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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER

Chairman

MARC SPITZER

Commissioner

WILLIAM MUNDELL

Commissioner

MIKE GLEASON

Commissioner

KRISTIN MAYES

Commissioner

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 REPLY
BRIEF**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Qwest Corporation (“Qwest”) hereby replies to the Post-Hearing Brief of Level 3 Communications, LLC (“Level 3”).

A. **Level 3 Seeks Special Treatment that Would Advantage it Over the Rest of the Industry.**

Level 3 commences its brief with the famous quote from *Cool Hand Luke* that “[w]hat we have here is a failure to communicate.” That is not true. In reality, the differences between the positions of Level 3 and Qwest are well defined. After working through Level 3’s rhetoric, it is clear that Level 3 wants the Commission to adopt an interconnection agreement that would treat it in a fundamentally different and far more advantageous way than other competitive local exchange carriers (“CLECs”), wireless providers, and interexchange carriers (“IXCs”). Most significantly, under Level 3’s proposed language, all of its ISP and VoIP traffic would be completely free of access charges (and subject to reciprocal compensation) even though, under existing law, access charges would often apply and reciprocal compensation is inappropriate. In a completely empty gesture, Level 3 states that it will pay access charges on what it refers to as “real toll calls.” Level 3 Brief at 10-11. However, under its proposed and specially crafted contract language, none of its traffic would qualify as a “real toll call.” In this instance and many others, there is a dramatic dichotomy between Level 3’s rhetoric and its proposed contract language.

Integral to Level 3’s scheme to avoid access charges and to require Qwest to pay reciprocal compensation on interexchange traffic is its assignment of telephone numbers to its Internet Service Provider (“ISP”) customers. Level 3’s language would permit it to

game the North American Numbering Plan (“NANP”) by assigning telephone numbers to callers located in local calling areas other than the local calling areas with which those numbers are associated. Thus, what are today interexchange calls between local calling areas will be magically transformed into what Level 3 refers to as “locally dialed calls.” By assigning numbers in this way, Level 3 is able to claim it has no obligation to pay access charges on these “locally dialed calls.”

Level 3 also advances an intercarrier compensation scheme designed to exploit its manipulation of the NANP and the one-way flow of traffic Level 3 creates by focusing exclusively on serving ISPs. Under Level 3’s proposed contract language, Qwest would be required to pay Level 3 for termination of both local and non-local ISP traffic delivered to Level 3. In addition, for the non-local traffic, Level 3’s proposed contract language would deny Qwest recovery of intrastate access charges that would otherwise apply. At the same time, Level 3’s proposed language would require Qwest to gather and deliver traffic from all over Arizona to Level 3 at its points of interconnection (“POIs”) without compensation, even though that traffic benefits only Level 3 and its ISP customers.

Level 3’s proposals are not consistent with existing law. For the reasons set forth more fully below, the Commission should adopt Qwest’s proposed contract language and reject Level 3’s attempt to receive special treatment.

B. The Commission Should Make its Decision on the Facts and the Law.

The “Preliminary Statement” of Level 3’s brief consists of unsubstantiated rhetoric that, for the most part, is contrary to established facts.

Level 3 implies, for example, that it stands as the last bastion between the ILECs and their monopolization of the telecommunications industry. Level 3 Brief at 2-8. Level 3 is simply wrong that Qwest does not face viable competition. Level 3 is silent about the major inroads that wireless and cable competitors have made as competitive alternatives to services provided by ILECs, including the increase in competition that will result from the recently-announced alliance between Cox Communications and Sprint (and four other cable companies) that will greatly enhance Cox's ability to sell cable phone, high speed Internet, wireless, and data services in the Arizona market.¹ Nor does Level 3 mention that in business markets, CLECs now control large shares of the market.

Among other arguments, Level 3 insists that its services should be given unique advantages so that it and other VoIP providers can act as a constraint on Qwest's prices. *Id.* at 2. Level 3 does not mention the other competitors in the Arizona market nor the fact that the last time Qwest increased local exchange rates in Arizona was in January 1995, nearly eleven years ago.²

Level 3 claims that Qwest wants the Commission to "step back 100 years and require new competitors to work under constraints that might have made sense long ago,

¹ On November 2, 2005, Sprint/Nextel and four cable companies (Cox Communications, Comcast, Time Warner Cable, and Advance/Newhouse Communications) announced a 20-year joint venture that will accelerate the offering what they refer to as a "quadruple play," which is "any combination of services including video, *wireless voice and data services, high speed Internet and cable phone service.*" (emphasis added). The service will be marketed in each area by Sprint and the cable company serving that particular area. A copy of the Joint Press Release is attached at Exhibit A.

² 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 (Ariz. Corp. Comm'n, January 3, 1995).

but that certainly do not now.” *Id.* Qwest, of course, has done nothing of the sort. Indeed, all Qwest asks is that Level 3 operate under the same set of rules that the rest of the industry operates under *today*.

Finally, Level 3 claims that the entire UNE based strategy is dead because the “fox” (presumably the ILECs) were “left . . . in charge of the henhouse.” *Id.* at 2. The underlying premise of this statement—that the ILECs have had free rein over UNEs—is transparently ridiculous. Level 3 is well aware that:

UNEs have been established and defined by the FCC in a series of orders; those orders have routinely been reviewed by federal courts.

State commissions set the prices for those UNEs on the basis of the forward-looking TELRIC methodology advocated by the CLEC community.

ILECs continue to provides UNEs to CLECs. Indeed, even where UNEs are no longer required under section 47 U.S.C. § 251 of the Act (e.g., line sharing, switching and shared transport), Qwest has entered into scores of commercial agreements that provide CLECs with continued access to both line sharing and Qwest Platform Plus™—the equivalent of UNE-P (which includes switching and shared transport).

In order to gain section 47 USC § 271 relief, Qwest had to demonstrate to state commissions and to the FCC that it was fully compliant with a variety of requirements, including that it was provisioning UNEs to CLECs at least as well as it provisions similar services to itself.

Qwest continues to provides hundreds of thousands of network element combinations throughout its territory, not to mention hundreds of thousands of other stand-alone UNEs.

It is the FCC, federal courts, and state commissions that have been guarding the henhouse.

II. ARGUMENT

A. Level 3's Arguments Relating to VNXX ISP Traffic Ignore Arizona Law and Rely on a Misinterpretation of the *ISP Remand Order*. (Issues 3A, 3B, 3C, and 4).

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

Level 3's effort to obtain special treatment is epitomized by its claim that no matter where ISP traffic originates and terminates, Level 3 should *never* be subject to toll or access charges and *always* be able to recover terminating compensation at \$.0007 per minute. Level 3's means of creating this argument stems directly from its plan to use VNXX to require Qwest to deliver traffic from throughout Arizona to Level 3's ISP customers. Despite Level 3's protests to the contrary, it is Level 3 and not Qwest that wishes to rewrite the rules related to intercarrier compensation.

The centerpiece of this argument on ISP traffic is its claim that the *ISP Remand Order*³ applies to all ISP traffic, regardless of the traffic's point of origination and termination. Level 3 Brief at 54-68. Level 3 reaches this conclusion by relying primarily on a decision of a federal district court judge in Connecticut, *Southern New England Telephone v. MCI WorldCom Communication* ("SNET"), 359 F. Supp. 2d 229 (D. Conn. 2005),⁴ a case that demonstrably misinterprets the *ISP Remand Order*, and that is not binding on the Commission. Level 3 compounds its error by misinterpreting other governing authorities. Level 3 can only reach its conclusion by blatantly ignoring governing language of *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)

³ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, CC Docket No. 96-98 (April 17, 2001) ("*ISP Remand Order*").

⁴ Level 3 Brief at 66-68.

(“*WorldCom*”), (a case that is binding), and by ignoring complete sections of the FCC’s analysis in the *ISP Remand Order*. When read in its proper context, the only consistent reading of the *ISP Remand Order* is that it applies only to “local” ISP traffic.⁵ Qwest’s analysis is directly supported by an August 16, 2005 decision of an ALJ in Oregon on the identical issue (“*Oregon ALJ Decision*”)⁶ and by an even more recent decision (November 18, 2005) by the Oregon commission (“*Oregon Pac-West Decision*”)⁷ that confirms and strengthens the analysis of the *Oregon ALJ Decision*.

In its opening Brief, Qwest outlined the history leading up to the *ISP Remand Order*, analyzed the order itself, and analyzed the *WorldCom* decision. Qwest Brief at 9-18. That analysis demonstrates conclusively that the *ISP Remand Order* applies only to local ISP traffic, and that other, non-local ISP traffic is, therefore, not subject to reciprocal compensation. Qwest will not repeat that entire analysis here, but will respond to the specific arguments advanced on this issue by Level 3.

⁵ For purposes herein, “local” ISP traffic refers to ISP traffic that originates with the end user dial-up customer and terminates with Internet equipment (e.g., modems, servers, and routers) that is physically located within the same Commission-approved local calling area.

⁶ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (OPUC ALJ Petrillo, August 16, 2005) (“*Oregon ALJ Decision*”) (A copy is attached as Exhibit A to Qwest’s opening brief).

⁷ Order, *In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp., Complaint for Enforcement of Interconnection Agreement*, Docket IC 9, Decision No. 05-1219 (Ore. Pub. Util. Comm’n, November 18, 2005 (“*Oregon Pac-West Decision*”). A copy of this decision is attached hereto as Exhibit B.

2. **The SNET Decision is a Demonstrably Erroneous Reading of the ISP Remand Order and the WorldCom Decision.**
 - a. **The SNET Court's Fundamental Error was to Substitute its Judgment of the Breadth of the *ISP Remand Order* for That of the *WorldCom* Court—the Court Charged By Congress to Provide the Definitive Interpretation of the *ISP Remand Order*.**

In the *WorldCom* decision, the D. C. Circuit reviewed the *ISP Remand Order* and stated its holding as follows:

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.*" 288 F.3d at 430 (emphasis added).

In *SNET*, the ILEC (SBC) properly argued that the quoted language defines the breadth of the *ISP Remand Order*. In response, the *SNET* judge, while quoting the critical language from *WorldCom* that describes the holding of the *ISP Remand Order* (357 F.Supp.2d at 231), then ignored this definitive interpretation made by the Hobbs Act reviewing court⁸ and substituted his own judgment for that of the D. C. Circuit.

⁸ Under the Hobbs Act, the federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here. Thus, the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders.

Further, as state entities implementing a federal act, state commissions must follow decisions of federal courts interpreting the Act and interpreting FCC decisions that implement the Act. See 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."). This Commission, the courts, and the parties in this case are bound by the *WorldCom* court's characterization of the breadth of the *ISP Remand Order*. See *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996); *FCC v. IIT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *U S West*

Without providing a reason, the *SNET* judge dismisses the critical language from the *WorldCom* decision with the conclusion that “these statements indicate that the FCC *began by addressing*” whether local ISP traffic is subject to compensation. *Id.* (emphasis added). In other words, he relegates the *WorldCom* court’s definitive statement of the holding of the *ISP Remand Order* to mere background information describing the beginning of the process.

The *SNET* judge’s dismissal of the express language of the *WorldCom* court is based on the flawed conclusion that the *WorldCom* language describes the *beginning* of the process before the FCC. Under no rational reading of the *WorldCom* language can this conclusion be true. The *WorldCom* court *was not* describing the *beginning* of the process; its language describes the *end* of the process. The *WorldCom* court did not describe the initial issue that was considered by the FCC in the *ISP Declaratory Order*; rather, the Court’s language specifically describes the *holding* of the *ISP Remand Order*.

In effect, Level 3 suggests that the *WorldCom* court did not really mean what it said when it defined the holding of the *ISP Remand Order* in terms “of calls made to internet service providers (“ISPs”) *located within the caller’s local calling area.*” 288 F.3d at 430 (emphasis added). To accept Level 3’s argument, one would have to conclude that the D.C. Circuit is incapable of correctly stating either the issue being considered by the FCC, or the FCC’s holding. Such a conclusion is both presumptuous and wrong.

Under the Hobbs Act, the Court of Appeals of the D.C. Circuit was given “*exclusive jurisdiction*” to review and interpret the *ISP Remand Order*. Thus, the *SNET*

Communications, Inc. v. Jennings, No. 99-16247, 2002 U.S. App. LEXIS 19798 at *16-*17, n. 2 (9th Cir. Sept. 23, 2002).

judge's contrary interpretation of the breadth of the *ISP Remand Order* violates the Hobbs Act and carries no weight. As between the two interpretations, this Commission and the parties to this arbitration docket are bound by the *WorldCom* court's interpretation of the breadth of the holding of the *ISP Remand Order*.

Two recent Oregon decisions directly support Qwest's analysis of this issue. In the first case, both Qwest and Level 3 were parties. Level 3 argued that the statements from the *ISP Declaratory Order*, the *Bell Atlantic* decision, the *ISP Remand Order*, and the *WorldCom* decision that described the issue as relating to only local ISP traffic, were merely "background statements."⁹ 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

⁹ The Oregon ALJ summarized Level 3's argument on this point: "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 and modem banks." *Oregon ALJ Decision* at 9 (emphasis added). If that were the case, one can only wonder why the D. C. Circuit in the *Bell Atlantic Cos. v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000), described 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.'*" (emphasis added). Nor does it explain why, in the appeal of the *ISP Remand Order*, the *WorldCom* court likewise defined the issue in terms of "calls made to internet service providers ("ISPs") *located within the caller's local calling area.*" 288 F.3d at 430 (emphasis added). These statements are certainly far more than mere background statements.

located in the same LCA as the end-users initiating the call. *Oregon ALJ Decision* at 9-10 (footnotes omitted).

To support his second point, the ALJ cited five paragraphs from the *ISP Declaratory Order* and three from the *ISP Remand Order*, all of which characterize the ISP traffic at issue as traffic originating and terminating in the same local calling area.¹⁰

Just two weeks ago, the full Oregon commission reached the same conclusion in its *Oregon Pac-West Decision*. The CLEC (“Pac-West”) sought rehearing of an Oregon commission decision that VNXX ISP traffic must be excluded from the RUF provision of an existing interconnection agreement; the effect of this decision was to obligate Pac-West to pay for all Local Interconnection Services (“LIS”) charges associated with ISP VNXX traffic. One of Pac-West’s arguments was that “ISP-bound traffic, as used in the *ISP Remand Order*, includes VNXX.” *Oregon Pac-West Decision* at 7. Although the commission stated that, in light of other reasons for rejecting reconsideration, it was unnecessary to rule on that issue, it nonetheless observed that “[t]here is nothing in the *ISP Remand Order* or the judicial decisions interpreting the FCC’s order to substantiate Pac-West’s assertion that the FCC’s definition of ISP-bound traffic includes VNXX traffic. Indeed, there is no mention whatsoever of VNXX-type arrangements in those decisions.” *Id.* at 8, citing the *Oregon ALJ Decision*. The commission also noted an inconsistency between Pac-West’s argument and the FCC’s Intercarrier NPRM:

The *ISP Remand Order* specifically preempts States from regulating ISP-bound traffic. At the same time, however, the FCC issued a *Notice of Proposed Rulemaking* in its Intercarrier Compensation proceeding, wherein it acknowledges that States may reject VNXX arrangements as a misuse of numbering resources. If VNXX is included in the definition of ISP-bound traffic and therefore preempted from State

¹⁰ *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*.

regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources. The only logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order*. *Id.* (footnotes omitted),

Finally, the commission noted that “Qwest’s tariffs define local traffic in a manner that is explicitly tied to the physical location of the customer, a fact emphasized by the Court in *Universal*”¹¹ and that, in an earlier order, the commission had “held that a competitive provider would violate conditions in its certificate of authority if it were to provide intrastate VNXX service.”¹² *Id.* at 8, 9.

b. The *SNET* Decision Mischaracterizes the FCC’s Decision to Use Statutorily-Defined Terms in its Analysis and Thus not Rely on the Word “Local.”

