 order of the Commission in a U S WEST rate case, where the Commission approved an agreement between U S WEST and Commission Staff to create several new EAS areas. In its order approving the new areas, the Commission noted that Staff had “analyzed communities of interest” based on, among other things, “call volume and direction, socioeconomic linkages, and *contiguity*.”²⁷

This distinction between local and toll has also been recognized in an Arizona statute in the age of local competition. Arizona Code §§ 40-282(C)(2)(a)-(b) contemplate separate certification for “local exchange” carriers on the one hand, and “interexchange” carriers on the other.

b. Commission Rules.

Commission rules consistently and extensively define local and interexchange services in terms of the geographic proximity of the parties to a call (or the lack thereof). The Commission’s “Competitive Telecommunications Services” rule ties local exchange traffic to traffic *within* exchange areas. This rule defines “Local Exchange Service” as “[t]he telecommunications service that provides a local dial tone, access line, and *local usage within an exchange area or local calling area*.” Arizona Administrative Code § R14-2-1102(7) (emphasis added). The Commission’s “Telephone Utilities” rule defines “toll service” as service “between stations in different exchange areas for which a long distance charge is applicable.” *Id.* § R14-2-501(23) (emphasis added). And the Commission’s “Telecommunications Interconnection and Unbundling” rule states: “the incumbent LEC’s *local calling areas and existing EAS boundaries*

²⁷ Opinion and Order, *In the Matter of the Application of U S WEST Communications, Inc., a Colorado corporation, for a Hearing to Determine the Earnings of the Company, the Fair Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return thereon and to Approve Rate Schedules Designed to Develop such a Return*, Docket No. E-1051-93-183, Decision No. 58927, at 112 (Ariz. Corp. Comm’n, January 3, 1995).

will be utilized for the purpose of classifying traffic as local, EAS, or toll for purposes of *intercompany compensation.*” *Id.* § R14-2-1305(A) (emphasis added).

Read together, these provisions could not be more clear in requiring that local and toll traffic be defined in terms of the geographical location of the parties to the call. In fact, § R14-2-1305(A) is explicit that *all* carriers comply with local calling areas and EAS boundaries (a geographical concept) for purposes of intercompany compensation.

Consistent with these rules, Qwest's proposed language treats traffic as local traffic only if it originates and terminates within the same LCA.

c. Commission Precedent.

Qwest’s position in this arbitration is consistent with recent precedent established by this Commission in its 2004 decision in the *AT&T Arbitration Decision*. In that case AT&T, like Level 3 in this case proposed to define “EAS/Local Traffic” by “the calling and called NPA/NXXs.” The arguments advanced by AT&T in that case were strikingly similar to those raised here by Level 3’s witnesses. The Commission rejected AT&T’s arguments and emphasized the need for broad industry participation where long-standing rules or practice are sought to be altered:

We find that Qwest’s proposed definition of “Exchange Service” comports with existing law and rules, and should be adopted. *AT&T’s proposed definition represents a departure from the establishment of local calling areas and may have unintended affect beyond the issues discussed herein and be subject to abuse.* Commission Staff did not participate in this arbitration proceeding. *We do not believe that it would be good public policy to alter long-standing rules or practice without broader industry and public participation.* (*AT&T Arbitration Decision*, at 13; emphasis added).

This conclusion directly supports Qwest’s position in this case. Just as in the *AT&T Arbitration Decision*, the changes proposed by Level 3 are not just minor adjustments to the language of an interconnection agreement. Rather, they represent dramatic changes in policy that would

ultimately affect the whole industry in Arizona. Changes of this nature should not be made without careful consideration of their impact and only after weighing input from a broader range of interested parties than are represented in this arbitration docket.

d. Qwest Arizona Tariffs.

Qwest's Arizona tariffs are consistent with Arizona statutes and rules. Section 2.1 of Qwest's Exchange and Network Services Price Cap Tariff defines an "exchange" as a "geographical unit, established by the Company, for the administration of telecommunications services in a specified area." This tariff also defines "exchange service" as "[t]he service of furnishing equipment and facilities for telephone communications *within* a designated area." (emphasis added). In turn, "exchange service area" is defined as "[t]he territory served by an exchange." This same section defines "local exchange service" as "[t]he furnishing of telecommunications services to the Company's customers *within an exchange for local calling*. This service also provides access to and from the telecommunications network for long distance calling." Further, this section defines "local service area or extended local service area" as "[t]hat area throughout which an exchange service customer, at a given rate, may make calls without the payment of a toll charge. A local service area may be made up of one or more exchange areas."

Section 5.1 of Qwest's tariff, "Exchange Areas," states that "[t]he Company develops exchange service areas to establish service *within a defined geographical area*." (emphasis added). Finally, Section 5.2 states that the rates and charges quoted for "local exchange service. . . . entitle the customer to *local calls*, without toll charges, *to all local exchange access lines connected to a CO of the exchange*, or to all exchange access lines serviced by COs of the extended local service area where comprised of more than one exchange." (emphasis added).

As with the Arizona statutes, rules, and the Commission prior decision in the *AT&T Arbitration Decision*, Qwest's approved tariffs define local and toll or long distance services in terms of geography—nothing in any of them suggests they are based on telephone numbers.²⁸ In addition, the FCC has consistently ruled that it is the state commissions that have the authority to define local calling areas and determine whether reciprocal compensation or access charges apply to particular traffic.²⁹

6. The Commission Has the Authority to Ban the Use of VNXX in Arizona and Should Do So.

One clear option open to the Commission is to simply ban the use of VNXX in Arizona. This option was adopted by the Vermont board. In its order, which was reviewed by a federal district court in *Global Naps, Inc. v. Verizon New England* (“*Global Naps*”),³⁰ the Vermont board ruled that the local/toll distinction is based on “the physical termination points of the calls.” (327 F.Supp.2d at 298.) It also banned the CLEC's use of VNXX in Vermont. (*Id.*).

²⁸ Mr. Brotherson also discusses in some length portions of the 1996 Act and FCC Rules that likewise support a geographical definition of local and interexchange calling. (Ex. Q-2, at. 43-45).

²⁹ *Local Competition Order* ¶ 1035 (With the exception of wireless traffic, “state commissions have the authority to determine what geographic areas should be considered ‘local areas’ for the purposes of applying reciprocal compensation obligations under section 251(b)(5), consistent with the commissions’ historical practice of defining local service areas for wireline LECs. *Traffic originating or terminating outside the applicable local area would be subject to interstate and intrastate access charges.*”) (emphasis added); accord Memorandum Opinion and Order, *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, 17 FCC Rcd 27,039, ¶ 549 (Wireline Competition Bureau, July 17, 2002) (“*Virginia Arbitration Order*”) (specifically relying on paragraph 1035 of the *Local Competition Order* for the proposition that the FCC “previously held that state commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation . . .”).

³⁰ 327 F.Supp.2d 290 (D. Vt. 2004).

The CLEC (Global) raised numerous objections to the board's decision on appeal, from a discrimination claim to a filed rate doctrine argument. The federal district court, however, dismissed these objections:

The Board's prohibition of VNXX service offends neither the "nondiscrimination strand" nor the "nonjusticiability strand" of the filed rate doctrine. The ban does not have the effect of discriminating, or requiring Global to discriminate, among Global's customers; it simply does not permit Global to offer the service to any of its customers. A ban on VNXX service likewise does not involve the Board or this Court in any determination of whether the rates or terms of the service are reasonable. The Board's ban has not varied the rates or terms of Global's tariff, nor has it attempted to enforce obligations between Global and its customers that do not appear in the federal tariff. The filed rates doctrine does not prevent the Public Service Board from prohibiting the use of VNXX within Vermont. (*Id.* at 301.)

Qwest requests that the Commission follow the example set by the Vermont Board and simply ban the use of VNXX in Arizona.

7. Under Arizona Law, Calls are Categorized as Local or Toll based on the Geographic Proximity of the Calling and Called Parties; Telephone Numbers Should be Assigned Consistent with this Categorization Method.

Mr. Gates made the following statement on behalf of Level 3:

Qwest is actually trying to invent a new way to classify calls that has no operational or historical basis in the telephone network. Qwest's proposal is to rate and distinguish traffic based on the actual physical location of customers as opposed to the numbers the customers are assigned. This flies in the face of the way calls have been rated since the establishment of the PSTN. (Ex. L-4, at 36).

Mr. Ducloo makes similar claims. (Ex. L-1, at 78-84). The foregoing discussion of the statutes, rules, and Commission decisions in Arizona demonstrates that these statements are pure fantasy. Geographical proximity, not telephone numbers, has always been the legal test in Arizona.

As Mr. Brotherson pointed out, the Level 3 testimony on this point is an example of getting the cause and effect relationship between two concepts backwards. (Ex. Q-2, at 46) Telephone numbers are supposed to be assigned to specific geographic areas so that they can be used to properly rate calls. Level 3 ignores this fact and makes the erroneous argument that

because telephone numbers have been the means of rating calls as local or interexchange, telephone companies and state commissions made a conscious decision that physical location is not relevant to call classification; i.e. that assigned telephone numbers are the only criterion. Level 3 implies that community of interest, distance, and the geographical location of parties to a call were never relevant factors. As demonstrated above, this argument has no legal basis in Arizona. Geographical proximity has always been both the basis for assigning telephone numbers and the basis for rating calls as local or interexchange. The telephone numbers, because they were historically linked with the exchange where the customer was located, were the means of assuring geographical proximity; in other words, telephone numbers were the means, not the end.

From a purely common sense perspective, the Level 3 argument simply ignores LCAs, the fundamental building block of telecommunications in Arizona and in every other state.³¹ For more than thirty years, no LCA in Arizona has been established without Commission approval. Geography and the location of called and calling parties have been concepts inherent in the determination of LCAs in Arizona. To suggest, as Level 3 does, that local service in Arizona is based purely on telephone numbers and not on geographical proximity is revisionist history at its worst. (Ex. Q-2, at 36-38).

³¹ In its Petition, Level 3 uses a fascinating euphemism to describe local calling areas. In its statement of Issue 3, Level 3 describes the issue as whether “Qwest may exclude ISP-bound traffic from compensation due under the *FCC’s ISP Remand Order* through contract terms that *seek to create artificial geographic boundary designations* of the ISP.” (Level 3 Petition at 26, emphasis added). Those “artificial geographic boundary designations” are, of course, local calling areas. This is simply another indication that Level 3 does not believe it should follow the rules the rest of the industry follows.

8. In Addition to Being Unlawful, VNXX Violates Sound Public Policy.

Level 3 wants to be able to obtain local telephone numbers in LCAs throughout Arizona, assign them to its ISP customers (who may have no physical presence in those LCAs or in Arizona at all), and require Qwest to gather and transport all of the traffic generated to those numbers to Level 3's POI in the two Arizona LATAs at no cost to Level 3 or its customers. Level 3 also plans to charge Qwest \$.0007 to terminate the traffic, because, Level 3 argues, it is "Qwest customers" who are making these calls and forcing Level 3 to terminate them.

The reality, of course, is very different. If, as Mr. Gates testified (Tr. 230), these calls are a "burden on Level 3," they are a self-imposed burden because Level 3 actively promotes the service that produces the traffic for which it wants compensation from Qwest. Level 3's marketing materials for "(3) Connect Modem" demonstrate that providing dial-up service to ISPs is a major Level 3 service—one that provides service to the "top 10 dial-up ISPs" in the country and that "processes over 13 billion minutes per month." (Ex. Q-16, at 1) It generates traffic in those volumes by providing "local dial-up service covering nearly 90 percent of the U.S. population." (*Id.* at. 2).