Another erroneous argument advanced by Level 3 is based on the *SNET* court’s obvious misunderstanding of the FCC’s decision to use statutory terms instead of the term “local” in its *ISP Remand Order* analysis. The *SNET* court characterized this as the FCC’s “express disavow[al of] the term ‘local.’” 359 F. Supp.2d at 231. Again, this is a misinterpretation of the *ISP Remand Order*. In the *ISP Remand Order*, the FCC was responding to the *Bell Atlantic* decision, which had criticized the FCC’s use of the local/long distance distinction in the *ISP Declaratory Order*. Thus, the FCC stated that it would “refrain from generically describing traffic as ‘local’ traffic because the term ‘local,’ *not being a statutorily defined category*, is particularly susceptible to varying

¹¹ The reference to *Universal* is to *Qwest Corp. v. Universal Telecom*, 2004 WL 2958421 (D. Ore. 2004). See Qwest Brief at 17, 29 n. 34.

¹² The Oregon commission also cited a recent decision in *Universal* that reciprocal compensation is owed only on when the ISP modems are located in the same local calling area as the calling party and concluded that this decision “is *inconsistent* with Pac-West’s claim that the *ISP Remand Order* requires payment of reciprocal compensation for VNXX traffic.” *Oregon Pac-West Decision* at 3, n. 6.

meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).” *ISP Remand Order* ¶ 34 (emphasis added). But the FCC’s decision to focus on statutorily defined terms is a far cry from deciding to completely disavow the historical significance of the traditional differences between local and interexchange calling. The *SNET* court’s characterization of the FCC’s action ignores the fact that statutorily defined terms in the 1996 Act retain the local/interexchange traffic distinction.

Contrary to Level 3’s arguments, the federal Act does not eliminate the concept of local traffic. The term “telephone exchange service,”¹³ a statutorily-defined term, clearly refers to what is commonly called “local” service. There is nothing to suggest that the FCC completely abandoned the concept of local service, nor is there anything to indicate that the concept of local service is abandoned in the 1996 Act. Instead, as it clearly stated, the FCC based the *ISP Remand Order* on a statutorily-defined term, “information access,” as the rationale for its decision to develop a separate compensation regime for calls made to ISPs “located within the caller’s local calling area.” *WorldCom*, 288 F.3d at 430.

It is also critical to note that in remanding, but not vacating, the *ISP Remand Order*, the *WorldCom* court explicitly stated that it was not ruling on a host of issues that might have bearing on the court’s decision not to vacate the order because “there is

¹³ 47 U.S.C. § 153(47): “The term ‘telephone exchange service’ means (A) *service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange, and which is covered by the exchange service charge*, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” (emphasis added). *North Carolina Util. Comm’n v. FCC*, 552 F.2d 1036, 1044 (4th Cir. 1976) (“The term ‘telephone exchange service’ is a statutory term of art, and means service *within* a discrete local exchange system”). (emphasis added).

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)).” The court stated:

[W]e do not decide whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’ (as those terms are defined in the Act), . . . or neither, or whether those terms cover the universe to which such calls might belong. 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* 288 F.3d at 434 (Emphasis added).

The *WorldCom* court thus concluded that there were a variety of theories upon which the system under the *ISP Remand Order* could be found to be lawful. Therefore, to suggest that the local/interexchange call distinction has been completely abandoned by the FCC simply because the FCC decided to focus on particular statutory language is simply wrong. To further suggest that FCC’s holding, as clearly defined by *WorldCom* and supported by the *ISP Remand Order’s* language, applies to more than local ISP traffic is also wrong.

c. The *SNET* Decision Ignores Critical References in the *ISP Remand Order* to the FCC’s Intent Not to Interfere with Existing Access Charge Mechanisms.

In *SNET*, SBC correctly argued (citing ¶ 37, footnote 66) that the *ISP Remand Order* discloses the FCC’s intent not to extend the interim compensation regime to ISP traffic to which an existing compensation regime, such as access charges, already applies. 359 F. Supp.2d at 232. The *SNET* judge addressed this argument by stating incorrectly that the quoted language “only indicates that the FCC did not want to disturb the *FCC’s* regulation of access charges.” *Id.* (emphasis added). That is simply wrong. In the *ISP*

Remand Order, the FCC made it abundantly clear that it did not want to interfere with *intrastate access* charges either. The FCC stated:

[W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because ‘it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, *but has no such concerns about the effects on analogous intrastate mechanisms.* *ISP Remand Order*, n. 66. (Emphasis added).

Other portions of the *ISP Remand Order* track those principles. These too were ignored by the *SNET* decision. Paragraph 39 states:

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

While acknowledging that the FCC intended to avoid impacts on access charges, the *SNET* judge ignores that intent, and instead adopts an interpretation that does precisely what the FCC said it did not intend to do—that is, displace the applicable intrastate access charge regime. The *SNET* judge’s conclusion treats the FCC’s express intent not to disturb the existing access regime as meaningless.

d. The Core Forbearance Order did Nothing to Alter Breadth of *ISP Remand Order*.

Level 3 erroneously argues that the *Core Forbearance Order*¹⁴ supports the conclusion that all ISP traffic is subject to the *ISP Remand Order*. Level 3 Brief at 58, n. 73. In fact, the *Core Forbearance Order* does not change anything. That order dealt

¹⁴ Order, *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241 WC Docket No. 03-171 (October 18, 2004) (“*Core Forbearance Order*”).

with the application of the *ISP Remand Order*, and specifically addressed whether certain provisions in the *ISP Remand Order* (the so-called new markets rule and growth cap rule) should continue to apply to ISPs. Because the *ISP Remand Order* did not address non-local ISP traffic, the *Core Forbearance Order* did not address the issue either. The *Oregon ALJ Ruling* correctly noted that “there is nothing in the *Core Communications Order* that even remotely suggests that the FCC intended to expand its definition of ISP-bound traffic to include VNXX-routed traffic.” *Oregon ALJ Ruling* at 11. The Oregon ruling also agreed with Qwest’s argument that “it would be highly unusual for the FCC to invoke a policy that would impact state authority (*i.e.*, regulation of intrastate access charges) without making some mention of that fact.” *Id.* at 11-12.¹⁵

e. Level 3’s Reliance on the Ninth’s Circuit *Pac-West* Case is Misplaced.

Level 3 relies on a Ninth Circuit case, *Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114 (9th Cir. 2003) (“*Pac-West*”), to support its argument that *WorldCom* requires all ISP traffic be subject to the interim regime of the *ISP Remand Order*. Level 3 Brief at 71-72. Qwest addressed that issue at length above and in its Opening Brief, where it demonstrated that Level 3’s interpretation is in direct conflict with both *WorldCom* and the *ISP Remand Order*. Qwest Brief at 9-16. Nor is the Ninth Circuit in a position to alter or contradict the *WorldCom* court’s decision on that point, as *WorldCom* was decided by the Hobbs Act reviewing court.

¹⁵ It would not be reasonable to suggest that the FCC would make such a significant decision without a disciplined and detailed analysis that led to an explicit decision on the issue.

Thus, Level 3's reliance on *Pac-West* misses the mark. Although it is true that the *Pac-West* court noted that *WorldCom* rejected the FCC's reliance on section 251(g), this is an irrelevant point that Qwest has never challenged. Pacific Bell, on the other hand, relied directly on section 251(g) to argue in *Pac-West* that a decision of the California commission subjecting ISP traffic to reciprocal compensation was unlawful. 325 F.3d at 1130. That issue is obviously a very different from the issue before this Commission here. What Level 3 apparently does not understand is that Qwest's position that the *ISP Remand Order* applies only to local ISP traffic is not premised on section 251(g); rather, it is based on the fact that the *ISP Remand Order* addressed only local ISP traffic, and that the *WorldCom* court agreed that local ISP traffic was the only traffic subject of the order (and then expressly refused to vacate the *ISP Remand Order* or the rules adopted pursuant to it).¹⁶ Hard as it may be for Level 3 to accept, the *ISP Remand Order* did not address all ISP traffic and the order remains in effect (including its decision to subject only local ISP traffic to its interim compensation regime). The *Pac-West* case does nothing to alter those conclusions and therefore does not support Level 3's argument.

3. Level 3's Argument That the FCC was Apprised of VNXX Traffic Before Issuing the *ISP Remand Order* Supports Qwest's Position

Level 3 argues that, because there were some general comments raising VNXX issues during the comment period prior to the issuance of the *ISP Remand Order*, the FCC necessarily addressed and resolved those VNXX issues in the *ISP Remand Order*. Level 3 Brief at 59-63. This argument actually undercuts Level 3's position because the

¹⁶ The only action the *WorldCom* court took was to "remand the case to the Commission for further proceedings." 288 F.3d at 434.

FCC clearly stated in the *ISP Remand Order* that it was not changing the compensation for traffic that is currently subject to intrastate access charges.

Level 3's argument is based on the false premise that simply because a commenting party may have referred to VNXX in its comments, the FCC's order necessarily resolved the issue in its order. Anyone with even a passing knowledge of FCC dockets knows that in a proceeding like the ISP docket, literally thousands of pages of comments and supporting documents are filed from scores of companies, trade associations, and individuals. Furthermore, those commenting parties raise scores of issues that are not decided by the FCC. Appendix A to the *ISP Remand Order* lists 48 entities or individuals as commenting in response to the FCC's June 23, 2000 public notice, while 38 entities and individuals filed reply comments. The same appendix lists 81 entities and individuals as commenting on the FCC's February 26, 1999 Notice of Proposed Rulemaking, while 41 entities and individuals filed reply comments. *ISP Remand Order*, Appendix A.

Level 3's reference to the filing by Qwest's expert, Dr. William Taylor, on this point also misses the mark. Level 3 Brief at 60-61. Even a cursory examination of Dr. Taylor's statement demonstrates that he was addressing an issue very different from VNXX. His point was that CLECs do not need to provide local service to all customers in an area (*i.e.*, they can concentrate on areas with large concentrations of business customers such as a downtown area, close to serving central offices in which they may collocate), which causes the incremental costs of the CLEC to be lower than the ILEC that must serve the entire exchange. Then Dr. Taylor noted that ISPs can likewise place their facilities in high-density areas, including collocating their equipment at a CLEC's

switch, thus resulting in “[t]ransport costs for such calls [being] lower than the average of all traffic terminating within the local exchange.” *Id.* at 60 (quoting Dr. Taylor’s presentation). There is nothing whatsoever to suggest that Dr. Taylor was discussing VNXX—indeed, the entirety of the material quoted by Level 3 makes it clear that Dr. Taylor was discussing the cost advantages *within* a “local exchange” that comes from a CLEC’s or ISP’s ability to self-select where it places its facilities.¹⁷

4. The Cost Issue Raised by Level 3 is Completely Irrelevant to this Docket.

Another argument advanced by Level 3 is its claim that VNXX should not be a cause of concern to the Commission or to Qwest because “Level 3’s use of VNXX arrangements, including for ISP-bound calling, does not place any material additional costs on Qwest.” Level 3 Brief at 53; *see also id.* at 42. This argument is not valid and is based on the false premise that there is no difference between traffic that is local in nature and traffic that it is interexchange in nature.

Level 3’s assertion that Qwest does not incur any material costs for transporting the traffic for additional distances is simply false. It also ignores the fact that Qwest has invested in switches and interoffice facilities throughout Arizona, that this equipment must be maintained by Qwest, that it must be augmented when traffic exceeds capacity, and that it must be repaired when damaged. When a retail or wholesale customer orders

¹⁷ The fact that the FCC cited Qwest’s letter that contained Dr. Taylor’s comments in footnote 189 of the *ISP Remand Order* is likewise a red herring. The question addressed in paragraph 92 (the paragraph with which footnote 189 is associated) was whether the distance from a CLEC’s switch to the ISP equipment was a factor relevant to its decision, and the FCC concluded it was not. That, however, is not the VNXX issue. VNXX relates to the distance from ISP end users to the modems of the ISP that answer the ISP call, and whether they are within the same local calling area. Paragraph 92 of the *ISP Remand Order* does not purport to address that issue.

circuits, Qwest must incur expenses to rearrange and install the ordered services. Even under the FCC's TELRIC methodology (as opposed to an embedded cost study), Qwest is entitled to a reasonable return on those assets. 47 U.S.C. § 252(d). Further, the FCC's forward-looking TELRIC methodology—which hypothesizes forward-looking cost levels (as opposed to the actual costs incurred by Qwest) and the most efficient network possible—demonstrates that Qwest incurs significant costs to transport such traffic. For example, as established by the Commission, the recurring monthly TELRIC-based rate for a DS3 entrance facility in ("EF") Arizona is \$357.16, with a nonrecurring cost for installation of \$256.87. Exhibit A, Qwest Arizona SGAT Fourteenth Revision, at 1. Depending on the mileage involved, a DS3 direct trunked transport ("DTT") circuit costs between \$243.17 and \$250.66 per month, with additional recurring per mile charges ranging from \$13.32 to \$22.91. *Id.* Multiplexing a DS3 to DS1 has a monthly recurring cost of \$228.05 and a nonrecurring cost of \$263.87. *Id.* To suggest that Qwest incurs no cost to transport interexchange traffic from around Arizona to a centralized POI or POIs is sheer fantasy and directly contrary to the findings of this Commission.

Furthermore, totally aside from the fact that Qwest incurs real costs, Level 3's argument misses the whole point. The question for the Commission is not a cost issue, but a question of the proper intercarrier compensation mechanism to apply to interexchange calls. The Florida commission grappled with this precise issue, where a CLEC argued that the ILEC's costs to deliver traffic to a POI did not vary whether the traffic was VNXX or whether it was delivered to a local customer:

We acknowledge that an ILEC's costs in originating a virtual NXX call do not necessarily differ from costs incurred originating a normal local call. *However, we do not believe that a call is determined to be local or toll based on the ILEC's costs in originating the call.* In addition, we do not

believe the proper application of a particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in delivering a call, *but rather upon the jurisdiction of a call as being either local or long distance.*¹⁸

Finally, perhaps the most telling evidence on this point is that, if the cost of transport is essentially free, as Level 3 suggests, then there is nothing to prevent Level 3 from building its own facilities to Flagstaff, Page, or to any other area it wishes to serve in Arizona. But, of course, the reality is that such facilities cannot be constructed without incurring significant costs—that is why Level 3 wants to use Qwest’s network. Level 3 should not be allowed the free use Qwest’s network on the basis of such transparently erroneous arguments.

5. Level 3’s Discussion of the History of Access Charges is Irrelevant.

Level devotes several pages to its completely original and entirely self-serving history of access charges. Level 3 Brief at 43-49. Its primary argument is that, because access charges have historically been associated with toll charges (by which Level 3 apparently means calls for which a specific per-minute charge is imposed), it would be unlawful for Qwest to impose access charges on VNXX traffic (because it is locally-dialed and the calling party purportedly pays no additional charge). *Id.* at 43-48. Its secondary argument is that allowing Qwest to impose what Level 3 characterizes as “supra-competitive, subsidy-laden access charges” (*Id.* at 53) will slow down competitors

¹⁸ Order on Reciprocal Compensation, *In re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, at 30 (Fla. PUC, September 10, 2002) (“*Florida Reciprocal Compensation Order*”) (emphasis added).

and enrich Qwest. *Id.* at 48-49. These arguments are meritless and should be rejected by the Commission

(i) **Level 3's Access Charge Analysis is a Contrived Scheme to use VNXX to Avoid the Applicable Compensation Regime.**

Level 3's fundamental argument is that there must be a "separate charge" for a call to meet the definition of "telephone toll service" under 47 U.S.C. § 153(48). Level 3 concludes that since there is no separate toll charge associated with VNXX, it cannot be "telephone toll service" and the application of access charges would be unlawful. *Id.* at 44-47. Once again, Level 3 misreads the law.

First, section 153(48) does not state that the "separate charge" must be a per-minute toll charge; instead, it states that a separate charge be imposed for the service that is "not included in contracts with subscribers for exchange service." Level 3 certainly charges its ISP customers for its service, a service that include access to "local" numbers and the ability of the ISP to generate traffic that is delivered to it from multiple locations in Arizona (including from local calling areas different than the local calling area where the ISP modems are located). In its marketing material, Level 3 touts the fact that its Connect Modem service serves "15,500 local calling rate centers" and provides "local dial-up service covering 90 percent of the U.S. population." Exhibit Q-16 at 1-2. Thus, Level 3 acknowledges that its Connect Modem service provides access to multiple local calling areas—it follows that Level 3's charges for that service include the capability to gain access to customers beyond a single local calling area. Thus, whether the charge is imposed by Level 3 on ISPs or by ISPs on end users, VNXX calls are "between exchange

areas” and “a separate charge” (i.e., a charge separate from Qwest’s local exchange rates) is imposed for that capability.

Second, even if one were to accept the premise that the statute is referring to some form of separate per-minute toll charge imposed on the end user, Level 3’s argument produces the anomalous and illogical result of creating a category of traffic not covered by any definition under the Act. Level 3 implies that “telephone exchange service” and “telephone toll service” are juxtaposed terms. Level 3 Brief at 46-47. Telephone exchange service, or what is commonly referred to as local exchange service, relates to traffic within the “same exchange area.” 47 U.S.C. § 153(47). Telephone toll service, on the other hand, relates to traffic “between stations in different exchange areas.” Between the two of them, the two major types of retail traffic are defined. However, Level 3’s reading the statute creates a category of traffic not covered by the Act (interexchange traffic for which no toll charge is imposed), and thus a hole in the statutory scheme that was obviously not intended by the drafters of the Act.

Level 3’s argument is based on an absurd statutory interpretation,¹⁹ the result of which benefits Level 3 and leaves Qwest holding the bag. The “new category” of traffic clearly is not within the same exchange area (and thus is not “telephone exchange service” and is not covered by local exchange rates). In fact, the traffic is interexchange in nature, but according to Level 3, because a toll charge is not imposed (not because one should not be, but because Level 3 has gamed the telephone numbering system) access

¹⁹ *Walgreen Arizona Drug Co. v. Arizona Dept. of Revenue*, 97 P.3d 896, 898 (Az. Ct. App. 2004) (“[Courts] interpret statutes to give them a fair and sensible meaning and to avoid absurd results.”) (citing *Ariz. Dep’t of Revenue v. Raby*, 65 P.3d 458, 460 (Az. Ct. App. 2003); *Pfeil v. Smith*, 900 P.2d 12, 14 (Az. Ct. App. 1995).

charges allegedly do not apply. Thus, under this scheme, Level 3 gains the benefit of requiring Qwest to bear the full cost of gathering and delivering traffic (for which Qwest obtains no additional revenue) to Level 3 and its ISP customers. Moreover, not only does Qwest lose access charge revenue to which it is entitled, under Level 3's theory, Qwest must pay all the costs to deliver the traffic to Level 3. Then, to add insult to injury, Level 3 believes it is entitled to \$.0007 per minute from Qwest for terminating these calls. That is not a result intended by any rational reading of the Act.

Third, Level mischaracterizes access charges. It states that "Congress codified the idea of access charges as a way to share toll revenues." Level 3 Brief at 45. Characterizing this arrangement as a revenue sharing mechanism is simply wrong. Access charges were designed, first, to allow the LECs to recover their costs for originating or terminating calls for IXC's. Second, particularly in the early days of access charges, another purpose was to maintain some of the subsidy that interexchange calling provided to local service and other benefited services. Thus, while access charges were a critical cost input into an IXC's toll pricing, the "revenue sharing" notion that Level 3 suggests existed is a figment of Level 3's imagination.²⁰

Finally, Level 3's argument is merely a post-hoc effort to justify its own inappropriate business practices as the following example illustrates. Assume a Phoenix-based Qwest local exchange customer who uses AT&T as his IXC for both intra- and interLATA calling decides to call a friend in Page. The customer would dial 1+ and then the Page telephone number. Qwest's switch would identify the call as an interexchange

²⁰ It is noteworthy that Qwest, in its provision of toll service, is required to impute access charges into its toll rates. Arizona Administrative Code § R14-2-1310. Thus, to the extent Level 3 argues that access charges are improper, they are applied to Qwest's toll service as well.

call and AT&T as the IXC. Qwest would, pursuant to its arrangements with AT&T, deliver the traffic to AT&T, who would then carry the traffic to Page, where the call would be terminated by Qwest or another LEC, depending on which company provides local service to the called party. If proper numbering practices are followed the calling party's IXC pays access charges.

With VNXX, however, the CLEC (Level 3 in this instance) is able to stand this practice on its head. By using its status as a CLEC to obtain local numbers throughout a LATA and providing those numbers to its ISP customers located outside the caller's local calling area, Level 3 creates the circumstances where calls that in any other context would be an interexchange calls appear to be local, thus fooling the billing system.

Mr. Brotherson made the following comment on Level 3's position that a toll call can only be a toll call if a discrete toll charge is imposed:

Thus, under this logic, if Level 3 did not charge its customers for VNXX calls, the VNXX calls could not be categorized as toll calls, could not be subject to access charges, and should be subject to reciprocal compensation. . . . Under what appears to be Level 3's theory, a carrier that offers toll but does not charge its customers would thereby exempt itself from FCC or state prescribed access charges. Exhibit Q-1 at 69.

Mr. Brotherson then addressed the question why Qwest does not simply impose toll charges on all Level 3 traffic:

Furthermore, Level 3's ability as a CLEC to obtain local numbers carries with it the assumption (apparently false in its case) that these numbers can be used to originate and/or terminate local calls. Thus, Qwest has no way to determine in advance whether any particular call is really a toll call that it should be billing as such. *Thus, a CLEC, like Level 3, that wants to rely on a definition that a toll call can only be a toll call if there is a charge to the end user, is enabled to create its own self-fulfilling prophecy. Id.* (emphasis added).

Given the assumption that Qwest must make that CLECs really do compete for local exchange service, Qwest does not (and cannot) presume in advance that CLEC traffic is not local in nature (despite the fact that the assumption is violated by CLECs that use VNXX). In delivering the traffic to the POI, Qwest does not know where the call will be terminated by the CLEC. Likewise, Qwest cannot know in advance whether the local number being dialed is a number assigned to real customer in the same local calling area as the calling party or whether it is a number assigned by Level 3 to an ISP whose modems are located in Phoenix or even in a different state.

Several state commissions have seen through this ruse. In Qwest's opening brief, it referred to a Pennsylvania decision that describes the dilemma very well: 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.*"²¹

In a 2003 case, the California commission reached a similar conclusion:

[A]s we clearly explained in D.03-05-075 and in prior arbitration decisions, *VNXX traffic is interexchange traffic*, by nature of its termination outside of the originating calling area, that is not subject to the FCC's reciprocal compensation rules, *even though it is rated as a local call to the calling party.*"²²

²¹ 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).

²² Order Denying Rehearing of Decision 03-05-075, *In the Matter of Verizon California (U-10021-C) Petition for Arbitration with Pac-West Telecomm, Inc. (U-5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application 02-060024, 2002 Cal. PUC LEXIS 1047, at *14 (Cal. PUC, December 4, 2003).

The Massachusetts commission likewise rules that “VNXX calls will be *rated* as local or toll based on the geographic end points of the call.”²³

Finally, in a decision related to non-ISP VNXX traffic,²⁴ the Florida commission reaffirmed an earlier order in which it had concluded that “intercarrier compensation for calls to these [VNXX] numbers shall be based on the end points of the particular call. This approach will ensure that intercarrier compensation will not hinge on a carrier’s provisioning and routing method, nor on the end user’s service selection.” 2003 Fla. PUC LEXIS 428, at *65. The commission thus held that because these calls “terminated to end users outside the local calling area in which their NPA/NXXs are homed, [they] are not local calls. *Therefore, carriers will not be obligated to pay reciprocal compensation for this traffic; rather, access charges will apply.*” *Id.* at *72 (emphasis added).

(ii) Level 3’s Subsidy Argument Ignores the History of Access Charge Reductions.

The Commission should reject Level 3’s claim that it would be improper to impose “subsidy-laden” charges on it for two reasons.

First, even if Level 3’s claim that access charges are “subsidy-laden” were proven to be true, access charges are not a form of intercarrier compensation that can simply be ignored by one group of competitors (VNXX providers) just because they have

²³ *Petition of Global NAPs, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 02-45, 2002 Mass. PUC LEXIS 65, at *50 (Mass. Dep’t of Telecom. and Energy, December 12, 2002).*

²⁴ *Order, In re Petition by Global Naps, Inc. for Arbitration Pursuant to 47 U.S.C. 252(b) of Interconnection Rates, Terms and Conditions with Verizon Florida Inc., Docket No. 011666-TP, Order No. PSC-03-0724-FOF-TP, 2003 Fla. PUC LEXIS 383, at *10-11 (Fla. PUC, June 18, 2003)*

created the false impression that VNXX calling is local in nature. Simply because applying access charges may be inconvenient or counter to the business plan of VNXX providers is not a legal justification for discriminating in their favor. In essence, Level 3 advocates that the rules that apply to other CLECs, ILECs, IXCs, wireless providers, and others should not apply to Level 3 because Level 3, with its IP network, represents the “future” while everyone else is mired in the past. Thus, Level 3 suggests, without quite saying it, that it should bear no share in covering the costs of the PSTN, even though it needs to use it just as much as other market participants.

Second, Level 3 ignores some critical facts in its oversimplified history of access charges. Level 3 implies that access charge levels are just the same as when they were placed into effect in the early 1980s. That is simply untrue. Interstate access charges have been reduced many-fold since they were first established in 1984. Furthermore, in the last fourteen years Qwest has made a series of significant reductions to its intrastate access charges in Arizona. Reductions occurred as part of the rate case orders in 1991 and 1995. Additional reductions occurred in 2001, 2002, and 2003. In Docket No. T-01051B-03-0454, additional switched access reductions have been stipulated to by the parties and a decision on the matter is pending before the Commission.

Thus, while Level 3 characterizes access charges as historically subsidy-laden, the fact is that access charge rates have plummeted, particularly in the past decade.

6. Level 3’s Reliance on the Mirroring Rule is Misplaced.

Under the guise of opposing discrimination, Level 3 makes an argument based on what is known as the “mirroring rule.” Level 3 Brief at 58-59. Although it is not clear,

Level 3 appears to claim that Qwest is attempting to violate the mirroring rule (a rule that originated in the *ISP Remand Order*) and thereby discriminate against Level 3.

Level 3's argument is based on a basic factual misunderstanding of Qwest's proposed language in this case. Qwest made it clear in its opening brief that, subject to Level 3's election under the mirroring rule,²⁵ Qwest will exchange all appropriate traffic at the FCC rate (currently \$.0007 per MOU) that applies to local ISP traffic.²⁶ Qwest Brief at 8-9. Qwest's concern, as it stated in its opening brief (*Id.* at 9), is that it is unclear whether Level has actually made an election under the mirroring rule. Thus, 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) and the \$.0007 rate on ISP traffic would apply to local ISP traffic pursuant to the *ISP Remand Order*. If Level 3 makes an election under the mirroring rule, then the \$.0007 rate would apply to all appropriate traffic.

Thus, Qwest's proposal in this case is completely consistent with the mirroring rule. Qwest proposes that local ISP traffic (the traffic covered by the *ISP Remand Order*) and all other local and EAS traffic be exchanged at \$.0007, but only if Level 3 explicitly elects to do so under the mirroring rule. Whatever Level 3's point is in reciting the mirroring rule from the *ISP Remand Order*, there is simply no dispute since Qwest's proposed language is in full compliance with the rule.

²⁵ *ISP Remand Order* ¶ 8.

²⁶ 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."

7. Level 3 Ignores Arizona Law When It Argues that the Relationship Between NXX and Local Calling Areas Is No Longer Relevant

One of the most striking aspects of Level 3's Brief is the absence of any meaningful discussion of Arizona statutes, rules, and decisions. Indeed, without any discussion of these authorities, Level 3 asks the Commission to "*embrace* the use of geographically independent telephone numbers, specifically 'virtual FX' or VNXX, for both Level 3's VoIP and ISP-bound services." Level 3 Brief at 50 (quoting heading II.B). Level 3 also introduces a corollary argument that LATAs, and not local calling areas, are now the relevant measuring stick. *Id.* at 68-69. To support its argument, Level 3 cites three examples of this alleged change: (1) the ESP exemption; (2) wireless service; and (3) the development of VoIP. *Id.* at 50-54.

As discussed in Qwest's opening brief (Qwest Brief at 47-50), the ESP exemption did not end the relevance of local calling areas. All the ESP exemption did (and all it still does) is to recognize that certain providers, ESPs, are treated as though they are end users and that, as such, access charges do not apply to them for originating and terminating traffic in the local calling area in which they obtain service. Precisely how the ESP exemption (which was first unveiled in 1984) began the destruction of local calling areas is not explained by Level 3.

Level 3's wireless argument (Level 3 Brief at 51) is utterly irrelevant. It is true that the equivalent of a local calling area in the wireless market, the MTA, is usually significantly larger than local calling areas that are used for wireline service. But nothing in the adoption of the MTA approach to wireless service suggests that local calling areas for wireline service are either invalid or nearing extinction. This docket does not relate to wireless service. If it did, then the terms and conditions would recognize MTAs as the

basis for whether access charges apply. The MTA approach to wireless service has been the basis for operations in wireless for many years and it has not, as Level 3 suggests, resulted in the demise of local calling areas for wireline services.