As a CLEC, Level 3 obtains local telephone numbers and markets its service (which includes, among other things, the "local Internet dial-up network," local numbers, modems and managed routers) to ISPs. (*Id.* at 1) Level 3 suggests that, by buying its service, an ISP can have a "Global Network in Five Days – Level 3's global presence lets you conduct business in most major markets around the world without additional capital equipment or the need for a local network management organization." (*Id.* at 2). So, in addition to revenues from terminating traffic, Level 3 also has an undisclosed amount of revenue from its ISP customers. With these incentives, Level 3 is not an innocent bystander burdened by calls to its ISP customers.

Mr. Gates repeatedly states that it is “Qwest’s customers” who are making these calls. (Ex. L-4, at 23, Ex. L-5, at 4, 9, 18-19). That is at the very least misleading. When a customer dials the “local” ISP access number, he or she is simultaneously the customer of Level 3’s ISP customer. It is Level 3 and its ISP customers who have created the services that have caused this traffic to be generated. The Colorado commission, in an earlier Level 3 arbitration, saw through Level 3’s argument: “When connecting to an ISP served by a CLEC, *the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC.*”³²

Level 3’s proposed language would create the precise arbitrage opportunity identified by the FCC in the *ISP Remand Order*. Level 3 has an economic incentive to create as many usage minutes as possible, because every minute that an end-user customer spends connected to a Level 3 ISP generates additional compensation for Level 3.

Contrast the scenario that Level 3 promotes with the world envisioned by the drafters of the 1996 Act. The drafters saw a market in which carriers actively competed to provide “local exchange service” to customers. Thus, CLECs would actually build alternative networks that would benefit customers and provide them with more competitive choices, create balanced exchanges of traffic, and provide revenues to companies that built real alternative telecommunications networks through reciprocal compensation. None of those things is present here.

The FCC’s analysis in the *ISP Remand Order* is instructive on this point. The FCC recognized that “Internet consumers may stay on the network much longer than the design expectations of a network engineered primarily for voice communications.” (*ISP Remand Order*

³² Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, at 36 (Colo. PUC 2001) (“*Colorado PUC Level 3 Decision*”) (emphasis added).

¶ 19). The FCC also noted that “[t]raditionally, telephone carriers would interconnect with each other to deliver calls to each other’s customers” and that it “was generally assumed that traffic back and forth on these interconnected networks would be relatively balanced.” (*Id.* ¶ 20) Not so in the case of Level 3. It provides no local exchange services; thus, every minute of use flows one-way to Level 3.

In the FCC’s view, “Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results.” (*Id.* ¶ 21) This situation led to

classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. (*Id.*)

The FCC thus concluded “that intercarrier payments for ISP-bound traffic have created severe market distortions.” (*Id.* ¶ 76).

9. Level 3’s Claim that Qwest’s FX and Qwest’s Affiliate’s Wholesale Dial and OneFlex Services are the Same as VNXX are Wrong. Each of these Services Recognizes and Conforms to the Existing LCA Structure.

Level 3 spends major parts of its testimony vainly attempting to demonstrate that Qwest is doing for itself what it is attempting to prevent Level 3 doing with VNXX. (E.g., Ex. L-1, at 86-88; Ex. L-4, pp. 32-34, 39-41, 54-55; Ex. L-5, 40-42). Level 3 focuses on three services, none of which have more than the most superficial resemblance to VNXX.

a. FX Service is Not Like VNXX.

Level 3’s primary argument is that VNXX and Qwest’s FX service are the same. In fact, Qwest’s FX service, which represents less than one tenth of one percent of all Qwest lines in Arizona (Ex. Q-2, at 55) is significantly different from VNXX. Level 3’s VNXX product uses

the PSTN to route and terminate calls to end users connected to the PSTN in another LCA. In all respects, except the number assignment, the call is routed and terminated as any other toll call. Qwest's FX product, on the other hand, delivers the FX calls within the LCA with which the number is geographically associated. In other words, a Qwest FX customer actually purchases a local service connection in the LCA associated with the telephone number in the same manner and at the same rate as all other local exchange customers. With FX, the calls are then transported on what is, in effect, the end user's private network (private line) to another location. The FX customer bears full financial responsibility for transporting the call to the location where it is actually answered by buying both parts of the FX service (the local service and the private line service) at the appropriate local and private line rates. (Ex. Q-1, at 50-51). Level 3, by contrast wants no financial responsibility to provide the transport to the distant location. The issue of financial responsibility for transport is at the heart of the most significant difference between VNXX and FX.³³ In calling its product "FX-like," Level 3 attempts to confuse this critical distinction. Level 3 is simply using the assigned telephone numbers to disguise calls that

³³ Two recent dockets before the Iowa Utilities Board addressed the VNXX/FX distinction. In both cases, the Board held, contrary to Level 3's claims, that VNXX and FX are not the same. See Final Decision and Order, *In re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Dkt. Nos. SPU-02-11 and SPU-02-13 (Ia. Util. Bd. June 6, 2003) ("Sprint/Level 3 Board Decision") ("Sprint and Level 3 are proposing to provide a service that is generically described as virtual NXX service (VNXX), which is not the same as FX or DID, and does not compensate the LECs for the use of their networks." (emphasis added); Arbitration Order, *In Re Arbitration of Qwest Corporation and AT&T Communications of the Midwest, Inc. and TCG Omaha*, Docket No. ARB-04-01 (IA Util. Bd. June 17, 2004) ("Iowa AT&T Arbitration Order") (virtual NXX (VNXX) calls, which appear to be included in the 'FX-like' calls at issue here, "are not local services but interexchange in nature.") See also Order, *Petition of Global NAPS, Inc. . . . For Arbitration to Establish an Interconnection Agreement with Verizon New England*, D.T.E. 02-45, 2002 Mass PUC LEXIS 65, at 52 (Mass. Dep't Telecom & Energy, December 12, 2002) (After evaluating the CLEC's argument that VNXX and FX are indistinguishable, the Massachusetts commission found the argument "unpersuasive. Verizon's FX service uses dedicated facilities to transport FX traffic to the FX customer's location, and the FX customer pays Verizon for the cost of transporting that traffic.").

would otherwise be toll calls.³⁴ The adoption of Level 3's language would bring chaos to a numbering system that has worked well for decades.

In the *Global Naps* decision (the case that upheld the Vermont board's ban on VNXX), the CLEC argued that banning VNXX would unlawfully discriminate against VNXX traffic because the ILEC offered FX service, which the CLEC characterized as "functionally identical to VNXX." The court rejected that argument:

Customers using FX service purchase an FX line, a link between two central offices, or switches. *They pay costs that cover the cost of the line and the transportation in bulk between the two points.* Calls placed to the line are considered terminated at that end, even though the calls are transported to the other end of the line and ordinarily would incur toll charges. . . . FX service thus allows what would be a toll call to be treated as a local call, even though the call actually terminates at a point outside the customer's local calling area. In that respect FX service functions the same as VNXX *from the point of view of the retail customer.*

From the carriers' and regulators' points of view, however, the services operate quite differently. When VNXX numbers are assigned, *neither Global nor its customers purchase any equipment, nor do they pay the costs of transporting the call.* Instead Global [the CLEC] relies on Verizon [the ILEC], to transport the calls, in accordance with Verizon's obligation to provide interconnecting services. Global does not dispute the distinction, but considers it irrelevant. (327 F. Supp.2d at 299, emphasis added, citation omitted).

VNXX provides the CLEC with free transport and FX requires the customer to pay for it. Thus, Qwest's FX offering in no way justifies VNXX.

b. Wholesale Dial Service is not Like VNXX.

Level 3 also argues that Wholesale Dial service, a product that Qwest's unregulated affiliate company QCC offers to ISPs, is like VNXX. (Ex. L-4, at 39-41; Ex. L-5, at 19, 42-43).

In this case, there is not even a superficial resemblance. Level 3 inaccurately describes

³⁴ This feature of VNXX was recognized by the Oregon federal court in the *Universal* case, which noted that Universal's VNXX arrangement allowed "the person making the call [to] be billed at the local rate for a call that was *really long distance*." 2004 WL 2958421, at * 9 (emphasis added).

Wholesale Dial then claims that Level 3 does the same thing. But there are dramatic differences. QCC offers Wholesale Dial by purchasing tariffed or catalog services (specifically Primary Rate ISDN service or "PRI") from Qwest (the ILEC) and then packaging these services for ISPs. This means that Wholesale Dial customers pay private line transport rates to transport calls from the LCA where the dial tone is provided to the location of the ISP. Thus, the calls are handed off from the end user to QCC within the LCA where the local service is purchased. QCC is simply aggregating traffic on bundled tariffed services and providing a service as a bundled product to ISPs. QCC bears full financial responsibility (at tariffed rates) to transport traffic from one LCA to another LCA where an ISP is located. (Ex. Q-2, at 56-57).

c. OneFlex™ Service is Not Like VNXX.

QCC, an unregulated affiliate of Qwest, also offers a VoIP service known as OneFlex™, by which it offers VoIP service with virtual numbers. But, once again, there is a dramatic difference between this service and VNXX. QCC's service honors LCA guidelines in that calls to or from these numbers from outside the LCA where the VoIP provider point of presence ("POP") is located are not local calls, and are not treated as local for compensation purposes. Consistent with the ESP exemption, all traffic is measured to and from the VoIP POP, just as Qwest's language proposes for Level 3, and all calls comply with the exemption. No VNXX calls are permitted with OneFlex™ because calls are exchanged between the POP and the caller within the same LCA. If Level 3 assigns a Phoenix number to its ESP customer in Phoenix then calls from Qwest Phoenix customers will be delivered to it as local. OneFlex™ does not assign a Flagstaff VNXX number to a Phoenix ESP customer as Level 3 hopes to do. (Ex. Q-2, at 58; Ex. Q-22).

10. VNXX Traffic is Improper Under Industry Guidelines.

Level 3's proposed language is not consistent with the telecommunications industry's numbering resource guidelines. Mr. Linse discussed at some length the industry guidelines that govern the proper use of numbering resources, and the fact that Level 3 is required to adhere to those guidelines. (Ex. Q-6, at 22-25).

In 1995, the FCC created the North American Numbering Council ("NANC"), which makes recommendations to the FCC on numbering issues and oversees the North American Numbering Plan ("NANP"). At the same time, the FCC created the NANPA, an impartial entity that is responsible for assigning and administering telecommunications numbering resources in an efficient and non-discriminatory manner. Under FCC rules, NANPA is directed to administer numbering resources in an efficient and non-discriminatory manner, *and* in accordance with the guidelines developed by INC (the North American Industry Numbering Committee). (47 C.F.R. § 52.13(b) and (d)). The Alliance for Telecommunications Industry Solutions (ATIS) has published a set of INC guidelines entitled "Central Office Code (NXX) Assignment Guidelines (COCAG)." These are really more than just guidelines because adherence to them is an FCC mandate. Level 3's proposed use of VNXX violates those guidelines.

Section 2.14 of the COCAG states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned. Exceptions exist, such as for tariffed services like foreign exchange services." (Emphasis added.) VNXX is not identified as an exception. In addition, section 4.2.6 of the COCAG provides that "[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested.*" (Emphasis added.)

Finally, "Geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP" while "Non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800." COCAG, § 13.0.

The telephone numbers that Level 3 proposes to use in Arizona are all Geographic NPA numbers. In other words, according to guidelines, they should correspond to discrete geographic areas. But under Level 3's mis-assignment of these numbers, they no longer correspond. Callers in Page who dial a Level 3 "local number" associated with the Page LCA would not reach anyone in the Page LCA; instead, the call would be transported over Qwest's LIS network to Level 3's POI in Phoenix, and then on to the modem banks that answer the call, which are also located in Phoenix. This misuse of numbers by Level 3 violates industry guidelines.