Finally, the VoIP argument (Level 3 Brief at 52-53) misses the point. No one disputes that IP-related CPE can be used anywhere a broadband connection exists and that the location of a VoIP end user may vary. That, of course, is why the location of the VoIP provider POP rather than the location of the VoIP customer is the relevant factor for determining whether a VoIP initiated call should be subject to access charges. Just as important is the fact that this case is not about what happens to VoIP calls on the Internet. This docket relates to the terms and conditions that apply to the use of the PSTN, just as interconnection agreements with wireless providers and wireline local exchange CLECs relate to how the PSTN is used. And, although Level 3 refuses to recognize it, local calling areas remain both legally and technologically relevant for the PSTN.

The Arizona Commission cannot simply embrace a proposal for sweeping change in an industry simply because one party suggests it. The Commission must follow governing statutes and its own rules. Those authorities in Arizona demonstrate overwhelmingly that the abandonment of local calling areas would directly violate Arizona law. Qwest addressed these issues at length in its opening brief (Qwest Brief at 18-21), and will accordingly highlight the fact that under Arizona statutes local calling is geographically defined as messages “between points within the same city, or town.”

Arizona Code § 4-329.²⁷

²⁷ The distinction between local and interexchange traffic is further underlined by Arizona Code § 40-282(C)(2)(a) & (b), which require separate certification for “local exchange” and “interexchange” carriers.

The Commission's rules are even more explicit. For example, the Commission's Competitive Telecommunications Services rule defines local exchange traffic as traffic "*within an exchange or local calling area.*" Arizona Administrative Code § R14-2-1102(7). The Commission's "Telecommunications Interconnection and Unbundling" rule 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.* § R14-2-1305(A) (emphasis added).

Finally, Qwest's position here is consistent with recent precedent established by this Commission 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 Commission rejected that language, noting among other things that "[w]e 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 13.²⁸

Level 3's argument that the LATA and not the local calling area is now the relevant geographical area is completely unsupported. Level 3 cites the fact that LATAs were used in the divestiture of the Bell System as the dividing line between Bell Operating Company market areas. Level 3 Brief at 69. While that is true, the inference that this somehow represents an abandonment of local calling areas does not bear scrutiny. Level 3 provides no support for the idea that LATAs replaced state-commission approved local calling areas. The FCC's holding in the *Local Competition Order* remains the law:

²⁸ See also Qwest's Brief at 21-22 for a discussion of Qwest's tariffs, which are completely consistent with Arizona statutes, rules, and Commission decisions.

[S]tate 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.*²⁹ (emphasis added).

Nor can Level 3 explain away the numerous references to local calling areas in the *ISP Remand Order* and the *ISP Declaratory Order*. *ISP Remand Order* ¶¶ 10, 13, and 24; *ISP Declaratory Order* ¶¶ 4, 7, 8, 12, 24 (n. 77), and 27. Further, 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). Mr. Gates 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 contradicts himself by stating that "for purposes of intercarrier compensation, all of those calls within that LATA routed to the single POI are treated as local." *Id.* Level 3's "LATA argument" is both unsupported and inconsistent with other Level 3 testimony and should be rejected.

8. Level 3's Assertion that Telephone Numbers Have No Historical Relationship to Location is Inconsistent With Prior Testimony of Level 3's Expert.

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

²⁹ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1035 (1996) ("*Local Competition Order*").

flies in the face of the way calls have been rated since the establishment of the PSTN. Exhibit L-4, at 39.

In other words, Mr. Gates would have us believe that location has no historical connection to the rating of calls. Yet in Florida docket three years ago, the Florida commission reported that Mr. Gates took a different position:

We disagree with the ALEC position that jurisdiction of traffic should be determined based upon the NPA/NXXs assigned to the calling and called parties. Although presently in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, we believe this practice was established based upon the understanding that NPA/NXXs were assigned to customers within the exchanges to which the NPA/NXXs are homed. *Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of the call.*³⁰

Thus, Mr. Gates admitted in the Florida docket that the historical practice of rating calls by telephone numbers was simply the means by which the location of the customers was determined, which is precisely the point that Mr. Brotherson made in his rebuttal testimony. Exhibit Q-2, at 32, 34-38.

9. Level 3's Characterization of QCC's One-Flex™ Service is Inaccurate.

Level 3 claims that at the same time that Qwest is attempting to require Level 3 to conform itself to local calling areas Qwest's "OneFlex product ignores its own local calling boundaries." Level 3 Brief at 12. Level cites no evidence to support this claim other than some testimony of Mr. Gates that does not even address that issue, a description of a completely different service (Wholesale Dial), and a description of virtual numbers related to OneFlex from a Qwest website. *Id.* at 52-53, n. 68. None of

³⁰ *Florida Reciprocal Compensation Order* at 30. (emphasis added).

the “evidence” cited supports Level 3’s claim nor does it rebut the evidence provided by Mr. Brotherson that OneFlex is not a VNXX service.

Mr. Brotherson testified that OneFlex honors local calling area guidelines: calls to or from these numbers from outside the local calling area where the VoIP provider point of presence (“POP”) is located are not treated as local calls for any purpose, including for compensation purposes. Further, 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 ESP exemption. Thus, because calls are exchanged between the POP and the caller within the same local calling area, no VNXX calls are permitted with OneFlex. See Qwest Brief at 30; Ex. Q-2, at 58; Ex. Q-22. Furthermore, Mr. Brotherson testified, using the example of the OneFlex VoIP POP being in Phoenix and the called party in Page, that “[a]ny traffic that’s to be terminated in Page by QCC’s OneFlex *would be handed off to an IXC and terminated paying access.*” Tr. 275 (emphasis added).

B. Qwest’s Proposed Definitions Should be Adopted for Issue 10 (Definition of “Interconnection”), Issue 11 (Definition of “Interexchange Carrier”), Issue 12 (Definition of “Exchange Access”), and Issue 14 (Definition of “Exchange Service”). Level 3’s Proposed Definition of “Telephone Toll Service” Should Be Rejected (Issue 15).

In Qwest’s opening brief, Qwest specifically addressed the language of Issues 10-12 and 14-15, describing Qwest’s specific rationale for the language it proposes in the language in each issue. Qwest Brief at 32-37. In contrast, Level 3 has not provided any argument or other rationale for the language it proposes on Issues 10-12 and 14-15. Therefore, because Qwest’s proposed language is consistent with the Act, with the Arizona SGAT, and with language accepted and approved in many other interconnections agreements in Arizona and elsewhere, the Commission should make the following

decisions related to the definitions relevant to VNXX issues: (1) adopt Qwest's Definition of "Interconnection" (Issue 10); adopt Qwest's Definition of "Interexchange Carrier" (Issue 11); adopt Qwest's Definition of "IntraLATA Toll Traffic" (Issue 12); adopt Qwest's Definition of "Exchange Access" and "Exchange Service" (Issue No. 14); and reject Level 3's Proposed Definition of "Telephone Toll Service." (Issue 15).

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 19).

Qwest explained in detail the reasoning behind its proposal, including a proposal to eliminate the last sentence of the Qwest-proposed language to paragraph 7.3.6.2. Level 3's Brief does not discuss this issue. Accordingly, the Commission should adopt Qwest's proposed language.

D. Level 3's Proposal to Exempt all VoIP Calls from Existing Intercarrier 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, and Issue 1A).

The essence of Level 3's argument is that access charges should never apply to VoIP traffic, no matter where the traffic enters the PSTN and no matter what Qwest must do to transport and switch the traffic to deliver it to the called party. In fact, Level 3 states categorically that "when Qwest and Level 3 exchange VoIP traffic, that traffic, too, should be subject to reciprocal compensation, not access charges." Level 3 Brief at 72. No decision of the FCC or the Commission supports Level 3's position.

1. Level 3 Seeks to Fundamentally Change the Compensation Regime.

Level 3's position is that the location of the VoIP provider POP has no relevance whatever to intercarrier compensation applies to VoIP calls. 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 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.

In one of the scenarios addressed by Mr. Ducloo on Arizona Exhibit Q-20, a VoIP customer with a Phoenix number calls a Page, Arizona PSTN customer of Qwest. Page and Phoenix are in different local calling areas and 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. The only justification offered by Mr. Ducloo is that it is Level 3's position

that “the reciprocal compensation rate that the FCC also applies to ISP-bound traffic is the appropriate compensation rate for [VoIP] traffic.” *Id.* at 184-85.

Level 3 is thus seeking an agreement whereby it can carry IP voice traffic, either as VoIP provider on its own behalf or on behalf of unaffiliated VoIP providers,³¹ that will allow it special treatment outside the existing regulatory structure. Level 3 erroneously asserts that 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 proper application of the ESP exemption exempts a VoIP provider from terminating access charges for delivering calls only to PSTN customers within the local calling area in which the VoIP provider is purchasing local exchange service. For all other calls, including calls that terminate to a local calling area different than the local calling area in which the VoIP provider purchases local exchange service, Qwest is entitled to applicable access charges.

2. The ESP Exemption Does Not Support Level 3’s Arguments.

Because Qwest addressed the issue of the impact of ESP exemption on VoIP in its opening brief (Qwest Brief at 47-50), Qwest will not repeat its argument here, other than to point out that all the ESP exemption does, and all it has ever done, is to allow “information service” providers to be treated as end users for purposes of originating and terminating traffic in the local calling areas in which the information service provider purchases service. It is nothing more than that. Thus, if a call by an end user would be

³¹ Level 3 acknowledges that it provides VoIP services to end users (large government and business accounts) in Arizona and that it also provides the same service as a CLEC to third party VoIP providers. Tr. 55-56.

subject to access charges, so too would the same call handed off to Qwest by an information service provider be subject to access charges.

Given all the attention that Level 3 paid to the ESP Exemption in its testimony, it is virtually silent on the subject in its brief. In fact, the exemption is mentioned on only one sentence, and then in support of Level 3's argument that the Commission should abandon local calling areas. Level 3 Brief at 51.

3. Level 3's Policy Argument is Without Merit.

In the end, Level 3's position comes down to an unsupported assertion that it would be poor public policy to apply access charges to VoIP. However, it is really the opposite that is true. It would be discriminatory and bad public policy to treat VoIP calls as Level 3 has proposed. If the VoIP provider POP is in one local calling area and the call must be terminated by the ILEC in another distant local calling area, there is no legal or policy reason for that call to be treated like a local call.

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

Level 3's Brief completely ignores the agreement language that would allow for audits and certifications related to VoIP (Issue 1a). Level 3 ignored the issue in its testimony as well. Accordingly, since Qwest's basis for the language is sensible and unchallenged, Qwest's proposed language should be adopted.

E. Level 3's Language and Arguments Related to SPOI Should Be Rejected (Issues 1A-1F, 1I and 1J).

1. The Act Requires the Carrier Requesting Interconnection to Pay the Cost of Interconnection.

Under Section 251(c)(2)(b) of the Act, Level 3 is required to compensate Qwest for interconnection costs incurred at Level 3's request. In its *Local Competition Order*, the FCC stated that "to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers." *Local Competition Order* ¶ 200. "[A] requesting carrier that seeks to have a 'technically feasible' but expensive interconnection would pursuant to Section 252(d)(1) be required to bear the cost of that interconnection including a reasonable profit." *Id.* ¶ 199.

Qwest offers Level 3 a number of options for interconnection and allows Level 3 to select the option that best meets its needs. Qwest Exhibit Q-4 at 3. As Mr. Easton explained, there are essentially three types of interconnection. Qwest Exhibit Q-3 at 5-6. One option is for the CLEC to build facilities to a Qwest central office for collocation, which allows a CLEC to put equipment in one of Qwest's serving wire centers and interconnect at that point. This option requires the CLEC to incur some cost in establishing the collocation but does not require the use of entrance facilities. *Id.* at 5, 19.

A second option is for the CLEC to purchase entrance facilities from a Qwest central office to the CLEC's nearest premises. This option is appropriate for those CLECs who do not want to incur capital expense by either laying fiber for a mid-span meet POI or setting up a collocation. *Id.* at 5. An entrance facility creates transport between a CLEC building and the nearest Qwest serving wire center (SWC). The costs

of two-way entrance facilities between Qwest and the CLEC are shared based on their relative use by each party. The application of the relative use factor (RUF) is discussed in Section II.F below.

Finally, a third option is for the parties to build to a meet point approximately midway between the CLEC's POI and a Qwest tandem or end office switch. This option, like the collocation alternative, requires a capital outlay on the part of the CLEC to achieve interconnection. *Id.* The relative use calculations that apply to an entrance facility purchased from Qwest do not apply to a Mid-Span Meet Point of Interconnection. *Id.* at 18. Although Level 3 emphasizes the meet point option in its arguments in this case, it is critical to remember that it is only one of three major approaches to interconnection each of which has different advantages and disadvantages for the CLEC. As Mr. Easton testified, it may be reasonable for Level 3 not to choose a meet point:

There are, however, sound reasons for Level 3 to choose the entrance facility options, instead of the Mid-Span Meet POI. By so choosing, Level 3 is able to avoid the initial, and often substantial, investment associated with building its own facilities to the POI. By choosing the entrance facility option, Level 3 pays a nominal non-recurring charge to "turn-on" the Qwest facilities and then pays a monthly recurring charge that is subject to a credit based on Qwest's relative use of the facilities. Level 3 is clearly avoiding significant capital expenditures by ordering the LIS entrance facility, yet is unwilling to compensate Qwest for this facility. *Id.* at 19.

Regardless of the form of interconnection chosen, it makes sense that the cost causer compensates Qwest for interconnection and transport costs. If the cost causer (Level 3) does not pay, then Qwest end user customers would have to bear the cost. Qwest Exhibit Q-3 at 5-6. Each of the interconnection options outlined above has its own compensation rules that are reflected in Qwest's SGAT and approved by this Commission. Qwest's proposed language follows the applicable rules and is consistent with the SGAT language

the Commission has allowed to take effect; Level 3's does not. If Level 3's language is adopted it would result in Level 3 receiving special treatment among CLECs and other carriers.

2. Establishing a Meet Point Does Not Relieve Level 3 of the Requirement that It Compensate Qwest for Interconnection Costs Qwest Incurs

Although Level 3's proposed language contemplates the use of entrance facilities, the method of interconnection that Level 3 focuses on in its Brief is a mid-span meet. Contrary to the impression created by Level 3,³² Qwest's proposed language does not apply the relative use factor in the context of the mid-span meet, consistent with the FCC rules cited by Level 3. However, the rules that apply to establishing mid-span meet point interconnection must be satisfied if this form of interconnection is established.

In its *Local Competition Order* the FCC articulated the nature of meet point arrangements, the responsibilities of the incumbent LEC with regard to establishing such arrangements, and the policy that supports them. Looking first to their configuration the FCC stated:

Meet point arrangements (or mid-span meets). . . are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network" (e.g. main distribution frame, trunk side of the switch), and the limited build out of facilities from that point may then constitute an accommodation for interconnection. In a meet point

³² Level 3 admits that "the reality is that Level 3 either collocates advanced network gear within buildings housing Qwest tandems; or splices fiber at "meet points;" or leases capacity to its POIs with Qwest." Level 3 Brief at n. 19.

arrangement each party pays its portion of the costs to build the facilities to the meet point. *Local Competition Order* ¶ 553

From this passage, it is clear that mid-span meets are for the “mutual exchange of traffic.” In this form of interconnection Qwest would be expected to bear a reasonable share of the cost of the facilities needed to create the meet point. The notion of cost sharing to establish the meet point is predicated on idea that the ILEC and CLEC are co-carriers and that each is benefiting from the arrangement. The FCC continued:

We believe that. . . . such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) *for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement.* Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. *Id.* (emphasis added).