11. Summary of Qwest Position on ISP VNXX Calling.

From both a legal and policy perspective, the Level 3 proposals should be rejected. On the other hand, Qwest's proposed language related to Issues 3a, 3b, 3c, and 4 (as those issues relate to ISP VNXX) is completely consistent with the law and with sound public policy. Qwest respectfully requests that the Commission adopt Qwest's proposed language.

B. Qwest's Proposed Definitions Related to Traffic Types and Inter-carrier Compensation Should be Adopted. Issue 10 (Definition of Interconnection), Issue No. 11 (Definition of Interexchange Carrier), Issue 12 (Definition of IntraLATA Toll Traffic), Issue 14 (Definition of Exchange Service), and Issue 15 (Definition of Telephone Toll Service).

The language discussed above under Issues 3 and 4 relating to the proper treatment of ISP VNXX goes to the heart of the issues in this docket. However, Level 3 has also proposed a series of definitions that are, in effect, the supporting cast for its effort to fundamentally change the definition of local calls, and cause major changes to inter-carrier compensation in Arizona.

Mr. Brotherson addressed each of these definitions in his direct testimony. (Ex. Q-1, at 66-74). Neither of Level 3's witnesses addressed any of these definitions in direct testimony and neither witness responded to Mr. Brotherson's testimony on this issue. Level 3's proposed definitions should be rejected on three grounds: (1) they are, in most cases, substantively incorrect; (2) they are misleading and ambiguous; once analyzed, it is clear that they would create an "Alice in Wonderland" world, where words are given meanings 180 degrees from their accepted meanings in the real world; and (3) Level 3 did not provide any testimony to support them. Qwest's proposed definitions should be adopted.

**1. The Commission Should Adopt Qwest's Definition of "Interconnection."
(Issue No. 10).**

Qwest defines "interconnection" as "the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic and Jointly Provided Switched Access traffic." (See definition of "interconnection" in Qwest proposed agreement, filed as exhibit A to Qwest's Response to Level 3's Petition, at 21). This is a commonly accepted definition in most Qwest interconnection agreements and in SGATs. Qwest's proposed language is not, as Level 3 suggests in its Petition, an attempt by Qwest to "regulate the types of traffic that may be exchanged between the Parties." (Level 3 Petition, at 45). Rather, Qwest attempts to use standard terminology that clearly defines the terms of the agreement in contrast to Level 3's proposals, which appear aimed at its larger objective of overhauling the intercarrier compensation arrangements established by the Commission and the FCC.

Level 3 proposes an "interconnection" definition containing erroneous and misleading definitions of two other terms, "telecommunications traffic" and "section 251(b)(5) traffic."

These definitions are packed with implications that conflict with federal law. For example, Level 3's definition of "telecommunications" attempts to reclassify all traffic to its benefit:

Telecommunications includes, but is not limited to Section 251(b)(5) Traffic, which is defined as Telephone Exchange Service, Exchange Access Service, Information Service, and Telephone Toll Service (including but not limited to IntraLATA and InterLATA Toll) traffic and is also defined to include ISP-bound traffic, VoIP Traffic. (Ex. Q-1, at 66)

Qwest objects to this definition because it is inconsistent with the Act, FCC rules, and the *ISP Remand Order*. The FCC's rule, 47 C.F.R. § 51.701(b) ("Rule 701(b)"), expressly excludes "exchange access" from the definition of "telecommunications traffic," yet Level 3 includes exchange access in its definition. In addition, despite the fact that toll traffic has never been considered to be subject to reciprocal compensation under section 251(b)(5), Level 3 includes both inter-LATA and intraLATA toll in its definition of "section 251(b)(5) traffic," which is incorporated into Level 3's definition of "telecommunications." And although the *ISP Remand Order* ruled that ISP traffic is not telecommunications traffic, Level 3 persists in including ISP traffic in its definition of "telecommunications traffic."

Thus, while ostensibly defining "interconnection," Level 3 really makes a back door attempt to expand the definitions of "telecommunications traffic" and "section 251(b)(5) traffic" to include categories of traffic that do not belong in either definition. The Commission should reject Level 3's definition of "interconnection" and its veiled attempt to turn commonly accepted definitions upside down. (Ex. Q-1, at 66-67). Qwest's straightforward definition of "interconnection" should be adopted.

2. The Commission Should Adopt Qwest's Definition of "Interexchange Carrier." (Issue No. 11).

Qwest defines the term "Interexchange Carrier," as "a Carrier that provides InterLATA or IntraLATA Toll services." In contrast, Level 3 defines the same terms as "a Carrier that

provides Telephone Toll Service.” (Ex. Q-1, at 67-68). Qwest’s proposed definition of “Interexchange Carrier” is the current, standard language included in interconnection agreements with CLECs. It has been approved by every commission (including this Commission) in Qwest’s region. An interexchange carrier is an access customer of a LEC, and typically purchases Feature Group D access trunks to originate and terminate “interLATA and intraLATA” toll calls. The terms “interLATA” and “intraLATA” have been and still are widely used and understood within the industry. Indeed, the Act contains a definition for “interLATA service” in section § 153(21). State commissions also reference intraLATA and interLATA services and refer to “toll” services ordered by an interexchange carrier (“IXC”).

Although it is not clear why Level 3 opposes the use of the terms interLATA and intraLATA in this definition (and its lack of testimony on the subject provides no further clarity), during negotiations Level 3 implied that in order for a toll call to be a toll call, a discrete charge must be imposed. Thus, under this logic, if Level 3 does not charge its customers for VNXX calls (and it does not), then VNXX calls could not be categorized as interexchange (or toll) calls; could not be subject to access charges; and should be subject to reciprocal compensation. The Commission should not approve such a definitional sleight-of-hand.

Under what appears to be Level 3’s theory, a carrier that offers an interexchange service, but does not charge its customers on a per-minute basis would thereby exempt itself from FCC or state prescribed access charges. Under this kind of thinking, a CLEC like Level 3 would be enabled to game the system using the mis-assignment of NXXs and, by its own actions, create the situation that would allow it to argue that VNXX is not telephone toll service, thus creating its own self-fulfilling prophecy. (Ex. Q-1, at 69). The decision of the Pennsylvania commission explains the dilemma: the CLEC “can create a situation in which a Verizon end-user can call a

CLEC customer outside the Verizon end-user's local calling zone without paying a toll charge, thus expanding the Verizon end-user's local calling zone without providing appropriate compensation to Verizon for the transport outside the local calling area. *This situation, i.e., the virtual NXX assignment 'tricks' Verizon's billing systems into failing to levy toll charges on the Verizon end-user and into payment of reciprocal compensation.*"³⁵ Level 3's language should be rejected.³⁶

3. The Commission Should Adopt Qwest's Definition of "IntraLATA Toll Traffic." (Issue No. 12).

Qwest defines "IntraLATA toll traffic" as "[t]raffic outside the Local Calling Area," while Level 3 defines it as traffic that "constitutes Telephone Toll Service."

Qwest's objection to Level 3's language is precisely the same issue described in its discussion of Issue 11. (Ex. Q-1, at 67-69). The dispute can be avoided by simply adopting Qwest's language, which is clear and has been widely accepted in SGATs and interconnection agreements.

4. The Commission Should Adopt Qwest's Definition of "Exchange Service." (Issue No. 14).

Issue No. 14 involves the definition of "exchange service or extended area service (EAS)/Local traffic." Qwest proposes that the term "exchange service" should have a meaning consistent with Arizona law, ("traffic that is originated and terminated within the Local Calling

³⁵ Opinion and Order, *Petition of Global NAPs South for Arbitration of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania*, 2003 WL 21135673, at Issue 4(c)(1) (Pa. PUC April 21, 2003)(note: Westlaw version unpaginated).

³⁶ In addition, Level 3's definition would allow Level 3 to avoid paying access charges on traffic that it routes on behalf of other IXCs. Under Level 3's definition, because Level 3 does not impose a discrete charge to the end user, in its view Level 3 would not be providing "telephone toll service." Thus, Level 3 could assert a right to send interexchange calls to Qwest for termination without paying appropriate access charges.

Area as determined by the Commission”). (Ex. Q-1, at 71). Level 3 proposes to delete the term altogether. (*Id.*)³⁷

No explanation is offered by Level 3 for excluding the term “exchange service,” despite the fact that it is used in provisions throughout the agreement, including in provisions that Level 3 does not dispute. Qwest’s proposed definition for exchange service is commonly used in Qwest interconnection agreements and is consistent with the definition of local traffic in Arizona law. Qwest’s language should be adopted.

5. The Commission Should Reject Level 3’s Proposed Definition of “Telephone Toll Service.” (Issue No. 15).

Level 3 includes a definition for “telephone toll service” (the statutory definition in the Act), while Qwest does not believe such a definition is necessary in the agreement. (Ex. Q-1, at 72). The real issue regarding this definition is Level 3’s attempt to exempt “telephone toll service” from access charges and instead treat this traffic as local. Level 3 proposes that “telephone toll service” be included in its definition of “section 251(b)(5) traffic.” Level 3 thus makes the preposterous suggestion that toll traffic, which by definition is subject to access charges, is also subject to reciprocal compensation. Level 3 uses the term “251(b)(5) traffic” throughout the agreement, without mentioning that it is defined to include toll. This is an inappropriate attempt to redefine categories of traffic in ways that will dramatically change methods of compensation. (Ex. Q-1, at 72-74). This language should not be accepted by the Commission.

³⁷ The parties have reached a resolution of Issue 9, which involved the definition of the term, “Exchange Access.” Qwest has agreed to Level 3’s proposal that the definition in the Act for this term be used in their agreement. (Ex. Q-1, at 71).

C. The Commission Should Accept Language Dealing with the 3-1 Ratio for ISP Traffic, But Should Eliminate the Last Sentence Proposed by Level 3. (Issue No. 19).

With one exception, Qwest is willing to accept the language proposed by Level 3 for paragraph 7.3.6.2:

7.3.6.2 Identification of ISP-Bound Traffic -- Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-Bound traffic. Either Party may rebut this presumption by demonstrating the factual ratio to the state Commission. Traffic exchanged that is not ISP-Bound traffic will be considered to be section 251(b)(5) traffic. (Ex. Q-1, at 63)

There are two issues relating to Issue 19: the first issue relates to whether Qwest or Level 3 could challenge the 3:1 ratio by seeking approval by a state commission to approve a means of using actual data; the second relates to Level 3's continuing attempt to change long-standing intercarrier compensation relationships with the introduction of the overly broad term "section 251(b)(5) traffic." Qwest agrees that the inclusion of the sentence "[e]ither party may rebut this presumption by demonstrating the factual ratio to the state Commission" resolves the first issue in Arizona. It is clear that this language allows a party to challenge the presumption before the Commission.

The second issue, however, is a serious one. Level 3's proposed last sentence states: "Traffic exchanged that is not ISP-Bound traffic will be considered to be section 251(b)(5) traffic." (Ex. Q-1, at 63) By incongruously including that sentence in this section (which relates to the 3:1 ratio and not to other compensation issues), Level 3 attempts to further confuse the issue and thereby effect a major policy shift in the categorization of traffic and the compensation regimes to which they are subject. In this case, Level 3 attempts to define all traffic that is not ISP-bound traffic to be "section 251(b)(5) traffic." This is simply not true. No one can seriously argue that *all* non-ISP traffic is subject to reciprocal compensation under section 251(b)(5). In

effect, the last sentence is a veiled attempt to classify *all* traffic exchanged between the two companies as local traffic. This sentence must be read side-by-side with Level 3's bizarre definition of 251(b)(5) traffic (discussed above under Issues 10-12, and 14-15), in which Level 3 attempts to include toll traffic in its definition of section 251(b)(5) traffic.³⁸ Thus, in a section devoted to the 3:1 ratio, Level 3 has inserted language that would have the effect of eliminating the interstate and intrastate access structures established by the FCC and Arizona Commission. The last sentence should, therefore, be omitted. With that change, Qwest agrees with the language.