Strangely, Level 3 quotes this language (Level 3 Brief at 25), but utterly fails to appreciate how it impacts its position in this arbitration. Level 3 does not seek interconnection here for the purpose of exchanging traffic. Nor can it show that the incumbent (Qwest) “gains value from the interconnection arrangement.” To the contrary, Level 3 seeks interconnection largely, if not exclusively, for the purpose of serving its ISP customers whose end users generate a large amount one-way calls flowing from Qwest’s network to Level 3. As the FCC has stated, where there is an exchange of traffic and each carrier benefits, “it is reasonable to require each party to bear a reasonable portion” of the cost. The inverse is also true, where there is no exchange, and only one party benefits (here, Level 3), it is not reasonable for the other party to bear the costs.

In the *Verizon Virginia*³³ case, the FCC clarified that incumbent carriers must recover the cost of interconnection including, where appropriate, the costs of embedded ILEC facilities:

AT&T's proposal splits the costs of construction between the parties equally, but does not split any of the costs of maintenance of the mid-span meet. Instead, AT&T's proposal leaves each party responsible for maintaining its side of the fiber splice. *Depending upon the location AT&T chooses for the fiber splice, this could leave Verizon bearing an inequitable share of the costs of maintaining the mid-span meet.* AT&T's proposal also does not account for situations where embedded plant is used to reach the meet point instead of newly constructed facilities. *Excluding the economic cost of embedded plant from the costs to be shared equally by the parties does not result in each party bearing "a reasonable portion of the economic costs of the arrangements."* *Verizon Virginia Order* ¶ 133 (emphasis added).

The FCC's language in *Verizon Virginia* contradicts Level 3's persistent assertion that Qwest must bear all cost of its network used for interconnection. As Qwest will discuss below, state regulatory commissions and courts who have looked at arrangements like the one Level 3 is proposing have concluded that the costs incurred in transporting one-way traffic to the CLEC's ISPs are not costs that should be borne by the ILEC. The mere claim that Level 3 wishes to establish a meet point arrangement does not relieve that company of the responsibility for the costs of interconnection that it imposes on Qwest's network. 47 U.S.C. §§ 251(c)(2) & 252(d).

³³ Memorandum Opinion and Order, *In the Matter of the Petition of WorldCom, Inc. et al for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, 17 FCC Rcd 27039 (Wireline Competition Bureau, 2002) ("*Verizon Virginia Order*").

3. Single Point of Interconnection Does Not Relieve Level 3 of the Obligation to Pay Applicable Access Charges.

It remains uncertain exactly what form or forms of interconnection Level 3 will actually adopt in Arizona, but assuming Level 3 establishes the meet point arrangement it discusses throughout its Brief, Level 3 seems to claim that it can simply “meet” Qwest at the point of its choosing and use Qwest’s network on a LATA-wide basis—without charge—to generate reciprocal compensation revenue for itself. Such “interconnection” is not supported by the Act or any FCC precedent.

Level 3 argues that requiring it to either establish a local presence in the LCAs in which it purports to provide local service or to pay access charges for interexchange calls “negates the point of the SPOI requirement.” Level 3 Brief at 17. Level 3’s argument on this point was rejected by the FCC in the *Local Competition Order* in which the FCC stated that “because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, access charges are not affected by our rules implementing section 251(c)(2).” *Local Competition Order* ¶ 176. As Level 3 noted, it is entitled to choose whether to interconnect at one point or more than one point within the LATA. One of the factors that Level 3 has to consider in making its choice is the extent to which it will have to pay access charges if it chooses only a single point of interconnection. Nevertheless, there is plainly no basis for Level 3’s contention that single point of interconnection somehow excuses it from paying access charges.

Level 3 attempts to argue that because end users do not have to dial 1+ before making what amounts to an inter-exchange call to reach Level 3’s customers (thanks to Level 3’s deployment of VNXX), it is appropriate that Qwest carry the traffic from any point in the LATA to the Level 3 POI without charge. Level 3 Brief at 21. This is

disingenuous. By using VNXX Level 3 sends a false economic signal to end users by disguising an interexchange call as local, and thereby encourages heavier use. This practice generates more revenue for Level 3 while burdening Qwest's network with uncompensated traffic. Furthermore, Level 3's argument that "network routing of toll calls is different" (*Id.*) is neither supported by the record or internally consistent. In fact the third "reason" given by Level 3 to demonstrate how Level 3's use is "different" is that "on the circuit switched network, for 1+ originated calls Qwest is either paid a toll by its end user. . .or receives access charges from a toll carrier." *Id.* That is exactly the point: Level 3's method of interconnection does not change the fact that interexchange calling in the PSTN to which Level 3 has chosen to interconnect results in the network provider being entitled to compensation for its use.

Later in its Brief Level 3 attempts to address this obviously unfair exploitation of Qwest's network without compensation by arguing that prior to the Act's permitting interconnection by competitors, Qwest incurred three kinds of costs (origination, transport, and termination) but now only incurs a portion of those costs. Level 3 Brief at 31. What Level 3 conveniently overlooks is that under Level 3's proposal for interexchange calls, Qwest is deprived entirely of the compensation that previously covered the costs of those calls and must instead pay Level 3 compensation at the rate of \$.0007 per minute of use. The outcome is entirely inequitable. Qwest still incurs some of the costs it would previously have incurred but receives no revenue and must pay Level 3 to boot.

In a final effort to bolster its position, Level 3 attempts to demonstrate the options of either paying access charges or establishing a local presence in the exchanges in

question are “unreasonably discriminatory” to Level 3. *Id.* at 18. Its argument strains credibility. Level 3 states that when QCC (a Qwest subsidiary) buys PRI services to establish a local presence and avoid access charges, it has no impact to the Qwest corporation because, “money goes out of one corporate pocket and into another.” *Id.* Level 3 ignores the important fact that Qwest Corporation incurs the costs for providing PRI. That cost is not affected by whether the purchaser is QCC or Level 3. While the payment by QCC (the affiliate) of the tariffed rate for PRI is something of a “wash” from the cash flow standpoint of the overall Qwest family of companies, the transaction is a big loss to Qwest unless QCC is able to take those facilities and generate revenue. If QCC fails to generate revenue, there is no offset to the expense incurred in providing to PRI. Therefore, Level 3’s characterization of Qwest’s affiliate’s transaction as a meaningless exercise is wholly inaccurate. Nor does imposing the same requirements on CLECs as on the Qwest affiliate amount to discrimination. The fact is that after purchase of appropriate facilities, QCC, Level 3, and all other CLECs have a valuable asset (PRI facilities) from which they can generate revenue. To compare this situation to one in which Level 3 has exactly the same potential generating revenue without the associated expense is a false comparison. Level 3 is not entitled to use Qwest’s network on a LATA-wide basis without charge and if it is permitted to do so, it would be that arrangement that creates unlawful discrimination in Level 3’s favor.

F. Qwest’s Proposed Language Relating to the Relative Use Factor (RUF) for Shared Facilities Is Consistent with Federal Law and Arizona Precedent (Issues 1G, 1H).

Level 3 asserts that Qwest’s RUF formula violates federal law. Level 3 Brief at 26. In fact, the language proposed by Qwest is consistent with federal law as interpreted

by the courts and this Commission and is substantially similar to that contained in Qwest's Arizona SGAT and adopted in numerous Commission-approved interconnection agreements in Arizona.

The baseline rule on interconnection is that the CLEC who requests interconnection must compensate the ILEC who provides it for the costs the ILEC incurs. *Local Competition Order* ¶¶ 199-200, 209. Level 3 attempts to skirt this baseline rule by relying on misinterpretation of two other FCC rules. Level 3 first claims that 47 C.F.R. § 51.703(b) prohibits Qwest from charging Level 3 for the costs of trunks and facilities on its side of point of interconnection. That rule provides:

A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

On its face, this rule applies only to "telecommunications traffic." That term is defined in 47 C.F.R. § 51.701(b)(1):

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access[.]* (emphasis added; citations omitted.)

Based on these regulations, Level 3 would only be correct that Qwest cannot charge for the facilities it uses to transport calls to Level 3 if those calls qualify as "telecommunications traffic."

The call flow from Qwest to Level 3 involves calls placed by customers of the ISPs served by Level 3. It is Level 3's traffic, not Qwest's traffic, that is flowing from Qwest to Level 3. This is significant because the FCC has determined that calls to ISP

providers do not qualify as “telecommunications traffic.” In its *ISP Remand Order*, the FCC found that “ISP-bound traffic falls under the rubric of ‘information access.’” *ISP Remand Order* ¶ 39. Thus, Rule 703(b) does not apply to limit recovery by Qwest of the cost of providing Direct Trunk Transport to Level 3 so that Level 3 can serve its ISP customers.

In a footnote, Level 3 attempts to argue that the *ISP Remand Order* is not good law in light of the D.C. Circuit’s opinion in *WorldCom*. Level 3 Brief, fn. 39. Qwest addressed Level 3’s argument concerning the validity of the *ISP Remand Order* following *WorldCom* in section II.4 of its opening brief and in section II.A.1 of this brief. It is sufficient here to note that the *WorldCom* court did not change the definition of “information access” and did not vacate the *ISP Remand Order*. Hence the determination that ISP traffic is not “telecommunications traffic” remains in effect.³⁴ Furthermore, in its opening brief, Level 3 itself removed all doubt that ISP-bound traffic is “information access” when it stated that “VoIP traffic is a form of “information access” traffic *just like ISP-bound traffic.*” Level 3 Brief at 72 (emphasis added).

³⁴ Two weeks ago, the Oregon commission interpreted these same authorities and ruled that ISP traffic is not “telecommunication traffic,” but is instead “information access traffic,” that this conclusion is clearly embodied in the FCC rules adopted in the *ISP Remand Order*, and the *WorldCom* “did not reject the FCC’s determination that ISP-bound traffic constitutes ‘information access’ rather than ‘telecommunications traffic.’” In fact, the Court specifically declined to vacate the FCC’s revised rules or define the ‘scope of telecommunications’ subject to §251(b)(5).” *Oregon Pac-West Decision*, at 6-7. In a footnote to that discussion, the commission stated that “Section 51.701(b) of the FCC rules defines ‘telecommunications traffic.’ Subsection (b)(1) of that rule makes specific reference to paragraphs 34, 39 and 42-43 of the *ISP Remand Order*. Paragraphs 39 and 42 clearly articulate that ISP-bound traffic is information access rather than telecommunications traffic. As noted, the D. C. Circuit did not vacate the FCC rules, leaving the agency’s determination intact.” *Id.* at 6-7, n. 20. See also *Global Naps, Inc. v. New Eng. Tel. & Tel.*, 226 F.Supp.2d 279, 291 (D. Mass. 2001) (“the FCC now views ISP-bound telephone traffic as ‘information access’ traffic—traffic that is excluded from reciprocal compensation”)

Level 3's second attack on the baseline rule that it must compensate Qwest for interconnection costs Qwest incurs is based on 47 C.F.R § 51.709(b) ("Rule 709(b)") which provides:

The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

Level 3 relies on this regulation for the proposition that it can only be charged for that portion of any shared facility that it "*actually uses* to send traffic to Qwest." Level 3 Brief at 27-28. Once again, Level 3 has misinterpreted the FCC's rule.

Rule 709(b), like Rule 703(b), does not apply because by its terms it is limited to telecommunications traffic.³⁵ Since the only traffic that is being transported over the subject facilities is "information access" (and therefore not "telecommunications traffic"), Rule 709(b) does not prohibit Qwest from recovering interconnection costs incurred so that ISP traffic can be delivered to Level 3's ISP customers. This interpretation of Rule 709(b)'s use of the term "traffic" was upheld by the Colorado federal district court in *Level 3 v. CPUC*, which found:

I conclude that [47 C.F.R. § 51.709(b)] must refer to "telecommunications traffic." The first part of the relevant regulations, 47 C.F.R. § 701(a), provides that "[t]he provisions of this subpart [which include 47 C.F.R. § 51.709(b)] apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a) (emphasis added). In light of the fact that 47 C.F.R. § 51.709(b), therefore, can only apply to "telecommunications traffic," under 47 C.F.R. § 51.701(a), 47 C.F.R. §

³⁵ Level 3 cites authority for the irrelevant notion that Rule 709(b) admits of no exceptions. Since Rule 709(b) does not apply in the first instance, it matters not whether it has any exceptions.

51.709(b)'s reference to "traffic" must be read to mean "telecommunications traffic."³⁶

The *Level 3 Decision* on this point was challenged earlier this year by another CLEC, AT&T, in a recent arbitration dispute in Colorado.³⁷ There AT&T tried, to no avail, to make the same arguments Level 3 raises here to attempt to persuade the court it had erred in the *Level 3 Decision*. After dismissing each of the arguments, the Court concluded:

AT&T has not identified any courts that have reached a contrary conclusion to the one reached in *Level 3*. Therefore, the only case law precedent on this issue is in direct contradiction to AT&T's assertions. While district court opinions are not binding precedent, even if decided by the same judge, the Level 3 decision provides strong persuasive authority in support of the determination that "traffic" in 47 C.F.R. § 51.709(b) refers to "telecommunications traffic."³⁸

The analysis of the Colorado district court in the earlier *Level 3 Decision* was relied upon by the Arizona commission, which, in an arbitration proceeding between AT&T Communications and Qwest, stated:

The District Court of Colorado engages in a thorough analysis of the relevant FCC rules concerning compensation and reaches the conclusion that ISP-bound traffic is not "traffic" for the purpose of compensation. . . We note that we agreed that ISP-bound traffic should not be considered in determining the relative use factor [when] we considered the comparable SGAT language. We find that Qwest's proposed language should be adopted.³⁹

Hence, this Commission has already ruled that ISP traffic cannot be included in the RUF calculation in such a way as to shift costs to Qwest. The Arizona Commission's decision

³⁶ *Level 3 Communication v. CPUC*, 300 F. Supp.2d 1069, 1078 (D. Colo. 2003) (emphasis original) ("*Level 3 Decision*").

³⁷ *AT&T v. Qwest Corporation* (D. Colo. 2005) (attached as Exhibit A to Qwest's opening Brief).

³⁸ *Id.* at 26.

³⁹ Decision No. 66888, *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix for Arbitration with Qwest Corporation*, at 23 (Ariz. Corp. Comm'n, April 6, 2004). ("*AT&T/Qwest Arbitration*")

on this point is consistent with that reached by other state regulatory commissions who have likewise excluded ISP traffic from traffic attributed to Qwest in the calculation of the RUF.⁴⁰

Here, however, the only traffic on the facilities in question is ISP traffic transported by Qwest to Level 3. Consequently while Rule 709(b) does not apply to prohibit Qwest from assessing charges for Level 3's use of Qwest's network, the concept of relative use is not helpful in analyzing how the costs of the facilities dedicated to Level's ISP traffic should be allocated.

Under 47 U.S.C. § 251 Qwest is required to permit Level 3 to interconnect for the purpose of providing telecommunications services. However, 47 C.F.R. § 51.100(c) provides:

A telecommunication carrier that has interconnected or gained access under sections 47 U.S.C. § 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Hence, Level 3 is permitted to interconnect for the purpose of providing information services only if it is also providing telecommunications services. Given the nature of its business, and its intense focus on serving ISP customers who generate only one-way

⁴⁰ Decision No. C03-1189, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, Docket No. 03B-287T ¶ 84 (Colo. PUC 2003); Arbitrator's Decision, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934*, ARB 332, at 7 (Oreg. PUC 2001); Report and Order, *In the Matter of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Qwest Corporation Regarding Rates, Terms and Conditions for Interconnection*, Docket No. 02-2266-02, at 4 (Utah PSC, February 20, 2004) (<http://www.psc.state.ut.us/telecom/04telecomOrders.html>).

traffic, Level 3 is not in a position to complain that it is entitled to use Qwest's facilities without charge. In fact, it is likely Level 3 is not entitled to interconnect and use Qwest's facilities at all.

However, assuming Level 3 is permitted to interconnect with Qwest for the purpose of providing service to ISP customers, under the Act Qwest is entitled to "rates, terms and conditions that are just, reasonable, and nondiscriminatory" for the provision of that interconnection. 47 U.S.C. § 251(c)(2)(D). In implementing the Act, the FCC stated, "to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers." *Local Competition Order* at ¶ 200. Since the ISPs that generate the ISP traffic are Level 3's customers, Level 3 must bear these costs. As the Colorado court in the *Level 3 Decision* noted:

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. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport. *Level 3*, 300 F. Supp.2d at 1079.

In the more recent Colorado district court case, AT&T argued that excluding ISP traffic from Qwest's side of the relative use equation did not efficiently allocate costs among carriers. The court responded:

AT&T argument is ridiculous. In CPUC's decision, CPUC set forth its policy rationale behind its determination that *the terminating carrier in ISP-bound traffic should bear the costs of joint facilities*. . . . Assuming, *arguendo*, that AT&T set forth a logical and detailed argument on this

point supported by facts, it would still be unpersuasive in light of the one-way nature of ISP-bound traffic.⁴¹

Similarly, in this case, Level 3 offers no reasonable explanation for its theory that Qwest should shoulder the burden of providing facilities that Level 3 orders for the transport of its ISP traffic. Level 3's effort to distinguish this Commission's decision in the *AT&T/Qwest Arbitration* highlights this fact. Level 3 acknowledges that "the Commission was concerned with the apparent unfairness of AT&T ordering special access facilities, the cost of which it would then foist off on Qwest." Level 3 Brief at 32. Level 3's insistence that AT&T's problem was that it "attempt[ed] to avoid the requirement that interconnection occur 'on' or 'within' the network," even if accurate, is beside the point. The fact is, Level 3 is doing exactly what AT&T attempted to do in that case—order facilities for the transport of its ISP traffic and then "foist" those costs onto Qwest. As in the *AT&T/Qwest Arbitration*, this Commission should reject the attempt to shift the costs of ISP traffic on Qwest, who receives no benefit from this traffic.

Consistent with the baseline rule, Qwest could legitimately have proposed language that required Level 3 to bear 100% of the costs of entrance facilities and direct trunk transport since virtually all of the traffic is ISP traffic for which Level 3 should be responsible. However, the language proposed by Qwest in section 7.3.1.1.3.1 (Entrance Facilities) and section 7.3.2.2.1 (Direct Trunked Transport) starts with the assumption that the flow of traffic in each direction will be equal and then allows adjustments to the fifty-fifty split based on actual use. If Qwest's usage is greater than the CLEC's, Qwest will pay a greater share of the cost of the facility and the CLEC a smaller share that is

⁴¹ *AT&T v. Qwest*, at 45 (attached as Exhibit A to Qwest's opening brief).

proportional to its use. Qwest's language for relative use is reasonable, if not generous to Level 3, and should be adopted by the Commission.

G. Qwest's FGD Trunks Provide Level 3 an Efficient Solution that Has Worked for Other CLECs and Provides the Billing Information Necessary to Support the Operations of All Carriers, Including the Rural Companies (Issues 2 and 18).

Qwest has offered Level 3 the option of combining all traffic types on Feature Group D ("FGD") trunks. Level 3's purported basis for seeking to combine all traffic types on the same trunks was trunk efficiency. Exchanging all traffic types over FGD trunks clearly provides this efficiency. Level 3 offers no explanation as to why it rejects FGD trunks for its combined traffic needs. Instead, Level 3 argues that Qwest should modify its operations to do something for Level 3 that it does not do for any other carrier.

As Mr. Easton testified:

All CLECs interconnected with Qwest have Interconnection Agreements that either provide for the segregation of traffic onto separate trunk groups or the combining of terminating traffic onto a FGD trunk group. There is simply no valid reason to give Level 3 special treatment that would cause great expense and disruption for Qwest and other carriers. Exhibit Q-3, at 33.

In an effort to shift gears from its trunk efficiency argument, Level 3 throws out a number of other arguments in shotgun fashion in an effort to justify the combination of all traffic types over LIS trunks. None of Level 3's arguments withstand scrutiny. First, Level 3 argues, erroneously, that there is no need to use FGD trunks. FGD trunks are clearly necessary so that Qwest can prepare records for Independent Telephone Companies and CLECs that terminate traffic delivered to Qwest by Level 3. Ex. Q-3 at 31-32. If FGD trunks are not used, Qwest will be unable to produce the records that Independents and CLECs today rely upon. Level 3 tries to dilute this point by arguing

that most of its traffic is "locally dialed" traffic, not switched access traffic. However, this argument is premised on Level 3's use of telephone numbers to disguise interexchange calls as local calls. Furthermore, Level 3 recently announced that it is acquiring WilTel, a major long distance provider. Thus, it is clear that some significant amount of traffic will be switched access traffic and that the use of FGD trunks will be required so that Qwest can continue to provide records to third parties.⁴²

Level 3 next gratuitously asserts that Qwest's failure to enable its LIS trunks to handle access traffic is Qwest's own fault. However, under Section 251(g) of the Act, Qwest was required to provide interconnection for switched access traffic after the passage of the Act on the same terms and conditions as it provided that interconnection before passage of the Act. Thus, the Act contemplated that Qwest would continue to carry switched access traffic over FGD interconnection trunks, not LIS trunks. Furthermore, as Mr. Easton testified, the cost of enabling LIS trunks to properly record switched access traffic is substantial. Exhibit Q-3 at 31. Accordingly, there was never a legal or economic justification to enable LIS trunks to handle switched access traffic.

Level 3's last argument is that FGD trunks suffer limitations for handling traffic types such as VoIP. Even if one accepts this contention, the proper response is not to dispense with the use of FGD trunks for switched access traffic. That would only lead to an inability to provide switched access records for both switched access traffic and VoIP traffic, an outcome that is clearly worse than using the FGD trunks as Qwest proposes for all traffic types.

⁴² The broad scope of the interexchange services offered by WilTel can be viewed on its website: http://www.wiltel.com/products/content/voice_services/oneplus.htm.

Level 3's only proposed alternative to FGD trunks involves the use of billing factors. The use of billing factors would not allow Qwest to provide the industry standard records that Independents, wireless carriers and CLECs require. Exhibit Q-3 at 31-32. Mr. Easton explained the problem with Level 3's proposal:

Today these records are produced mechanically, using the information recorded on the FGD trunks. If Qwest does not record this traffic as FGD, neither Qwest nor the collaborating LEC, CLEC or WSP can bill the IXC who originated the call. In addition, if one of these IXC calls that Level 3 is requesting to route over LIS were routed on to another CLEC, ILEC or WSP, Qwest could potentially get billed for switched access or reciprocal compensation for a call that really originated with an IXC, as Qwest would be unable to provide the appropriate [jointly provided switched access] record to the CLEC, ILEC or WSP. *Id.*

Moreover, even if, contrary to fact, Qwest were to agree to Level 3's billing factor proposal, it could not do so on behalf of the independents, CLECs and wireless providers whose billing systems also depend on following industry guidelines. Level 3's proposal simply does not work for Qwest or the industry. *Id.*

H. Level 3 Did Not Address the Following Issues in its Brief: Definition of Call Record (Issue 8); AMA Switch Technology (Issue 6); Trunk Forecasting (Issue 17); Signaling Parameters (Issue 20); Ordering of Interconnection Trunks/Compensation for Special Construction (Issues 21 and 22); and Incorporation of Local Terms (Issue 5).

In its opening brief Qwest identified and discussed six other topics related to Issues 1 and 2 that were either not discussed separately or were not addressed at all by Level 3 in its Brief. These are Issue 8 (definition of call record), Issue 6 (AMA switch technology), Issue 17 (trunk forecasting), Issue 20 (signaling parameters), Issues 21 and 22 (ordering of interconnection trunks and special compensation for construction), and Issue 5 (incorporation of local terms). Since Level 3 has not addressed these issues,

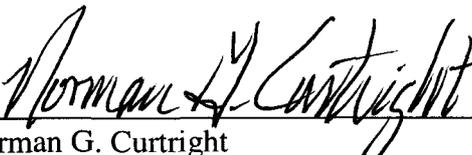
Qwest respectfully requests that the Commission adopt Qwest's proposed language on each of these issues.

Level 3 did make a change in the Issues Matrix to its definition of a call record. However, by substituting the word "may" for the word "shall," Level 3 has effectively eliminated any requirement on its part to provide any particular information in call records. This new proposal is not reasonable. A call record must contain all of the information that is necessary to properly rate and bill a call. Qwest's definition does this, Level 3's new definition does not.

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 2nd day of December, 2005.

By 
Norman G. Curtright
Corporate Counsel, Qwest Corporation
4041 N. Central Ave., 11th Floor
Phoenix, Arizona 85012

Thomas M. Dethlefs
Corporate Counsel, Qwest Corporation
1801 California, 10th Floor
Denver, Colorado 80202

Ted D. Smith
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

Attorneys for Qwest Corporation

ORIGINAL and 13 copies hand-delivered
for filing this 2nd day of December, 2005, to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing hand delivered
this 2nd day of December, 2005, to:

Lyn Farmer, Chief Administrative Law Judge
Jane Rodda, Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 85007
jrodda@cc.state.az.us

Maureen A. Scott, Esq.
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007

Christopher Kempley, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Ernest Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Copy of the foregoing mailed and emailed
this 2nd day of December, 2005, to:

Thomas H. Campbell
Michael T. Hallam
LEWIS AND ROCA LLP
40 N. Central Avenue
Phoenix, AZ 85004
Email: tcampbel@lrlaw.com
mhallam@lrlaw.com

Henry T. Kelley
Joseph E. Donovan
Scott A. Kassman
Kelley, Drye & Warren, LLP
333 W. Wacker Drive
Chicago, IL 60606
Email: HKelly@KelleyDrye.com
JDonovan@KelleyDrye.com
SKassman@KelleyDrye.com

Christopher W. Savage
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Washington, D.C. 20006
Email: csavage@crblaw.com

Richard E. Thayer, Esq.
Director – Intercarrier Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Email: rick.thayer@level3.com

Erik Cecil, Regulatory Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Email: erik.cecil@level3.com

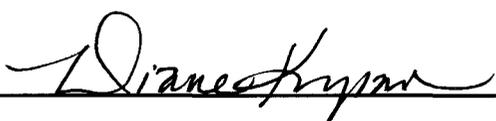


EXHIBIT A

EXHIBIT A
QWEST REPLY BRIEF



Together with NEXTEL

Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture

Tens of millions nationwide to have access to the "Quadruple Play" integrating video, voice, Internet and wireless capabilities

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Media Contacts:

Sprint:

Nick Sweers, (913) 794-3460

Comcast:

Jennifer Khoury, (215) 320-7408

Tim Fitzpatrick, (215) 981-8515

Time Warner Cable:

Mark Harrad, (203) 328-0613

Cox Communications:

David Grabert, (404) 269-7054 (office)

or (678) 592-2258 (cell)

Advance/Newhouse Communications:

Jennifer Mooney, (407) 210-3165

Kena Lewis, (407) 210-3177

Investor Contacts:

Sprint:

Kurt Fawkes, (913) 794-1140

Comcast:

Marlene S. Dooner, (215) 981-7392

Leslie A. Arena, (215) 981-8511

Dan Goodwin, (215) 981-7518

Time Warner Inc.:

Jim Burtson, (212) 484-8719

Kelli Turner, (212) 484-8269

NEW YORK -- 11/02/2005

Sprint Nextel Corporation (NYSE:S), Comcast Corporation (Nasdaq: CMCSA, CMCSK), Time Warner Cable -- a unit of Time Warner Inc. (NYSE: TWX), Cox Communications and Advance/Newhouse Communications today announced they will form a joint venture that will accelerate the convergence of video entertainment, wireline and wireless data and communications products and services to the approximately 41 million customers currently served by four of the country's largest cable companies as well as to Sprint's nearly 46 million wireless subscribers. The venture has the potential to serve approximately 75 million homes currently passed by the cable companies.

The companies in the joint venture will work to develop converged next generation products for consumers that combine the best of cable's core products and interactive features with the vast potential of wireless technology to deliver services

anywhere, any time. Leveraging the expertise, technical leadership and customer focus of Sprint and four of the largest, most successful cable and broadband communications companies will provide millions of customers access to the most advanced integrated entertainment, communications and wireless products available anywhere in the United States.

Terms of the Agreement

The joint venture, which is mutually exclusive for three years and has a 20-year term, calls for a combined initial financial commitment of \$200 million, \$100 million of which will be committed by Sprint and \$100 million of which will be committed collectively by the cable companies. The investment is expected to be used to fund the development of the converged services, national marketing initiatives and back office integration. The companies contemplate additional participation from other cable companies.

Beginning in 2006, the companies in the joint venture plan to:

- Offer consumers access to the expanded four element bundle, or "Quadruple Play," or any combination of services including video, wireless voice and data services, high speed Internet and cable phone service
- Serve growing consumer demand for a wireless "third screen" beyond the TV and computer screens
- Develop and introduce new co-branded wireless devices that will provide new and unique features that integrate cable and wireless services all on a single device
- Sell and market these co-branded products and services to customers through a combination of 1,600 Sprint retail stores, cable retail outlets and other third-party distributors, including thousands of RadioShack stores

Unlike MVNO (mobile virtual network operator) or other wholesale relationships, the companies participating in this joint venture will retain full economic benefits of the acquired customers, similar to what they currently enjoy through their direct retail channels.