D. Level 3's Proposal to Exempt all VoIP Calls from Existing Inter-carrier Compensation Regimes Should be Rejected. Level 3 Should be Subject to the Reasonable Certification and Audit Provisions Proposed by Qwest. (Issues 16, Issue 3b, Issue 3c, Issue 4,³⁹ and Issue 1a).

Level 3 takes the position that all VoIP calls are exempt from access charges no matter where the calls are terminated or under what circumstances, so long as the calls are originated in IP and delivered to Qwest by Level 3. It believes that it, or its third party VoIP providers, can place VoIP calls on the PSTN and never pay access charges that would apply to any other carrier (including wireless carriers) under the same circumstances, even though many of the calls are neither local in nature nor qualify for the ESP exemption. Although Level 3 attempts to couch its advocacy in the nomenclature of the ESP exemption, once its proposals are fully analyzed, it is clear that Level 3 is merely proposing another variation of VNXX for VoIP traffic. Level 3's

³⁸ One can only be reminded of the perversion of language in Orwell's "1984," where virtually every important term actually had a meaning opposite from what it appeared to mean.

³⁹ In the discussion of ISP VNXX traffic, Qwest addressed issues 3b, 3c, and 4, all of which also relate VoIP traffic in addition to ISP traffic. The fundamental arguments made by Qwest in the sections above apply with equal force to VoIP traffic as well.

proposals should be rejected for all of the same reasons the Commission should reject Level 3's ISP VNXX proposals.

1. The Commission Should Accept Qwest's Definition of VoIP.

Time Division Multiplexing ("TDM") is the language of the PSTN, while Internet Protocol ("IP") is the specific language of the Internet that is used to transmit VoIP. (Ex. Q-1, at 7-8). In order for voice traffic to be exchanged between a TDM network, like Qwest's, and an IP network like Level 3's, equipment must convert the traffic from one protocol (i.e., TDM to IP, or IP to TDM) to the other. As it relates to the VoIP traffic exchanged between Qwest and Level 3, this function occurs at what Level 3 refers to as its Gateway switch. (Ex. L-1, at Ex. RRD #9 VoIP Call Flow).

The parties addressed the four general types of calls that arguably fall within the definition of VoIP traffic. The first are the so-called IP-IP calls, or calls that both originate and terminate on IP-compatible customer premises equipment ("CPE") over broadband connections. The parties agree that these are VoIP calls, but also agree they are irrelevant to this docket because they are originated, transmitted, and terminated entirely over the Internet. Given that they never touch the PSTN, these calls do not impact the interconnection agreement between the parties in this case. (Tr. 108; Ex. Q-1, at 9-10).

The second category of calls originates in IP (i.e., on IP-compatible equipment over a broadband connection), but terminate to a traditional TDM line on the PSTN (i.e., IP-TDM). Both parties agree that this category meets the proper definition of VoIP. (Ex Q-1, at 10; Tr. 109).

The third category of calls originates in TDM over a regular PSTN line, but terminates in IP (i.e., on IP-compatible equipment over a broadband connection). These calls are known as TDM-IP calls. As will be discussed below, the language proposed by both parties excludes this

category from the VoIP definition because the calls do not originate on IP-compatible equipment over a broadband connection. Yet, inexplicably, Level 3's testimony and discovery disagrees with its own proposed language, which clearly requires that a VoIP call originate in IP. In cross-examination, Level 3 states that it wishes to include such calls within the VoIP category. (Tr. 188-90)

The fourth category is known as TDM-IP-TDM or "IP in the middle" calls. Both parties acknowledge that the FCC has ruled that this traffic is not VoIP, not subject to the ESP exemption, and should be treated like any other TDM call. (Tr. 108-09; Ex. Q-1, at 11-12, 14). The FCC ruled in the *AT&T Declaratory Ruling* that this type of call is not a VoIP call even if at some point during the call it was converted to IP because, before delivery it was reconverted to TDM and delivered over the PSTN.⁴⁰ Thus, of the four categories, the only one at issue in terms of whether it falls within the definition of VoIP is TDM-IP.

There are three significant differences in the competing definitions of "VoIP traffic." Qwest will consider them in order.

a. Level 3 Should Not be Permitted to Remove the Phrase "at the premises of the party making the call" from the VoIP Definition.

Level 3 inappropriately removes two phrases from the VoIP definition ("at the premises of the party making the call" and "end user premises"), both of which were included by Qwest to underline the fact that VoIP calls must originate in IP. The point of Qwest's language was to make it clear that VoIP calls must originate in IP, on IP-compatible end user equipment. If the IP equipment is not at the premises where the call originates, then it must originate in TDM and

⁴⁰ Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (April 14, 2004) (ruling that AT&T's service was a telecommunications service and is subject to access charges) ("*AT&T Declaratory Ruling*").

be converted to IP elsewhere; thus, it would not meet the proper test for a VoIP call. Level 3 removed two references to the premises of the end user, but did not explain why in its testimony. Qwest speculates that Level 3 is concerned that Qwest might be trying to require that VoIP calls originate from only one place. That was not Qwest's intention. VoIP calls can be originated on any computer with a broadband connection. For purposes of identifying VoIP, Qwest does not care where the end user is physically located, but only that the call originates in IP from IP-compatible equipment over a broadband connection. But wherever the end user customer is located when it originates a call, it must originate it in IP and not in TDM to qualify as VoIP.

b. Level 3's Proposal to Add the Words "or from" Should Be Rejected. TDM-IP Calls Should Not Be Included in the Definition of VoIP.

The second difference is that Qwest's language requires that a VoIP call be "transmitted over a broadband connection to the VoIP provider." Inexplicably, Level 3's language states that the call must be "transmitted over a broadband connection to or from the VoIP provider." It is a physical impossibility for a call to originate in TDM and IP simultaneously, so Level 3's language is hopelessly inconsistent. The ultimate issue is whether TDM-IP calls should be categorized as VoIP. The FCC has not yet ruled on a definitive definition of VoIP, but all indications thus far are that the only traffic that will meet the VoIP definition is traffic that originates in IP. Thus, in order to assure conformity with the FCC, Qwest strongly urges the Commission to adopt Qwest's language and exclude TDM-IP traffic from the VoIP definition.

c. The Additional Language Originally Contained in the Qwest-Proposed VoIP Definition, But Now Moved to Section 7.2.2.12 and 7.2.2.12.1 Should be Adopted.

Qwest's proposed definition of "VoIP traffic" originally contained a second paragraph; Level 3 proposes to strike all of the additional language. This language describes how VoIP traffic will be treated under the interconnection agreement as well as establishing the

interconnection compensation rules that apply to VoIP traffic. Although Qwest believes this language is critical and must be included in the interconnection agreement, Qwest recognized that the language more appropriately relates to terms and conditions and should not be in the "VoIP traffic" definition. Qwest, therefore, proposed to move the language from the definitions section to section 7.2 of the agreement (specifically section 7.2.2.12 and 7.2.2.12.1) (Ex. Q-1, at 26-27). Regardless of where it is placed, the language defining the treatment of VoIP traffic is necessary to avoid future disputes.

Section 7.2 of the ICA addresses exchange of traffic generally. A subset of that section, 7.2.2, discusses the terms and conditions for the exchange of traffic. The terms and conditions describing the exchange of VoIP traffic should be located in the next available subsection, 7.2.2.12. Mr. Brotherson proposed the following language be inserted:

7.2.2.12 VoIP Traffic. VoIP traffic as defined in this agreement shall be treated as an Information Service, and is subject to interconnection and compensation rules and treatment accordingly under this Agreement based on treating the VoIP Provider Point of Presence ("POP") as an end user premise for purposes of determining the end points for a specific call.

7.2.2.2.12.1 CLEC is permitted to utilize LIS trunks to terminate VoIP traffic under this Agreement only pursuant to the same rules that apply to traffic from all other end users, including the requirement that the VoIP Provider POP must be in the same Local Calling Area as the called party. (Ex. Q-1, at 26-27)

The first provision, that VoIP traffic (properly defined) is an information service does not appear to be contested. Section 7.2.2.2.12.1 addressed two other concepts: (1) that the VoIP provider point of presence ("POP") be considered an end user location for purposes of determining the end points of a call; and, (2) the corollary principle that the use of Local Interconnection Service ("LIS") trunks may be used for VoIP under the same rules that apply to other end users, including the requirement that the VoIP provider POP be located in the same LCA as the party called.

Level 3's proposals are part of a consistent effort to receive treatment that is far more beneficial to it than the a well-established set of rules under which other similarly situated carriers operate. Level 3 seeks through *definitions* to exempt its traffic from what would otherwise be subject to applicable state or federal access charges.

2. Through its Proposed Language, Level 3 is, in Effect, Seeking Authorization for VNXX for VoIP Traffic. This Proposal is Inconsistent with the ESP Exemption and Sound Public Policy and Should be Rejected (Issues 3b, 3c, and 4).

In Issue 3b, Level 3 attempts to define "VoIP VNXX traffic" as "telecommunications over which the FCC has exercised exclusive jurisdiction under section 201 of the Act." That is not a definition. It is merely a legal conclusion. Nowhere in Level 3's discussion of Issues 3 or 4 does Level 3 provide any citation or support for that contention. In section 7.3.6.1 (Issue 3c), Level 3 proposes language that suggests that VoIP traffic is in some manner related to the *ISP Remand Order*, although it provides no citation of authority for that proposition either. With regard to Issue 4, Level 3 appears to propose that reciprocal compensation be paid on VoIP traffic on the basis of telephone numbers, rather than the physical location of the called and calling parties. Yet elsewhere Level 3 suggests that all VoIP traffic be subject to reciprocal compensation, irrespective of telephone numbers. Thus, Level 3's proposed language amounts to inconsistent proposals.

Neither of Level 3's inconsistent proposals as to what part of VoIP traffic should be subject to reciprocal compensation is acceptable to Qwest, nor are they consistent with Arizona and federal law.

Reciprocal compensation has been traditionally limited to those cases where the physical end points of a call are within the same LCA. Both of Level 3's inconsistent proposals would abandon that limitation and require reciprocal compensation on VoIP traffic in far more

situations than it is paid for other traffic. But that is not all. By proposing to substantially broaden the circumstances in which reciprocal compensation would apply, Level 3 suggests that it should be allowed at the same time to avoid the existing carrier compensation system that governs compensation for interexchange calls. For reasons that Level 3 has not explained, it proposes an end run around the normal compensation rules for VoIP traffic.

Level 3's effort to abandon the historical distinction between local traffic (for which reciprocal compensation is appropriate) and non-local traffic (whose compensation is governed by an alternative compensation system) for VoIP traffic should be rejected.

a. Level 3 Seeks Reciprocal Compensation on all VoIP Traffic, Irrespective of Where the VoIP Provider POP is Located Or Where Qwest Must Transport the Call to Terminate It. Level 3's Proposal is an Attempt to Fundamentally Change the Established Compensation Regime.

Level 3's proposed language would require the payment of terminating compensation at \$.0007⁴¹ on every MOU from every call that meets its "VoIP traffic" definition.⁴² On cross examination, Mr. Ducloo asserted erroneously that the location of the VoIP provider POP has no relevance whatever to intercarrier compensation for VoIP calls. (Tr. 165-97).⁴³

Thus, Level 3 takes the position that access charges should never apply to a VoIP call originated on its IP network, no matter where it enters the PSTN, and without regard to where

⁴¹ Level 3 chooses the \$.0007 rate because it is the rate in the *ISP Remand Order*, although it never explains why that rate specifically designed for ISP traffic, as opposed to the voice rate established by the Arizona Commission, would apply.

⁴² Level 3's VoIP VNXX defines it as traffic "over which the FCC has exercised exclusive jurisdiction . . . and to which traffic a compensation rate of \$.0007/MOU applies." (Ex. Q-1, at 44).

⁴³ Although Level 3 denies that VoIP providers have a point of presence, Mr. Ducloo testified that "the service that Level 3 provides to VoIP entities is a translation or protocol conversion service that allows communications between end users of the PSTN and the Internet." (Ex. L-1, at 59).

Qwest must transport the call for termination. Level 3's position on this point was made clear during the cross examination of Mr. Ducloo, where he was questioned about the compensation implications of several scenarios involving VoIP.

Two scenarios involved VoIP calls originated on Level 3's IP network. The first of these was illustrated on Exhibit Q-20, and is the most telling. In this scenario, a VoIP customer with a Phoenix number calls a Page PSTN customer of Qwest. Page and Phoenix are about 275 miles from each other. As described by Mr. Ducloo, the VoIP call would be routed over the IP network to the Level 3 Gateway switch in Phoenix, where the call would be converted from IP to TDM. From there, Level 3 would deliver the call in TDM format to Qwest at the POI (which is located near the Qwest access tandem in Phoenix). Then, in Mr. Ducloo's words, "we would expect Qwest to carry the call to the end office that serves that particular end user, and then terminate the call to the end user in Page. For that call we would compensate Qwest reciprocal compensation for termination, which is .0007." (Tr. 182). Yet, Mr. Ducloo acknowledged that this call was not even "locally dialed" under Level 3's theory that telephone numbers, and not physical location, should govern the categorization of the call. Mr. Ducloo was quite candid: "the Level 3 position is that for VoIP that traditional access charges and local boundaries don't apply. Geography doesn't matter." (*Id.* at 183). Mr. Ducloo acknowledged that if the caller were a Phoenix PSTN customer making a call to Page, that Qwest would receive terminating access charges from the customer's interexchange carrier (*Id.* at 184-85), even though, in both cases, "the work is the same." (*Id.* at 185). Yet Mr. Ducloo testified that when it offers VoIP, there is no such thing as an associated IXC that it hands interexchange traffic to and that Level 3's position is that terminating access charges never should apply to VoIP traffic. (R. 184-85, 187).

The second scenario hypothesized the same Qwest PSTN customer in Page, but a VoIP customer actually located in Phoenix (but who uses a Page number for its VoIP service). According to Mr. Ducloo, even though the call would still enter the PSTN at the Phoenix POI and Qwest would still be required to transport and terminate the traffic in Page, instead of receiving terminating access, Qwest would receive \$.0007. (*Id.* at 192-93).

Thus, Level 3's position on VoIP is that access charges can never be assessed on a VoIP-originated call that is terminated by Qwest in TDM, no matter how far Qwest must transport the call in order to terminate it. Although it is far from clear how Level 3 reaches this conclusion, it apparently believes the historical ESP exemption gives it or its third party VoIP providers a blanket exemption from access charges under all circumstances. This argument is not supported by the law and would be grossly unfair to Qwest. The ESP exemption only exempts a VoIP provider from terminating access for delivering calls to PSTN customers in the LCA in which the VoIP provider is purchasing local exchange service. For all other calls, including calls that terminate to a different LCA than the LCA where the VoIP provider purchases local exchange service, Qwest is entitled to charge applicable access charges.

b. The Proper Application of the ESP Exemption.

The ESP exemption was originally established in 1984 at the time access charges were established following the Modified Final Judgment (MFJ) that governed the divestiture of the old Bell System. While establishing the access charge regime in use today for all IXCs, the FCC permitted Enhanced Service Providers ("ESPs") to connect their POP (point of presence) to the local network via local exchange service as opposed to access services (e.g., Feature Group D) that IXCs were (and still are) required to purchase.

The most critical aspect of the exemption is that the ESP is treated like an end user. This principle is clearly articulated in two different portions of the FCC's 1988 *ESP Exemption Order*.⁴⁴

Under our present rules, *enhanced service providers are treated as end users for purposes of applying access charges*. . . . Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. (*ESP Exemption Order* ¶ 2, n. 8; emphasis added).

Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users." (*Id.* ¶ 20, n. 53).

Level 3's language is a direct attempt to avoid the FCC's ruling. Instead of standing in the place of an end user (whose local service gives it the right to originate and terminate calls within the LCA in which it is located without incurring additional charges), Level 3 believes it is entitled to terminate traffic throughout the same LATA without incurring access charges.⁴⁵ Level 3 cited

⁴⁴ Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, (1988) ("*ESP Exemption Order*").

⁴⁵ In the discussion of the first VoIP scenarios discussed above, Mr. Ducloo suggested that Level 3 should not be required to pay terminating access charges because Page and Phoenix are "within the same LATA." (Tr. 184) Mr. Gates elsewhere made the statement that "[b]y only requiring a single POI per LATA, the FCC has effectively defined the local calling area for interconnection CLECs to be the LATA." (Ex. L-4, at 13). On cross-examination, Mr. Gates contradictorily stated that he was not suggesting that the single POI per LATA concept "in any way changes the Commission's authority over those local calling areas;" yet, in the next sentence he stated that "for purposes of intercarrier compensation, all of those calls within that LATA routed to the single POI are treated as local." (Tr. 148) This is nonsense, particularly in light of the Commission's "Telecommunications Interconnection and Unbundling" rule that states: "the incumbent LEC's *local calling areas and existing EAS boundaries* will be utilized for the purpose of classifying traffic as local, EAS, or toll for purposes of *intercompany compensation*." *Id.* § R1421305(A) (Emphasis added). Level 3's language would nullify that rule. Finally, in response to the question whether "you are aware of an order where the FCC has specifically stated that the local calling area for CLECs is the LATA in those words," Mr. Gates stated: "No. Not specifically, no." (Tr. 150).

no authority for this expansive reading of the ESP exemption. It defies common sense that an ESP, which stands in the place of an end user customer, would then receive privileges far beyond those granted to end user customers. A non-ESP end user customer located in Phoenix that called Page would incur toll charges. Yet Level 3 seems to think it should be given greater rights than such end users (i.e., that a VoIP provider in Phoenix should be able to terminate calls to Page without incurring access charges).

Under Arizona law, a voice call between separate LCAs is a toll call and must be treated as such. This rule applies equally to VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the ESP is located, but the call is being sent for termination to another LCA, the provider is not entitled to free transport to the terminating LCA under the ESP exemption or on any other basis, nor is it allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a physical presence in that LCA. Calls of this sort are properly classified as interexchange traffic and must be handed off to an interexchange carrier (IXC), which must connect to Qwest via a Feature Group connection.

Level 3 attempts to improperly use the ESP exemption to effect a VNXX scheme for VoIP calls. Level 3's proposed language would magically transform interexchange VoIP voice calls into the equivalent of a local call. For all the reasons set forth in earlier sections dealing with ISP VNXX traffic, the Commission should reject Level 3's attempt to apply VNXX to VoIP traffic. Level 3 cites no authority to suggest that such a result is legally permissible nor does it provide meaningful reasons why this traffic (which consists of voice calls that are no different to the end user than a voice call using the public switched telephone network) should receive special regulatory treatment. Its language should be rejected and Qwest's should be adopted.

3. The Commission Should Adopt Qwest's Proposed Audit and Certification Language Related to VoIP (Issue 1A).

Qwest proposed language that would allow operational audits related to VoIP traffic (Ex. Q-1, at. 33; section 7.1.1.1) and language requiring Level 3 to certify that traffic it characterizes as VoIP traffic meets the approved definition (*Id.* at 38, section 7.1.1.2). Level 3 provided neither direct nor rebuttal testimony on either issue.

As Mr. Brotherson testified, both provisions are necessary. (Ex. Q-1, at 32-39). In both cases, the language is necessary so that Qwest can verify that the traffic that Level 3 identifies as VoIP traffic is valid VoIP traffic entitled to the ESP exemption and other treatment related to VoIP under the agreement.

Audits are necessary to verify the jurisdiction of a call by ensuring that a VoIP call is properly classified for billing purposes according to the location of the originating and terminating points of the PSTN portions of the call. Audits are necessary to ensure that calls that are classified as VoIP are properly identified as VoIP calls in compliance with the FCC's definition of VoIP, which is the basis of Qwest's proposed definition of VoIP. Ironically, as Mr. Brotherson pointed out, Level 3 agreed to numerous other audit procedures in other portions of the agreement. (*Id.* at 36), and has even proposed section 7.3.9, an auditing provision for company factors. (*Id.* at 37).

Similarly, certification that VoIP configurations as defined in the agreement are critical. The Commission should require Level 3 to certify that VoIP traffic that it sends to Qwest meets the definition adopted by the Commission in the agreement. As with the auditing provision, Level 3 agreed to numerous certification requirements in the agreement. (*Id.* at 38-39).

Given the obvious benefit of such provisions and Level 3's failure to provide any reason to reject them, the Commission should adopt both provisions.

E. Level 3's Language and Arguments Related to SPOI Should be Rejected (Issue Nos. 1, 1a – 1f, 1i and 1j)

Level 3, in general, characterizes Issue 1 as whether it is entitled to interconnection at a single point in each LATA. However, this issue is not about single point of interconnection (“SPOI”) within the LATA. It is about compensation for the use of Qwest’s network. Under the Act, Qwest has a duty to provide interconnection with its local exchange network “on rates, terms and conditions that are just, reasonable, and nondiscriminatory” and in accordance with the requirements of Section 252 of the Act. 47 U.S.C. § 251(c)(2)(D). Section 252 of the Act in turn provides that determinations by a state commission of the just and reasonable rate for the interconnection shall be “based on the cost...of providing the interconnection,” “nondiscriminatory,” and “may include a reasonable profit.” 47 U.S.C. § 252(d)(1). As the FCC has recognized, these provisions make clear that CLECs must compensate incumbent LECs for the costs incumbent LECs incur to provide interconnection. (See *Local Competition Order* ¶¶ 200, 209). This is true even when the costs are incurred on Qwest’s side of the point of interconnection.

The Courts are in agreement with Qwest’s position. In *U S WEST Communications, Inc. v. Jennings*, for example, the Ninth Circuit expressly noted that “to the extent that AT&T’s desired interconnection points prove more expensive to U S WEST, we agree that the [Arizona Corporation Commission] should consider shifting costs to AT&T.”⁴⁶ Similarly, in *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, the Third Circuit Court of Appeals noted that while Worldcom was entitled to choose interconnection at a single point per LATA, “to the extent...that WorldCom’s decision on interconnection points may prove more

⁴⁶ 304 F.3d 950, 961 (9th Cir. 2002).

expensive to Verizon, the PUC should consider shifting costs to WorldCom.”⁴⁷ Ironically, Level 3 cites both of these cases in its Petition to support its request for a single point of interconnection, but then fails entirely to mention that both cases would require Level 3 to compensate Qwest for the costs that Qwest incurs to provide interconnection.