Next generation wireless products and services

The next generation wireless phone will be designed to connect customers of Comcast, Time Warner Cable, Cox and Advance/Newhouse Communications to Sprint through Sprint's nationwide high-speed Power Vision™ EV-DO (Evolution Data Optimized) network and integrate products from each cable company. Customers using the converged services will be able to seamlessly interface between email, home and mobile voicemail, Digital Video Recorders (DVRs) and photo programs. An interactive demonstration of these capabilities and services can be found at <http://64.207.132.216/>. The parties plan to implement and sell Power Vision™ EV-DO-enabled handsets and service packages that will enable customers to:

- Use interactive features like remotely programming their home DVRs
- Have a single voice mailbox that serves both the home and the wireless phone
- Access innovative new calling plans which allow for unlimited calls between the home and the wireless device
- Surf the Internet using their cable Internet portal
- Send and receive e-mail from their cable high-speed Internet account
- Access unique content like streaming television programming, music, video clips, games and pre-recorded DVR programs

In addition, the five companies have agreed to work together to explore potential next generation wireless technology business plans for new services that could be provided using Sprint's Broadband Radio Spectrum (2.5 GHz), with the goal of further integrating wireline and wireless services. This spectrum has the capability to provide high-speed data connectivity that can help deliver an even wider and richer array of entertainment and communications services.

In each market, the price of the integrated offering will be agreed to by Sprint and the cable company serving that market. Each cable company will be responsible for billing customers and for customer service in its territory for the converged offering. Customers can enjoy the convenience of a single bill for all of their services, including video, data, phone and wireless.

Gary Forsee, president and CEO of Sprint Nextel said, "The new Sprint-cable partnerships will forever transform what used to be merely a cell phone into an indispensable third screen in customers' lives. By giving consumers more access to information, entertainment and data from their cell phone, we will create more loyal customers, and we'll further drive our growth. With the convergence of technologies and capabilities accelerating, we will create personalized content, useful innovative applications and easy-to-understand navigation required by consumers. Together with our cable partners, we will have the unique content and distribution assets to realize this opportunity."

Brian Roberts, chairman and CEO of Comcast Corporation said, "This agreement, which represents the most expansive technological convergence of its kind, will deliver to our customers an unprecedented level of real-time, high-speed mobility and access to content all in a single package. We have always believed cable provided the best available entertainment and communications experience, and by teaming up with other leaders of our industry, we will now take that competitive advantage to the next level. Together with Sprint Nextel, we look forward to developing fully integrated products that give our customers an even better entertainment experience whether they are in the home or on the move."

"We believe this joint venture is the right way for cable operators like Time Warner Cable to fully engage in the wireless business in the most customer-friendly and least capital intensive manner," said Glenn Britt, chairman and chief executive officer of Time Warner Cable. "This is really about much more than adding a fourth element to our existing video, data and telephone bundle. It is about developing a wireless platform that connects all of our services for the customer both inside their home and when they are on the road."

Jim Robbins, president and CEO of Cox Communications said, "This revolutionary partnership will forever change the way Americans consume entertainment, communicate and exchange information. With more than 3 million Cox customers already choosing to bundle at least two services, and more than 1 million bundling cable TV, high-speed Internet and telephony, our company has been realizing the benefits of bundling for some time now. We look forward to further increasing our customers' satisfaction by adding new wireless services, increased integration and portability."

Robert Miron, chairman and CEO of Advance/Newhouse Communications said, "We welcome this opportunity to join our partner Time Warner Cable, as well as Comcast and Cox, in this very worthwhile initiative, which will enable us to offer our customers a wireless addition to our product line of digital cable, high speed data services and digital phone, and future cutting edge innovations to be developed by the venture."

Media Luncheon and Product Demonstration

The CEOs of Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications will hold a luncheon for the media and product demonstration today at 1:00 p.m. ET in the Le Trianon room on the second floor of the Hotel Plaza Athenee, located at 37 East 64th Street in New York City.

Reporters who cannot attend may call into a teleconference to listen to the event and ask questions. U.S. reporters should call (866) 297-4539 and international reporters should call (706) 679-9046. The conference call ID number is 2067146. A replay of the call will begin at 5:00 p.m. today and will be available for 24 hours. To access the replay, please call (800) 642-1687 or (706) 645-9291 and input the conference call ID number 2067146. The conference call will also be webcast and can be accessed at <http://www.videonewswire.com/event.asp?id=3122Z>. The interactive demonstration of these capabilities and service can be found at <http://64.207.132.216/>.

About Sprint Nextel

Sprint Nextel offers a comprehensive range of wireless and wireline communications services to consumer, business and government customers. Sprint Nextel is widely recognized for developing, engineering and deploying innovative technologies, including two robust wireless networks offering industry leading mobile data services; instant national and international walkie-talkie capabilities; and an award-winning and global Tier 1 Internet backbone. For more information, visit www.sprint.com/mr.

About Comcast

Comcast Corporation (Nasdaq: CMCSA, CMCSK) (<http://www.comcast.com>) is the nation's leading provider of cable, entertainment and communications products and services. With 21.4 million cable customers, 7.7 million high-speed Internet customers, and 1.2 million voice customers, Comcast is principally involved in the development, management and operation of broadband cable networks and in the delivery of programming content.

The Company's content networks and investments include E! Entertainment Television, Style Network, The Golf Channel, OLN, G4, AZN Television, PBS KIDS Sprout, TV One and four regional Comcast SportsNets. The Company also has a majority ownership in Comcast-Spectacor, whose major holdings include the Philadelphia Flyers NHL hockey team, the Philadelphia 76ers NBA basketball team and two large multipurpose arenas in Philadelphia. Comcast Class A common stock and Class A Special common stock trade on The NASDAQ Stock Market under the symbols CMCSA and CMCSK, respectively.

About Cox Communications

Cox Communications, a Fortune 500 company, is a multi-service broadband communications company with approximately 6.7 million total customers, including 6.4 million basic cable subscribers. The nation's third-largest cable television provider, Cox offers both analog cable television under the Cox Cable brand as well as advanced digital video service under the Cox Digital Cable brand. Cox provides an array of other communications and entertainment services, including local and long distance telephone under the Cox Digital Telephone brand; high-speed Internet access under the Cox High Speed Internet brand; and commercial voice and data services via Cox Business Services. Local cable advertising, promotional opportunities and production services are sold under the Cox Media brand. Cox is an investor in programming networks including Discovery Channel. More information about Cox Communications can be accessed on the Internet at www.cox.com.

About Time Warner Cable

Time Warner Cable owns and manages cable systems serving subscribers in 27 states, which include some of the most technologically advanced, best-clustered cable systems in the country with more than 75% of the Company's customers in systems of 300,000 subscribers or more. Utilizing a fully upgraded advanced cable network and a steadfast commitment to providing consumers with choice, value and quality customer care, Time Warner Cable is an industry leader in delivering advanced products and services such as video on demand, high definition television, digital video recorders, high-speed data, wireless home networking and Digital Phone. Time Warner Cable is a subsidiary of Time Warner Inc.

About Advance/Newhouse Communications

Advance/Newhouse Communications manages Bright House Networks which serves more than two million customers in several large markets that include Tampa Bay and Central Florida (Orlando), Indianapolis, Birmingham, Bakersfield and Detroit, along

with several other smaller systems in Alabama and the Florida Panhandle. Bright House Networks offers its customers a wide range of cable television services including Video on Demand, high speed data and Digital Phone services. For more information, visit www.mybrighthouse.com.

Safe Harbor

This news release includes "forward-looking statements" within the meaning of the securities laws. The statements in this news release regarding the business outlook, expected performance, as well as other statements that are not historical facts, are forward-looking statements. The words "estimate," "project," "forecast," "intend," "expect," "believe," "target," "providing guidance" and similar expressions are intended to identify forward-looking statements. Forward-looking statements are estimates and projections reflecting management's judgment and involve a number of risks and uncertainties that could cause actual results to differ materially from those suggested by the forward-looking statements. With respect to these forward-looking statements, management has made assumptions regarding, among other things, customer and network usage, customer growth and retention, pricing, operating costs, the timing of various events and the economic environment.

Future performance cannot be ensured. Actual results may differ materially from those in the forward-looking statements. Some factors that could cause actual results to differ include:

- with respect to Sprint Nextel, the uncertainties related to its contemplated spin-off of our local telecommunications business;
 - the effects of vigorous competition and the overall demand for the services offered by the parties in the agreement as well as the converged service offerings described in this release;
 - the costs and business risks associated with providing new services and entering new markets;
 - the effects of mergers and consolidations in the communications and cable industries and unexpected announcements or developments from others in the communications and cable industries;
 - the uncertainties related to investments in networks, systems, and other businesses;
 - the uncertainties related to the implementation of business strategies (including those described above)
 - the impact of new, emerging and competing technologies;
 - unexpected results of litigation pending or filed against the parties included in this release;
 - the costs of compliance with regulatory mandates;
 - the risk of equipment failure, natural disasters, terrorist acts, or other breaches of network or information technology security;
 - the risk that third parties are unable to perform to requirements under agreements related to our business operations or that the parties described in this release are unable to finalize definitive agreements surrounding the contemplated activities (including, but not limited to, the distribution relationship with RadioShack);
 - the possibility of being impacted by changes in political or other factors such as monetary policy, legal and regulatory changes or other external factors over which the parties have no control; and
 - other risks referenced from time to time in each of the party's filings with the Securities and Exchange Commission (SEC).
- The parties believe these forward-looking statements are reasonable; however, you should not place undue reliance on forward-looking statements, which are based on current expectations and speak only as of the date of this release. No party is obligated to publicly release any revisions to forward-looking statements to reflect events after the date of this release. The parties regularly disclose in their respective public SEC filings a detailed discussion of risk factors including their respective 2004 Form 10-Ks as amended, and you are encouraged to review these filings.

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EXHIBIT B

EXHIBIT B
QWEST REPLY BRIEF

ORDER NO. 05-1219

ENTERED 11/18/05

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

IC 9

In the Matter of)

PAC-WEST TELECOMM, INC., vs.)
QWEST CORPORATION)

ORDER

Complaint for Enforcement of)
Interconnection Agreement.)

DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED

Background. On July 26, 2005, the Public Utility Commission of Oregon (Commission) entered Order No. 05-874 in response to a complaint filed by Pac-West Telecomm, Inc. (Pac-West), against Qwest Corporation (Qwest). Order No. 05-874 interprets and enforces various terms of the interconnection agreement (ICA) entered into by Pac-West and Qwest.

On September 26, 2005, Pac-West filed an application for rehearing or reconsideration of Order No. 05-874. Pac-West seeks reconsideration of the portion of the decision that concludes that the relative use factor (RUF) set forth in Article V, Section D.2.d., of the ICA does not apply to VNXX traffic transported over direct trunk transport (DTT) facilities. Pac-West requests that the order be modified to recognize that VNXX traffic bound for Internet service providers (ISPs) must be included in the RUF calculation used to determine each carrier's responsibility for the cost of the transport facilities used to interconnect their networks.

On October 11, 2005, Qwest filed a reply to Pac-West's application. Qwest contends that Order No. 05-874 correctly concludes that the RUF is inapplicable to DTT facilities used to exchange VNXX traffic.

The Relative Use Factor. Article V of the Pac-West/Qwest ICA governs reciprocal traffic exchange. Section D of Article V governs compensation for local traffic exchanged under the ICA. Subsection D.2.d. provides that compensation paid to the provider of DTT facilities shall be adjusted to reflect the provider's relative use of the facility during the busy hour. That percentage is referred to as the relative use factor, or RUF.

Order No. 05-874. In December 2004, the U.S. District Court for the District of Oregon issued a decision in *Qwest v. Universal Telecom (Universal)*.¹ Order No. 05-874 interprets the *Universal* decision to hold that the FCC's *ISP Remand Order*² does not apply to transport arrangements. We therefore held that the "ISP Amendment" executed by Qwest and Pac-West in 2003 to "reflect" the terms of the *ISP Remand Order* did not have any effect on the provisions in the Pac-West/Qwest ICA relating to transport, including the RUF.³ Because the *ISP Remand Order* does not apply to transport obligations, we further held that the ICA must be interpreted based upon the law in effect at the time the ICA was executed in 2000.⁴ At that time, the prevailing law in Oregon was that ISP-bound traffic was "local" traffic subject to the reciprocal compensation requirements of §251(b)(5) of the Telecommunications Act of 1996 (Act).⁵

As a result of these determinations, the Commission found that the RUF provision in the Pac-West/Qwest ICA applies to ISP-bound traffic. However, because the RUF applies only to local traffic under the ICA, and *Universal* holds that VNXX traffic is not local,⁶ we concluded that the RUF does not apply to VNXX traffic.⁷

¹*Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Dec. 15, 2004) (*Universal*).

²*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, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2001, *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*.)

³As noted below, Pac-West and Qwest also executed a Change of Law Amendment to the ICA at the same time. See Order No. 05-874 at 27, fn. 84.

⁴Prior to the *ISP Remand Order*, FCC policy was that reciprocal compensation was due only for "local" traffic. *Universal* at 27; *WorldCom v. FCC*, 228 F.3d at 429, 430 (D.C. Cir. 2002). In that order, the FCC "abandoned the distinction between local and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic for purposes of §251(b)(5)." *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114, 1128, 1131 (9th Cir. 2003). Since we interpret *Universal* to hold that the *ISP Remand Order* does not apply to transport obligations, the FCC's abandonment of the "local-interstate" distinction is irrelevant to the Pac-West/Qwest ICA. Instead, the law in effect at the time the ICA was executed in 2000 governs the agreement. As emphasized, the prevailing law in Oregon was that ISP-bound traffic was "local" traffic. See also, Order No. 05-874 at 3, fn. 4, 28.

⁵*Universal* at 20; Order No. 05-874 at 28. See also, Order No. 00-722, docket ARB 238.

⁶The definition of "local/EAS" traffic in the *Universal/Qwest ICA* is the same as that in the *Pac-West/Qwest ICA*. With respect to that definition, the Court held:

Thus, for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA [local calling area] or EAS [extended area service region] and terminated [sic] 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

Pac-West Position. Pac-West makes the following arguments in support of its application:

(a) Order No. 05-874 misconstrues the *Universal* decision. The Court's finding that the *ISP Remand Order* does not alter contractual obligations to transport traffic applies only to the existing Qwest/Universal agreement. The Pac-West/Qwest ICA differs from that agreement because Pac-West and Qwest executed the ISP Amendment⁸ adopting the *ISP Remand Order*.

(b) The *ISP Remand Order* rejects the "local-interstate" distinction for purposes of determining whether traffic is subject to the reciprocal compensation requirements of §251(b)(5). Instead, the FCC found that §251(b)(5) applies to "all traffic not excluded by §251(g)." Thus, the provisions in the ICA limiting the RUF to the transport of "local" traffic are no longer valid, and the RUF must be construed to apply to "all traffic not excluded by §251(g)."

definition of local traffic [under the ICA] 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." *Universal* at 24.

On September 22, 2005, the Court entered a supplemental opinion in *Universal*. Interpreting the foregoing statements, the Court stated that it:

... intended compensable traffic to include traffic that originates in one LCA or EAS area and 'terminates' in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the 'termination point' is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision and the *ISP Remand Order*. [Citing Commission Order No. 99-218 docket ARB 91, entered March 17, 1999, and the *ISP Remand Order*]. *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA (D. OR. Sept. 22, 2005) (*Universal Supp. Op.*).

Thus, the Court recognized that both the Commission's ARB 91 decision and the FCC's *ISP Remand Order* require reciprocal compensation for ISP-bound traffic only when ISP modems are located within the same local calling area as the calling party. The Court's holding is inconsistent with Pac-West's claim that the *ISP Remand Order* requires payment of reciprocal compensation for VNXX traffic.