In an attempt to avoid its obligation to compensate Qwest for interconnection costs Qwest incurs, Level 3 erroneously relies upon Rule § 51.703(b) of the FCC’s interconnection rules. Rule 51.703(b) provides that “a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.” 47 C.F.R. §51.703(b)(emphasis added). Rule 51.703(b) is not applicable here, however, because the term “telecommunications traffic” has been defined by the FCC to exclude “information access traffic,” 47 C.F.R. §51.701(b)(1). In its *ISP Remand Order*, the FCC determined that ISP-bound traffic (defined to be traffic destined for the Internet where the ISP server is located in the same local calling area as the originating caller) is information access traffic.⁴⁸

As subparts of Issue 1, Level 3 identifies eight sub-issues (a-f, i and j) that purportedly involve proposed contract language involving the manner of interconnection. For each of these issues, Level 3 attempts to interject disclaimers that it is not responsible to pay for interconnection costs incurred at its request. These disclaimers are not appropriate in sections of the agreement that address the manner of interconnection. (Ex. Q-3, at 9-16, 23-24) The financial obligations of the parties are addressed in other sections of the interconnection

⁴⁷ 271 F.3d 491, 518 (3rd Cir. 2003).

⁴⁸ *ISP Remand Order* ¶ 39.

agreement. Accordingly, the Commission should reject the contract language that Level 3 has proposed for Issues 1a through 1f, 1i and 1j.

Furthermore, in the contract language that Level 3 has proposed for Issues 1b and 1f, Level 3 incorrectly describes facets of interconnection. In its proposed language for Issue 1b, Level 3 confuses what is required to create a point of interconnection with what is required to interconnect two networks. In its proposed language for Issue 1f, Level 3 inappropriately removes the reference to tandem switches and end office switches as places where traffic may be exchanged. This is inappropriate because there are no other places within Qwest's network where traffic may be exchanged. Level 3 also eliminates any requirement to establish trunking to subtending network switches when traffic volumes require it. This language change is effectively a retraction of the commitment Level 3 makes in its testimony to establish such trunking when it is necessary. (Ex. Q-6, at 11-14). Accordingly, the Commission should reject Level 3's proposed language for Issues 1b and 1f.

F. The Commission Should Adopt Qwest's Proposed Language Setting Forth The Relative Use Factor (RUF) for Determining the Cost of Jointly Used Facilities (Issues 1g and 1h)

Issues 1g and 1h deal with how the cost of jointly used facilities will be allocated between Qwest and Level 3. Issue 1g raises the question as it relates to entrance facilities (Ex. Q-3, at 16-17), while Issue 1h concerns two way direct transport facilities (Ex. Q-3, at 21). Aside from the facilities that the language applies to, the issue is same. While Level 3 agrees in its testimony that a relative use factor should be used (Ex. L-1, at 7-8), Level 3 proposes no contract language that would set forth the terms for such a factor. Accordingly, Qwest's proposed language should be adopted.

G. If Traffic is to be Combined, It Should be Combined on FGD Trunks Rather than LIS Trunks (Issue 2, Issue 18)

In Issue 2, Level 3 contends that it should be allowed to commingle all traffic including switched access traffic over LIS trunks. Qwest has agreed to allow all traffic except for switched access traffic to be carried over these trunks. However, Qwest requires that switched access traffic be carried over FGD interconnection trunks. Qwest has agreed to allow all traffic to be carried over FGD trunks.

Switched access traffic should be carried over FGD trunks for three reasons. First, switched access traffic must be exchanged over FGD trunks in order to allow Qwest to provide industry standard terminating records to Independent Telephone Companies (“ICOs”), CLECs, and wireless service providers (“WSPs”). Without these records, these ICOs, CLECs and WSPs will not be able to bill Level 3 for interexchange traffic that Level 3 originates. (Ex. Q-3, at 31-32). Level 3’s proposal to use an entirely new system of billing factors simply does not address this problem. Qwest and every ICO, CLEC, and WSP receiving traffic from Level 3 would have to completely rework their billing systems and processes solely, at great expense, for Level 3. If Level 3 prevails on this issue, other carriers could opt in to the Level 3 agreement; thus, Qwest, each ICO, CLEC, and WSP would then each be required to provide the same capability to those carriers, thus further increasing the administrative burden to maintain separate billing systems and processes.

Second, Qwest has the ability to receive all types of traffic over FGD trunks. (Ex. Q-5, at 33). By routing all traffic over FGD trunks, Level 3 will achieve the same trunk efficiencies that would be gained by routing all traffic over LIS trunks, but without the disadvantage of disabling Qwest’s billing systems. Qwest has developed the billing systems that allow it both to prepare billing records for ICOs, CLECs and WSPs and to permit commingling of various traffic types

over FGD trunks. Thus, if switched access is to be commingled with other types of traffic, it should be done on FGD trunks.

Finally, switched access traffic should be exchanged over FGD trunks in order to comply with Section 251(g) of the Act. Under Section 251(g), Qwest is required to provide interconnection for the exchange of switched access traffic in the same manner that it provided interconnection for such traffic prior to passage of the Act. Section 251(g) of the Act specifically provides:

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory *interconnection restrictions and obligations* (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

(Emphasis added). As the FCC has stated, “[p]ursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to the enactment of the 1996 Act.”⁴⁹

In this proceeding, Level 3 is inappropriately requesting that Qwest apply its access service tariffs differently for Level 3 than for all other carriers.

The legally binding practice between Qwest and CLECs is to route all interLATA switched access traffic and intraLATA switched access traffic not carried solely by LECs via Feature Group services. This is done according to industry requirements for procedures to record and bill access traffic, including the industry guidelines for jointly provided switched access billing and records exchange processes, so that Qwest can use its systems that were previously developed to mechanize these processes. Level 3 seeks to combine Level 3 switched

⁴⁹ *Local Competition Order*, ¶1034.

access, local and information access traffic over non-Feature Group interconnection trunks and, by implication, to force Qwest to abandon or materially retrofit its mechanized billing system, records handling procedures and switched access tariffs that have been in use by the telecommunications industry since prior to the Act. Level 3's proposal to use billing factors that are by their nature just estimates rather than Qwest's mechanized processes should be rejected.

H. The Commission Should Adopt Qwest's Definition of Call Record (Issue 8).

Qwest and Level 3 propose two very different definitions of a call record. (Ex. Q-5, at 36). Qwest's proposed definition is tied to the information that is necessary to rate and bill a call. Under Qwest's definition, a call record would include the originating telephone number, terminating telephone number, billing telephone number if different, time and date of call, duration of the call and any other data necessary to properly rate and bill a call.

Level 3's proposed definition of a call record does not require the information necessary to rate and bill a call. (*Id.*, at 35-37). Indeed, the only information essential to rate and bill a call that Level 3's definition includes is calling party number. Noticeably absent from Level 3's definition are the terminating telephone number, the time and date of the call, and the duration of the call. (Ex. Q-6, at 29-30). This basic information is essential to rate and bill a call. For example, it is impossible to bill intercarrier compensation that is calculated on a minute-of-use basis if the duration of the call is not provided in the call record.

Level 3's proposed definition also requires information that is not required by the industry today. (Ex. Q-5, at 37-38). For example, "Charge number" and "Originating Line Indicator" are not presently required and, as a result, are often not contained in the signaling stream used to create a call record. Thus, Level 3's proposed definition would require Qwest to provide information that often simply does not exist. Level 3's language should therefore be rejected.

I. AMA Switch Technology (Issue 6).

Level 3 took issue with Qwest's proposed definition for "Automated Message Accounting" (or "AMA") because it included the phrase "inherent in Switch technology." Qwest has agreed to remove this phrase from the definition and, accordingly, there should no longer be a dispute concerning this definition.

J. The Commission Should Adopt Qwest's Proposed Language Relating to Trunk Forecasting (Issue 17).

Qwest proposes that the interconnection agreement contain forecasting provisions. (Ex. Q-3, at 36). Forecasts from CLECs are necessary so that Qwest can plan for future demands for its network. Qwest is concerned that Level 3 may have an incentive to overstate its need for capacity to induce Qwest to build capacity to handle Level 3's most optimistic needs. Qwest initially proposed to address this concern by requiring Level 3 to back up its forecasts with deposits. After Level 3 objected to this language, Qwest proposed new language that would allow Qwest to adjust forecasts downward based on the relationship between trunks actually ordered by Level 3 and Level 3's forecasted trunk demand in previous months. (*Id.* at 36-38). Thus, under Qwest's proposal, if Level 3 overstates its anticipated needs, Qwest will be entitled to adjust future forecasts downward to counter any tendency on Level 3's part to overstate its needs in its forecasts.

Level 3 has not disputed that it is appropriate to require Level 3 to provide forecasts. Nor has Level 3 challenged Qwest's current forecasting proposal in its pre-filed testimony or through cross-examination at hearing. Accordingly, the Commission should adopt Qwest's proposed forecasting language for sections 7.2.2.8.4 and 7.2.2.8.5 of the interconnection agreement.

K. The Commission Should Adopt Qwest's Language Relating to Signaling Parameters (Issue 20)

Both Qwest and Level 3 have proposed language for section 7.3.8 of the agreement concerning signaling parameters. (Ex. Q-5, at 42-45). Qwest's proposed language uses industry defined terms. (*Id.* at 45-50). In contrast, Level 3's proposed language uses undefined terms such as "CRI" that do not have an accepted meaning in the telecommunications industry. To be sure, "CRI" does not even exist in the SS7 protocol used in the industry. (*Id.* at 45).

The purpose of section 7.3.8 of the interconnection agreement is to establish the signaling requirements between telecommunications networks. Level 3's proposed language would excuse it from providing the calling party number for IP originated calls even though the fact that a call is IP originated does not prevent the population of the calling party number signaling parameter. The calling party number is essential to properly rate and bill a call. (*Id.* at 49-50). Thus, Level 3's proposed language will lead to disputes as to the rating and billing for calls.

Furthermore, in at least one circumstance, Level 3's language will burden Qwest and Qwest alone with populating the "originating line information" (or "OLI") parameter to identify VoIP calls. (*Id.* at 47) However, the industry standard setting bodies have not determined to use the "OLI" parameter to identify VoIP calls. (*Id.*) Thus, the effect of Level 3's proposed language for Section 7.3.8 is to require the use of this parameter even though other carriers will not be using it. Level 3's proposal should be rejected.

L. The Commission Should Reject Level 3's Disclaimers Concerning Ordering of Interconnection Trunks/Compensation for Special Construction (Issues 21 and 22)

Level 3 proposes the addition of Sections 7.4.1.1 and 19.1.1 to the provisions in the interconnection agreement that address the ordering of interconnection trunks and compensation for special construction, respectively. (Ex. Q-3, at 43, 45) Sections 7.4.1.1 and 19.1.1 are Level 3 disclaimers of any responsibility to pay for interconnection services or construction that it

orders. Level 3's language is misplaced. Sections 7.4 and 19.1 of the agreement have to do with the ordering of interconnection service and special construction and do not address allocation of the responsibility for the cost of interconnection or special construction. (*Id.* at 43-45).

Moreover, Level 3's proposed Sections 7.4.1.1 and 19.1.1 only underscore why its position on allocation of the costs of interconnection is wrong. The fact that Level 3 requests (or orders) facilities or construction on Qwest's side of the point of interconnection demonstrates that the interconnection and/or construction is done for Level 3's benefit. Level 3 makes requests for Qwest facilities on Qwest's side of the point of interconnection so that Level 3 can serve its own ISP customers.

Sections 7.4.1.1 and 19.1.1 are completely unnecessary. The Commission will determine who pays the costs of interconnection in the sections of the agreement that are related to Issue 1. Accordingly, since nothing in Section 7.4 or 19.1 requires Level 3 to pay interconnection or construction costs, Level 3's proposed Sections 7.4.1.1 and 19.1.1 should be rejected.

M. Incorporation of SGAT Terms (Issue 5).

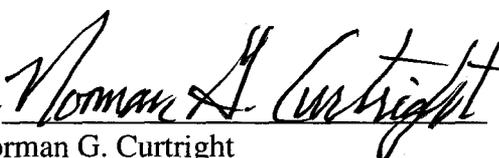
Issue 5 concerns what Level 3 interpreted to be cross-references in Qwest's template interconnection agreement to Qwest's Statement of Generally Available Terms ("SGAT"). Level 3 has misinterpreted the cross-references. The references in the template agreement to Qwest's SGAT indicate when the Commission has approved state-specific language that is different than the generic language used in the fourteen state template. Thus, for example, the state commissions in Colorado, Minnesota and South Dakota have each prescribed language for Section 5.8.1 that is different than Section 5.8.1 in the fourteen state template. The interconnection agreement Qwest submitted to supplement its Initial Response contains the state-specific language Qwest has proposed and contains no cross-references to the SGAT. Qwest

does not believe that Issue No. 5 represents an actual dispute between the parties and Level 3 said nothing about this issue in its testimony.

III. CONCLUSION

For all of the foregoing reasons, the Commission should approve and adopt Qwest's proposed contract language for the interconnection agreement between the parties.

RESPECTFULLY SUBMITTED this 18th day of November, 2005.

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ATTACHMENT A

ISSUED: August 16, 2005

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

IC 12

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

DISPOSITION: COMPENSATION FOR VNXX-ROUTED
ISP-BOUND TRAFFIC NOT AUTHORIZED
UNDER INTERCONNECTION AGREEMENT

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) 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*.¹

¹ *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*").

A prehearing conference was held in this matter on June 30, 2005. On July 5, 2005, the ALJ issued a Memorandum requesting that the parties file briefs addressing whether the ICA requires compensation for the exchange 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),"² a central issue in this complaint proceeding is whether the FCC's use of the term "ISP-bound traffic" in that order encompasses VNXX traffic.³ The parties filed briefs addressing that issue on July 18, 2005.

VNXX

In Order No. 04-504, the Commission described VNXX as follows:

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A 'Virtual NXX' (VNXX) occurs when a CLEC assigns a 'local' rate center code to a customer physically located in a 'foreign' rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer's phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer's physical location in Portland is a distance of some 50 miles. Thus, under a CLEC's VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC's Portland customer. When those same customers call the ILEC's Portland customers, served out of the same central office as the CLEC's Portland customer, they are charged intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided

² The 'FCC ISP Order' is more commonly known as the 'ISP Remand Order.' I use the latter reference throughout this ruling. 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.")

³ ALJ Memorandum, July 5, 2005, at 2.

business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost 21 years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.⁴

For purposes of this case, "VNXX-routed ISP-Bound traffic" describes a situation wherein a CLEC, such as Level 3, obtains 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 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.⁵

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.⁶ 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.

Applicable Law

Section 251(b)(5) of the Telecommunications Act of 1996 requires all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In its 1996 *Local Competition Order*,⁷ the FCC found that Section 251(b)(5) reciprocal compensation obligations "apply only

⁴ Order No. 04-504 at 2. (Footnotes omitted.)

⁵ Qwest notes that the ISP server or modem banks may be located in another state. VNXX arrangements can also exist for voice traffic. Qwest Brief at 1-2. See also, *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket UM 1058, Order No. 04-504 (Sept. 7, 2004).

⁶ Thus, for intercarrier compensation purposes, Qwest states that the relevant endpoints are the physical location of the calling party and the physical location of the ISP's servers or modem banks. Qwest describes this arrangement as "local ISP traffic," to distinguish it from "VNXX-routed ISP-bound traffic."

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). ("Local Competition Order.")

to traffic that originates and terminates *within a local area* as defined by the state commissions.”⁸

In its 1999 *Declaratory Ruling*, the FCC concluded that ISP-bound traffic was interstate traffic, and therefore not subject to the reciprocal compensation provisions of §251(b)(5).⁹ The FCC “reached this conclusion by applying its end-to-end analysis, traditionally employed in determining whether a call was jurisdictionally interstate or not, stressing that ISP-bound traffic ultimately reaches websites that are typically located out-of-state.”¹⁰

On review in *Bell Atlantic Tel. Cos. v. FCC*,¹¹ the United States Court of Appeals for the District of Columbia (D.C. Circuit) vacated and remanded the *Declaratory Ruling*. The Court held “that the [FCC’s] order had failed to adequately explain why the traditional ‘end-to-end’ jurisdictional analysis was relevant to deciding whether ISP calls fitted the local call or the long-distance call model.”¹²

On remand, the FCC again concluded that the reciprocal compensation provisions of §251(b)(5) should not govern the compensation between two LECs involved in delivering ISP-bound traffic.¹³ This time, however, the FCC abandoned the “local v. long distance” dichotomy used in the end-to-end analysis in the *Declaratory Ruling*.¹⁴ Instead, the FCC held that “under §251(g) of the Act it was authorized to

⁸ Local Competition Order at ¶1034, *ISP Remand Order* at ¶12. (Emphasis added.)

⁹ *ISP Remand Order* at ¶1.

¹⁰ *WorldCom Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Circuit 2002) (*WorldCom*).

¹¹ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000) (*Bell Atlantic*).

¹² *WorldCom*, 288 F.3d at 431.

¹³ *Id.*

¹⁴ *ISP Remand Order* at ¶¶46-47, 54, 56; See also, *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003), *ISP Remand Order* at: In the *ISP Remand Order*, the FCC explained that it had erred by attempting to characterize ISP-bound traffic as “local” or “long distance.” It held, in part:

45...By indicating that all ‘local calls,’ however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term ‘local call,’ and thus that term could be interpreted as meaning either traffic subject to local *rates* or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term ‘local’ created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs, yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*. There we held that ‘[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2).’ We now hold

'carve out' from §251(b)(5) calls made to ISPs located within the caller's local calling area."¹⁵ Specifically, the FCC concluded that ISP-bound traffic is "information access" under §251(g), and therefore "excepted from the scope of 'telecommunications' subject to reciprocal compensation under §251(b)(5)."¹⁶

On review in *Worldcom v. FCC*, the D.C. Circuit again remanded the *ISP Remand Order* to the FCC. The Court concluded that the FCC erred in relying upon §251(g) "to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."¹⁷ Emphasizing that its decision was limited to 251(g), the Court stated:

Having found that §251(g) does not provide a basis for the Commission's action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act, 47 U.S.C. §§153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the 'telecommunications' covered by §251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to §251(b)(5); see §252(d)(B)(i) (referring to bill-and-keep). Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether §251(g) provided the

that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here. *ISP Remand Order* at ¶¶45-46, see also, ¶¶23-31, 54. (Footnotes omitted.)

¹⁵ *WorldCom*, 288 F.3d at 430.

¹⁶ *Id.* at 431. Having removed ISP-bound calls from the scope of §251(b)(5), the FCC established an interim compensation regime including a transition to 'bill and keep,' whereby each carrier recovers its costs from its own end-users. In arriving at this solution, the FCC pointed to a number of flaws in the prevailing intercarrier compensation mechanism for ISP calls, under which the originating LEC paid the LEC that served the ISP. Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls.... To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules that sought to limit arbitrage opportunities by lowering the amounts and capping the growth of ISP-related intercarrier payments. These tend to force ISP-serving LECs to recover an increasing portion of their costs from their own subscribers rather than from other LECs. *Id.* at 431-432. See also, *ISP Remand Order* at ¶1.

¹⁷ *Id.* at 430. (Emphasis added.)

authority claimed by the Commission for not applying §251(b)(5).

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§251(b)(5) and 252(d)(B)(i)).¹⁸

Discussion.

I. As noted above, the Level 3/Qwest ICA provides that the parties shall exchange ISP-bound traffic as that term is used in the FCC's *ISP Remand Order*, pursuant to the rates specified in the *ISP Remand Order*.¹⁹ The parties appear to agree that, until October 18, 2004, at least, no compensation was due for ISP-bound traffic in accordance with Section 7.3.6.3 of the ICA. That provision basically mirrors the "New Markets Rule" adopted in the *ISP Remand Order*.²⁰

On October 18, 2004, the FCC released its *Core Communications Order*, granting forbearance from the New Markets Rule. Level 3 asserts that the practical effect of that Order is to require intercarrier compensation for all ISP-bound traffic, including VNXX-routed ISP-bound traffic, after October 18, 2004, under Section 7.3.6.2.3.4 of the ICA. That provision contemplates payment at \$.0007 per minute of use (MOU).

Qwest apparently concedes that the *Core Communications Order* requires it to pay Level 3 for "local" ISP-bound traffic originated by Qwest customers

¹⁸ *Id.* at 434.

¹⁹ Section 7.3.4.3 provides: "The Parties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order. The FCC ordered rate for ISP-bound traffic will apply to EAS/Local and ISP-bound traffic in lieu of End Office call termination and Tandem Switched Transport. See Section 7.3.6 of this Agreement for FCC-ordered rates."

Section 7.3.6 of the ICA is entitled 'ISP-Bound Traffic.' Section 7.3.6.1 specifies that 'the Parties shall exchange ISP-bound traffic pursuant to the compensation mechanism set forth in the FCC ISP Order.' Accordingly, the rates set forth in the ICA mirror the interim compensation rates specified in the *ISP Remand Order*.

²⁰ *ISP Remand Order* at ¶81; *Core Communications Order* at ¶24.

and terminated by Level 3 at the \$.0007/MOU compensation rate.²¹ Qwest's objection, and indeed the principal dispute in this proceeding, concerns whether the ICA requires the parties to exchange compensation for VNXX-routed ISP-bound traffic. In accordance with Section 7.3.4.3, the Commission must determine whether the FCC's definition of "ISP-bound traffic" in the *ISP Remand Order* includes VNXX-routed ISP-bound traffic.²²

II. Qwest argues that prior and subsequent history confirm that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which the customer initiating an Internet call, and the ISP equipment to which that call is directed, are located in the same local calling area. It points out that:

- The FCC's description of ISP traffic in the *Declaratory Ruling* states that "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."²³
- The *ISP Remand Order* contains essentially the same description of ISP traffic, observing that "an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area."²⁴
- In the *Bell Atlantic* decision, remanding the *Declaratory Ruling* back to the FCC, the D.C. Circuit stated that the issue before the FCC in the *Declaratory Ruling* was "whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves 'local.'"²⁵
- In the *WorldCom* decision, remanding the *ISP Remand Order*, the D.C. Circuit stated that "[i]n the order before us the Federal Communications Commission held that under §251(g) of the Act it was authorized to 'carve out' from §251(b)(5) calls made to internet service providers ('ISPs') located within the caller's local calling area."²⁶

²¹ Qwest Complaint at ¶28; see fn. 6.

²² ALJ Memorandum at 2; Level 3 Brief at 2.

²³ *Declaratory Ruling* at ¶4. (Emphasis added.)

²⁴ *ISP Remand Order* at ¶10. (Emphasis added.) The FCC does not discuss 'atypical' methods of accessing the Internet. Qwest states that the other methods involve making either a 1+ toll call or an "800" service call to access ISP modem banks located outside an end-user's LCA. Qwest Brief at 2.

²⁵ *Bell Atlantic*, 206 F.3d at 2. (Emphasis added.)