⁷In its application, Pac-West also asserts that the definition of local traffic included in Qwest's tariff and adopted by the Court in *Universal* is inconsistent with an interpretation of local traffic made by the FCC in *Starpower Communications LLC v. Verizon South*, Memorandum Opinion and Order, EB-00-MD-19, FCC 03-278 (rel. Nov. 7, 2003). We find that *Universal* is controlling, and agree with Qwest that the *Starpower* decision is factually inapposite. See Qwest Response at 24-26.

⁸See Order No. 05-874 at 28-30, for discussion of the Pac-West/Qwest ISP Amendment.

(c) The *ISP Remand Order* was reviewed in *WorldCom v. FCC* by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).⁹ Pac-West claims that, because the D.C. Circuit concluded that ISP-bound traffic was “not excluded by §251(g)” it is properly categorized as “telecommunications” subject to the reciprocal compensation requirements of §251(b)(5). As such, the FCC’s reciprocal compensation rules – including §51.709(b) which mirrors the RUF – apply to ISP-bound traffic.

(d) The *ISP Remand Order* encompasses all ISP-bound traffic, including VNXX ISP-bound traffic. Thus, the RUF applies to VNXX traffic.

Standard for Reconsideration. OAR 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

- (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
- (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
- (c) An error of law or fact in the order which is essential to the decision; or
- (d) Good cause for further examination of a matter essential to the decision.

Commission Decision. Upon review, the Commission is unpersuaded by the arguments advanced by Pac-West in support of its application. We conclude that Order No. 05-874 correctly interprets the law applicable to the Pac-West/Qwest ICA and does not require revision. In addition, we find a number of flaws in the reasoning underlying Pac-West’s application:

(a) To begin with, we note that Pac-West’s argument is premised upon its claim that the *ISP Remand Order* encompasses transport obligations under the ICA. This argument is a complete reversal from the position articulated by Pac-West in the proceeding below. Pac-West makes no effort to explain its change in position or to explain the presumed shortcoming in its prior analysis.¹⁰

⁹*WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

¹⁰In the proceeding below, Pac-West devoted an entire page of its reply brief to support its claim that the *ISP Remand Order* addressed only the *termination* of ISP-bound traffic and did not encompass *transport* arrangements. Among other things, Pac-West stated: “In its recent order granting in part the forbearance petition filed by Core Communications [footnote omitted], the FCC clarified that the *ISP Remand Order* was designed to modify *reciprocal compensation for ISP-bound traffic only, not to disturb any other aspect*

(b) Even if we assume, for the sake of argument, that *Universal* is inapplicable and the *ISP Remand Order* encompasses transport obligations under the ICA, it still does not produce the outcome Pac-West desires. At the time Pac-West and Qwest executed the ISP Amendment to their ICA incorporating the *ISP Remand Order*, they also executed a new Change of Law Amendment. The Change of Law Amendment provides that the “Existing Rules” govern the ICA. The “Existing Rules” include the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof.”¹¹

In 2003, when the new Change of Law Amendment was executed, the “Existing Rules” included two decisions interpreting the effect of the *ISP Remand Order* on ISP-bound traffic and the RUF. Specifically, the Commission had entered Order No. 01-809 in *Level 3 Communications*,¹² holding that the FCC’s *ISP Remand Order* excluded ISP-bound traffic for purposes of calculating the relative use of transport facilities. At the time the Change of Law Amendment was executed, Order No. 01-809 had also been sustained on appeal in *Level 3 Communications v. PUC* by the U.S. District Court for the District of Oregon.¹³

In *Universal*, the Court found that the *Level 3 Communications v. PUC* decision was inapplicable because it involved an arbitration agreement established after the issuance of the *ISP Remand Order*. The Court also emphasized that the *ISP Remand Order* “does not alter carriers’ other obligations under [FCC] Part 51 rules,”¹⁴ including obligations to transport traffic.

As explained above, Order No. 05-874 interprets the *Universal* decision to hold that the *ISP Remand Order* does not apply to transport obligations. Accordingly, we held that the *ISP Remand Order* did not change the law with respect to transport obligations in the Pac-West/Qwest ICA, leaving the existing contract provisions in effect. If, however, we accept Pac-West’s new-found theory and assume (a) that *Universal* is inapplicable and (b) that the *ISP Remand Order* encompasses transport obligations, then the two *Level 3 Communications* decisions noted above comprise the “Existing Rules”

of ICAs between ILECs and CLECs, such as cost-sharing arrangements applicable to DTT facilities.” (Pac-West Reply Brief at p. 12 (November 24, 2004) (emphasis added). Thus, Pac-West’s current claim is completely opposite from the position it advanced in the proceeding below. See, Order No. 05-874 at 27-28.

¹¹Order No. 05-874 at 31.

¹²*Re Petition of Level 3 Communications for Arbitration with Qwest Corporation*, docket ARB 332, Order No. 01-809, entered September 13, 2001. See also, Order No. 05-874 at 25.

¹³*Level 3 Communications LLC v. Public Utility Commission of Oregon*, et al., CV 01-1818-PA, mimeo at 6-7 (D. OR, November 25, 2002). See also, Order No. 05-874 at 26.

¹⁴*Universal* at 12.

governing the ICA.¹⁵ Those decisions interpret the *ISP Remand Order* to hold that ISP-bound traffic is excluded from the relative use calculation of transport facilities.¹⁶

Thus, Pac-West's latest theory yields essentially the same result as that obtained from Order No. 05-874.¹⁷ Because of the operation of the 2003 Change of Law Amendment, *all* ISP-bound traffic – including any VNXX ISP-bound traffic – is excluded for purposes of calculating the relative use of direct trunk transport facilities.

(c) Pac-West's argument focuses on the fact that the *ISP Remand Order* rejects the "local v. interstate" distinction¹⁸ for purposes of determining the traffic subject to §251(b)(5). It goes on to claim that, because ISP-bound traffic was "not excluded by §251(g)" it is properly categorized as "telecommunications." In advancing this claim, Pac-West ignores important elements of the *ISP Remand Order* and the *WorldCom* decision that undermine its argument. Specifically, it fails to point out that:

- Section 251(b)(5) of the Act and the FCC's Part 51 reciprocal compensation rules, including §51.709(b), apply only to "telecommunications" traffic.
- The *ISP Remand Order* concludes that ISP-bound traffic is not "telecommunications traffic" but rather "information access traffic."¹⁹
- The conclusion that ISP-bound traffic is information access is clearly embodied in the FCC Rules adopted in the *ISP Remand Order*.²⁰

¹⁵In Order No. 05-874, we expressed reservations regarding whether the *Level 3* decisions should comprise the "Existing Rules" under which the Pac-West/Qwest ICA should be interpreted. In particular, we observed that an important rationale underlying our decision in Order No. 01-809 to exclude ISP-bound traffic from the RUF was inconsistent with the D.C. Circuit's decision in *WorldCom*. Upon review, we find that those decisions do not conflict. While the D.C. Circuit held that the FCC did not have authority under §251(g) to remove ISP-bound traffic from the scope of §251(b)(5), it did not reverse the FCC's determination that that ISP-bound traffic is information access rather than telecommunications. Nor did the Court find that the FCC could not exercise preemptive authority over ISP-bound traffic. Although our comments were not made in response to arguments raised by the parties, and were therefore essentially *dicta*, we take this opportunity to clarify our position regarding the matter.

¹⁶Order No. 01-809, Appendix A, at 13-14; Order No. 05-874 at 25. *See also*, *Universal* at 12.

¹⁷In fact, Order No. 05-874 is less restrictive than the result produced by Pac-West's new theory. The Order applies the RUF to all ISP-bound traffic except for VNXX ISP-bound traffic. Under Pac-West's new theory, the 2003 the Change of Law Amendment operates to exclude *all* ISP-bound traffic from the RUF.

¹⁸As noted in Order No. 05-874, there is some uncertainty regarding the future application of the local-interstate distinction. Order No. 05-874 at 30; *see also*, Administrative Law Judge Ruling, docket IC 12, dated August 16, 2005, at 10, fn. 38.

¹⁹*See, e.g.*, *ISP Remand Order* at paras. 1, 30, 39, 42.

²⁰Section 51.701(b) of the FCC rules defines "telecommunications traffic." Subsection (b)(1) of that rule makes specific reference to paragraphs 34, 36, 39 and 42-43 of the *ISP Remand Order*. Paragraphs 39 and

- Although *WorldCom* rejected the FCC's conclusion that §251(g) "carves out" ISP-bound traffic from the scope of §251(b)(5), the D.C. Circuit did not reject the FCC's determination that ISP-bound traffic constitutes "information access" rather than "telecommunications traffic." In fact, the Court specifically declined to vacate the FCC's revised rules or define the "scope of telecommunications" subject to §251(b)(5).²¹

In *Universal*, the Court acknowledged a decision by the U.S. District Court for the District of Colorado, holding that "the *ISP Remand Order* excluded ISP-bound traffic from the definition of telecommunications traffic; instead designating it as information access."²² Consistent with its analysis of the *Level 3 Communications v. PUC* decision, the *Universal* Court declined to exclude ISP-bound traffic from the definition of "telecommunications," noting that the Qwest/Universal ICA predated the *ISP Remand Order*, and reiterating that the *ISP Remand Order* "does not alter carriers' other obligations under [FCC] Part 51 rules."²³

As we have emphasized, Order No. 05-874 did not address whether ISP-bound traffic is telecommunications because we construed *Universal* to hold that the *ISP Remand Order* does not apply to transport arrangements. If, however, we accept Pac-West's claim that *Universal* is inapposite and that the *ISP Remand Order* encompasses transport obligations, then there is no logical reason for us to reach a result different from the Colorado Federal District Court decision. Since the ISP Amendment requires the Pac-West/Qwest ICA to "reflect" the terms of the *ISP Remand Order*, and since that order [and the FCC's revised Part 51 rules] specify that ISP-bound traffic is *not telecommunications*, there is no basis for Pac-West's claim that ISP-bound traffic is subject to the reciprocal compensation requirements of §251(b)(5).

(d) As a result of the foregoing discussion, it is unnecessary for us to resolve Pac-West's claim that ISP-bound traffic, as used in the *ISP Remand Order*, includes VNXX traffic. Nevertheless, we make the following observations:

42 clearly articulate that ISP-bound traffic is information access rather than telecommunications traffic. As noted, the D.C. Circuit did not vacate the FCC rules, leaving the agency's determination intact.

²¹The D.C. Circuit stated: "... 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 authority claimed by the Commission for not applying §251(b)(5)." *WorldCom* at 434.

²²*Universal* at 11-12, citing *Level 3 Communications v. Colorado Pub. Util.*, 300 F. Supp. 2d 1069 (D. Colo. 2003).

²³*Id.*

(1) There is nothing in the *ISP Remand Order* or the judicial decisions interpreting the FCC's order to substantiate Pac-West's assertion that the FCC's definition of ISP-bound traffic includes VNXX traffic. Indeed, there is no mention whatsoever of VNXX-type arrangements in those decisions.²⁴

(2) The *ISP Remand Order* specifically preempts States from regulating ISP-bound traffic.²⁵ At the same time, however, the FCC issued a *Notice of Proposed Rulemaking* in its Intercarrier Compensation proceeding, wherein it acknowledges that States may reject VNXX arrangements as a misuse of numbering resources.²⁶ If VNXX is included in the definition of ISP-bound traffic and therefore preempted from State regulation, there is no rational reason why the FCC would have made a contemporaneous statement recognizing that States may reject VNXX arrangements as misuse of numbering resources.²⁷ The only logical conclusion is that the FCC did not contemplate that VNXX traffic would be encompassed by its *ISP Remand Order*.²⁸

(3) In Order No. 04-504, entered in docket UM 1058, we recognized that VNXX service bears a resemblance to Foreign Exchange, or FX, service. In Order No. 83-869, entered in 1983, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers. The Commission also terminated all FX arrangements for business customers and required that they be converted to Feature Group A access service. Consistent with these determinations, Qwest's tariffs define local traffic in a manner that is explicitly tied to the physical location of the customer, a fact emphasized by the Court in *Universal*.

²⁴See e.g., Administrative Law Judge Ruling, docket IC 12, dated August 16, 2005 (holding that VNXX traffic is not encompassed by the definition of ISP-bound traffic in the *ISP Remand Order*). Although Pac-West asserts that some jurisdictions have reached a different conclusion, we remain unpersuaded by those decisions. In addition, Qwest asserts that "the vast majority" of other jurisdictions have concluded that VNXX traffic is not subject to reciprocal compensation. See, Qwest response at 25, fn 20.

²⁵*ISP Remand Order* at para. 82.

²⁶In the *Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket 01-92, FCC 01-132, rel. April 27, 2001, para. 115. The FCC noted that it has "delegated some of its authority to state public utility commissions . . . to reclaim NXX codes that are not used in accordance with Central Office Code Assignment Guidelines." It then cited a decision by the Maine Public Utility Commission directing the North American Numbering Plan Administrator to reclaim NXX codes improperly used by Brooks Fiber to provide unauthorized VNXX service.

²⁷At least one federal district court has also recognized that states have the authority to reject VNXX arrangements. *Global NAPS, Inc. v. Verizon New England, Inc., et al.*, 327 F. Supp. 2d 290, 300 (D. Vermont January 12, 2004).

²⁸This also appears to be the result reached in the supplemental opinion entered in *Universal*. See, fn. 6; *Universal Supp. Op.* at 2.

(4) In Order No. 04-504, the Commission also held that a competitive provider would violate conditions in its certificate of authority if it were to provide intrastate VNXX service.²⁹

As we have stated, resolution of Pac-West's application for reconsideration does not require us to decide whether ISP-bound traffic encompasses VNXX traffic. We make these observations only to make clear that we have serious reservations concerning the validity of Pac-West's argument on this issue.

Conclusion. Based on the foregoing, the Commission finds no basis for Pac-West's claim that Order No. 05-874 incorrectly applies the law. We therefore conclude that the application for reconsideration should be denied.

²⁹Order No. 99-229, granting Pac-West's certificate of authority, imposes several conditions, including the following:

7. For purposes of distinguishing between local and toll calling, applicant [Pac-West] shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, [Pac-West] shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.

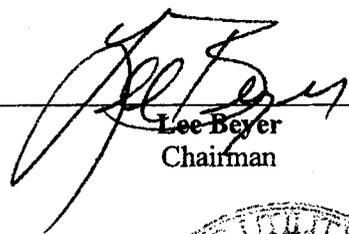
8. When applicant [Pac-West] is assigned one or more NXX codes, [Pac-West] shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.

Thus, Pac-West has a legal obligation to comply with specific requirements relating to local exchange boundaries and the assignment of telephone numbers. See, Order No. 04-504 at 5, Qwest Response at 26, fn. 22.

ORDER

IT IS ORDERED that the application for reconsideration filed by Pac-West Telecomm, Inc., on September 26, 2005, is denied.

Made, entered, and effective NOV 18 2005

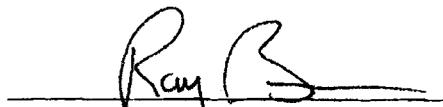


Lee Beyer
Chairman



John Savage
Commissioner





Ray Baum
Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.