²⁶ *Worldcom*, 288 F.3d at 430. (Emphasis added.) The Court also held "[t]he reciprocal compensation requirement of §251(b)(5) . . . is aimed at assuring compensation for the LEC that completes a call originating within the same area.'). *Id.*

III. Level 3 argues that nothing in the *ISP Remand Order* limits reciprocal compensation payments to traffic exchanged within the same local calling area. It contends that:

[w]hile Qwest relies on background statements in the *ISP Remand Order* that discuss ISPs ‘typically’ establishing points of presence in the same local calling area, the FCC’s decision was in no way dependent upon the geographic location of the ISP. To the contrary, the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream, all the way to the server on which the actual content was located.²⁷

Level 3 also emphasizes that the *ISP Remand Order* expressly repudiates the FCC’s earlier rulings limiting §251(b)(5) to local telecommunications. In that Order, the FCC stated that it had erred in focusing on the nature of the service (i.e., local or long distance) in interpreting the relevant scope of §251(b)(5). Moreover, it specifically found that “[o]n its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* ‘telecommunications’ they exchange with another telecommunications carrier, without exception.”²⁸ In addition, the FCC stated that “[u]nless subject to further limitation, Section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, – i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier.”²⁹

Level 3 further maintains that *WorldCom* expressly rejects the FCC’s conclusion in the *ISP Remand Order* that §251(b)(5) was “subject to further limitation” because certain types of traffic, including ISP-bound traffic were ‘carved out’ by §251(g). It observes that the Court found that “ISP-bound traffic exchanged between LECs did not constitute ‘information access’ subject to §251(g), as the FCC had asserted.”³⁰ It also stressed that the Court did not “cast any doubt on the [FCC’s] express finding that §251(b)(5) applies, ‘on its face,’ to *all* telecommunications traffic, whether local or otherwise.”³¹ In addition, Level 3 observes that the FCC amended its reciprocal compensation rules to eliminate the word “local” and to apply §251(b)(5) to all telecommunications.

²⁷ Level 3 Brief at 6.

²⁸ *ISP Remand Order* at ¶31. (Emphasis in original.)

²⁹ *Id.* at ¶32. (Emphasis in original.)

³⁰ Level 3 Brief at 5.

³¹ *Id.*

IV. For the reasons set forth below, I find that ISP-bound traffic, as defined in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic:

(a) Level 3 appears to argue that the FCC's decision to reject the "local v. long distance" dichotomy in the *ISP Remand Order* somehow compels the conclusion that the FCC's definition of ISP-bound traffic includes VNXX-routed ISP-bound traffic. The problem with that argument is that it confuses the FCC's description of how ISP-bound traffic is provisioned with the agency's conclusions regarding how that traffic should be treated for reciprocal compensation and jurisdictional purposes.³² Put another way, 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 longstanding definition of ISP-bound traffic.³³ Beginning with the *Declaratory Ruling* and extending to the *ISP Remand Order*, the FCC has consistently described ISP-bound traffic as "the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC."³⁴ That definition was adopted by the D.C. Circuit in both the *Bell Atlantic* and *Worldcom* decisions. None of these decisions provide any indication that ISP-bound traffic encompasses VNXX-routed traffic.

(b) Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D.C. Circuit are really only "background statements" and were not intended to place a geographical limitation on the placement of ISP servers or modem banks. On the contrary, Level 3 stresses that "the FCC concluded that ISP-bound traffic was interstate based on its end-to-end analysis of the entire media stream...."³⁵ This argument is unconvincing. First, it presumes that both the FCC and the Court chose to describe ISP-bound traffic in a particular manner without intending it to have any specific meaning. Second, it ignores the fact that there are repeated references in both the *Declaratory Ruling* and the *ISP Remand Order* that make clear that the FCC intended that an ISP server or modem bank be located in the same LCA as the end-user customer

³² The Ninth Circuit recognized the distinction "between the jurisdictional analysis of what constitutes 'interstate' or 'intrastate' traffic, and the analysis of what constitutes 'local' or 'interexchange' traffic for the purposes of reciprocal compensation." *Pacific Bell*, 325 F.3d at 1126.

³³ As discussed herein, the FCC has consistently recognized that ISP-bound traffic is initiated by an end-user customer making a seven-digit local call to an ISP server/modem bank located in the same local calling area. Once the call reaches the server/modem bank, the ISP utilizes a variety of computer processing and other functions to enable the caller to access the Internet. It is this understanding of ISP-bound traffic that the FCC had in mind as it endeavored to determine whether ISP-bound traffic is eligible for reciprocal compensation. It is also important to note that, in the proceedings that led to the *Declaratory Ruling*, many CLECs argued that ISP-bound traffic actually involved two calls: the first terminating at the ISP's local server, where a second, packet-switched "call" then commenced. That theory was rejected by the FCC in the *Declaratory Ruling* by applying the end-to-end analysis. The decision to abandon the end-to-end analysis in the *ISP Remand Order* did not, however, alter the FCC's understanding of how ISP-bound traffic is provisioned. See e.g., *ISP Remand Order* at ¶¶ 9-16.

³⁴ *ISP Remand Order* at ¶13.

³⁵ Level 3 Brief at 6.

initiating the call.³⁶ Third, Level 3's argument continues to confuse the FCC's jurisdictional analysis of ISP-bound traffic with the definition of how that traffic is provisioned. The FCC has consistently held that ISP-bound traffic is "predominately interstate for jurisdictional purposes."³⁷ The *ISP Remand Order* did nothing to change that determination. Likewise, the *ISP Remand Order* preserved the FCC's holding in the *Declaratory Ruling*, which defined ISP-bound traffic to require ISP servers or modems to be located in the same LCA as the end-user customer initiating the call.

(c) As noted above, Level 3 reads the *ISP Remand Order* and the *Worldcom* decision to mandate that: (a) the reciprocal compensation requirements of §251(b)(5) apply to *all* telecommunications, and (b) that ISP-bound traffic qualifies as telecommunications. These assertions remain open to question.³⁸ Even if Level 3's interpretation of these decisions is correct, it does not advance its position regarding VNXX traffic. Because VNXX-routed ISP-bound traffic does not fall within the

³⁶ See, e.g., *Declaratory Ruling* at ¶¶4, 7-8, 12, 24 (fn. 77), 27; *ISP Remand Order* at ¶¶10, 13, 24.

³⁷ The FCC emphasized that it has been consistent in its jurisdictional treatment of ISPs. It further emphasized that "[i]nternet service providers are a class of ESPs [Enhanced Service Providers]. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as interstate access." *ISP Remand Order* at ¶57. (Emphasis in original.) See e.g., ¶¶52-58 for discussion of the ESP exemption.

³⁸ In *WorldCom*, the D.C. Circuit held:

The reciprocal compensation requirement of §251(b)(5), quoted above, is aimed at assuring compensation for the LEC that completes a call originating within the same area. Although its literal language purports to extend reciprocal compensation to all 'telecommunications,' the [FCC] has construed it as limited to 'local' traffic only. For long distance calls, by contrast, the long-distance carrier collects from the user and pays both LECs – the one originating and the one terminating the call. 288 F.3d at 429. (Citations omitted.)

The D.C. Circuit went on to emphasize that it did not decide "whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access'...." Nor did the Court "decide the scope of the 'telecommunications' covered by §251(b)(5)." *Id.* at 434.

Likewise, in *Pacific Bell* (issued subsequent to *WorldCom*), the Ninth Circuit held "[b]ecause the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of §251, the CPUC's decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with §251." 325 F.3d at 1130.

More recently, in *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (2004), the U.S. District Court for the District of Oregon held that "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." It further held that VNXX traffic was not local "whether it was ISP-bound or not." *Universal*, mimeo at 24.

The *Worldcom*, *Pacific Bell*, and *Universal* decisions disclose that there remains considerable uncertainty regarding the future application of "local v. interstate" analysis, as well as the scope of "telecommunications" under §251(b)(5) of the Act.

FCC's definition of ISP-bound traffic, it is irrelevant whether ISP-bound traffic is telecommunications subject to reciprocal compensation.

(d) Level 3 suggests that paragraph 84 of the *ISP Remand Order* supports its position because the FCC made reference to agreements negotiated between CLECs and RBOCs that provided compensation for VNXX traffic. In that paragraph, the FCC explained the reasons why its interim compensation regime included rate caps "to limit carriers' ability to draw revenue from other carriers, rather than from their own customers." The third reason cited by the FCC was "that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements."³⁹ The FCC's discussion, however, makes no mention of VNXX-routed ISP-bound traffic. To argue that a passing reference to "negotiated agreements" somehow expands the FCC's definition of ISP-bound traffic is unreasonable.

(e) Level 3 suggests that the fact that VNXX calls are "locally dialed" is sufficient to bring those calls within the FCC's definition of ISP-bound traffic. Thus, as long as an end-user customer makes a seven-digit call to access an ISP, it is unnecessary to impose a geographical limitation on the location of the ISP's server/modem bank. This is a convenient theory, but it is inconsistent with the characterization of ISP-bound traffic that has been consistently used by the FCC and the D.C. Circuit.

(f) Level 3 next argues that the *Core Communications Order* requires that the definition of ISP-bound traffic include VNXX-routed traffic. It states that "[t]he FCC's retention of the Rate Cap and Mirroring rules and forbearance from the New Markets and Growth Cap rules has made it clear that ISP-bound traffic encompasses traffic that is terminated to an ISP by means of VNXX routing."⁴⁰ It also points out, among other things, that the FCC recognized that the ISP dial-up market has changed, and that it is necessary to promote efficient investment in telecommunications services and facilities.⁴¹ Level 3 stresses that precluding VNXX-routed traffic from ISP-bound traffic will result in unnecessary investment expense, create the need for a separate compensation system, and encourage regulatory arbitrage.⁴²

Despite Level 3's claim, 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.⁴³ Moreover, as Qwest points out, it would

³⁹ See also, *ISP Remand Order* at ¶85.

⁴⁰ Level 3 Brief at 11.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ At most, the FCC decision in *Core Communications* to forbear from the New Market's rule signalled its intention to permit the continued payment of reciprocal compensation for ISP-bound traffic. But, as

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.

Level 3's VNXX-related policy arguments are irrelevant to the issue before the Commission. The Commission's task is to interpret the Level 3/Qwest ICA; specifically, whether the term "ISP-bound traffic," as used in the *ISP Remand Order*, encompasses VNXX-routed traffic. That inquiry does not include an evaluation of the parties' competing policy arguments.

(g) Level 3 argues that the legal and factual issues in this case are intertwined and that an ALJ ruling interpreting Section 7.3.4.3 of the ICA is inappropriate at this time. I disagree with that assessment. In my opinion, the relevant FCC and judicial interpretations of ISP-bound traffic are dispositive of this issue.

(h) Because this ruling has a substantial impact upon the interests of the parties, I am automatically certifying it to the Commission. In the final analysis, the interests of both parties are better served by having the agency resolve this matter as soon as possible. That is especially true given the parties have already indicated that the Commission's decision will be appealed no matter who prevails. The sooner the parties obtain final resolution regarding the treatment of VNXX-routed ISP-bound traffic, the sooner they will be able to devote their energies and resources to more productive pursuits.

RULING

For the reasons set forth above, I find that the term "ISP-bound traffic," as used in the *ISP Remand Order*, does not include VNXX-routed ISP-bound traffic. Accordingly, Section 7.3.4.3 of the Level 3/Qwest ICA does not require the exchange of compensation for this traffic.

Objections to this ruling shall be filed with the Commission no later than August 30, 2005. Replies to objections shall be filed with the Commission no later than September 9, 2005.

Dated at Salem, Oregon, this 16th day of August, 2005.

Samuel J. Petrillo
Administrative Law Judge

emphasized in this ruling, that decision has no bearing on this matter because VNXX-routed traffic does not fall within the FCC's definition of ISP-bound traffic, as that term is used in the *ISP Remand Order*.