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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

LEVEL 3 COMMUNICATIONS, LLC,
Complainant

vs.

QWEST CORPORATION,
Respondent

DOCKET NO. T-01051B-05-0415
T-03654A-05-0415

QWEST CORPORATION'S
RESPONSE BRIEF

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1 Qwest Corporation (“Qwest”) hereby responds to the Opening Brief of Level 3
2 Communications, LLC (“Level 3”). Level 3’s interpretation of the *ISP Remand Order* is
3 demonstrably incorrect. The *ISP Remand Order* applies only to ISP traffic that originates and is
4 delivered to an Internet Service Provider (“ISP”) in the same local calling area (“LCA”)—it does
5 not apply to VNXX ISP traffic. Level 3 ignores VNXX Arizona statutes, Commission rules,
6 Commission decisions, and Qwest tariffs, all of which are inconsistent with VNXX. VNXX is
7 an arrangement that disregards the well established and legally-mandated concept of LCAs.
8 Through VNXX, Level 3 provides the functionality of toll or 8XX at no extra charge to the
9 calling party, and shifts the cost to the ILEC (Qwest) for transporting this “disguised” toll call.
10 Contrary to Level 3’s assertions that the interconnection agreement requires compensation *to*
11 *Level 3* for VNXX ISP traffic, VNXX is not one of the types of traffic covered by the parties’
12 interconnection agreement.

13 **I. COUNT I OF LEVEL 3’S COMPLAINT SHOULD BE DENIED.**

14 Since 1999, the FCC has consistently, repeatedly, and forcefully expressed the view that
15 intercarrier compensation creates improper economic incentives for CLECs that primarily serve
16 ISPs.¹ In the *ISP Remand Order*, the FCC identified the problem with such compensation as
17 giving carriers “every incentive to compete, not on the basis of quality and efficiency, but on the
18 basis of their ability to shift costs to other carriers, a troubling distortion that prevents market
19 forces from distributing limited investment resources to their most efficient uses.”² The FCC has
20 found the problem to be “particularly acute” in the context of carriers delivering traffic to ISPs.³

21 ¹ Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the*
22 *Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of*
23 *1996, Intercarrier Compensation for ISP Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP*
24 *Declaratory Order*”); Order on Remand and Report and Order, *In the Matter of Implementation*
25 *of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier*
26 *Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”); 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*”).

² *ISP Remand Order* ¶ 4.

³ *Id.* ¶ 5.

1 As an illustration, the FCC indicated “under its current carrier to carrier cost recovery
2 mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its
3 costs from originating carriers.”⁴

4 Thus, while there have been battles over numerous legal issues and policy questions
5 about the specifics of moving to a bill and keep regime, there can be no doubt that the overall
6 policy goal of the FCC has been to eliminate, rather than expand, intercarrier compensation for
7 calls bound for ISPs.⁵

8 Level 3’s interpretation of the FCC’s rulings seeks to turn this policy approach on its
9 head, and not only maintain intercarrier compensation for ISP traffic, but expand it to areas
10 neither addressed nor imagined by the FCC at the time they made the rulings so central to this
11 case. Level 3 seeks to do this by mischaracterizing the issues presented in the *Local Competition*
12 *Order*,⁶ the *ISP Remand Order* and the *Core Forbearance Order*.

13 Level 3 attempts to characterize the *ISP Remand Order* and modifications to the FCC
14 rules as eliminating any distinction between local and toll traffic. Level 3 ignores the fact that
15 each of these proceedings focused on a different issue than the present case. In each of the cases,
16 the starting factual assumption was that a call was placed from an end user to an ISP located
17 within the same calling area. As will be discussed more fully below, this starting point gave the
18 term “ISP-bound” its particular meaning limited to traffic placed by a caller to an ISP physically
19 located in the same LCA. Thus, rather than abandoning the distinction between local and toll,
20 the FCC instead described ISP-bound traffic in such a way as to eliminate the need to use the

21
22 ⁴ *Id.*

23 ⁵ Courts have not questioned the appropriateness of this policy goal. As an illustration,
24 although the D.C. Circuit disagreed with the legal analysis of the FCC in the *ISP Remand Order*,
25 it refused to vacate the rules promulgated by the FCC and remanded to the FCC for further legal
26 analysis. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). Bill-and-keep as a goal
is cited at paragraphs 4, 6, 7, 8, 66, 67, 68, 72, 73, 74, 75, 76, 77 and 80 of the *ISP Remand*
Order.

⁶ First Report and Order, *In the Matter of Implementation of the Local Competition*
Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (“*Local*
Competition Order”).

1 term “local” in its rules.

2 It is important to place the *ISP Remand Order* in its proper context. In the late 1990s,
3 when the FCC’s ISP traffic docket was initiated and single-point-per-LATA interconnection was
4 uncommon, ISP traffic was generally handled in one of two ways. If the ISP was located outside
5 the end user customer’s LCA, the end user would need to dial a 1+ toll call or an “800” service
6 call to access the modem banks of the ISP. Such traffic was appropriately characterized as
7 interexchange traffic subject to access or long distance charges. The other situation involved two
8 LECs competing in the same LCA. In this second situation, an end-user customer of one LEC
9 dialed a local number that allowed it to access an ISP customer of the second LEC. This was the
10 situation the FCC addressed in its 1999 *ISP Declaratory Order* and in its 2001 *ISP Remand*
11 *Order*. The FCC concluded that, because of the one-way nature of such traffic, requiring
12 reciprocal compensation payments on local ISP traffic was distorting the development of
13 competition in the local markets.⁷

14 The *Bell Atlantic* decision,⁸ which gave rise to the *ISP Remand Order*, aptly described the
15 setting in which the FCC was operating. It described two universes, reciprocal compensation
16 obligations that apply to local traffic and access charge obligations that apply to long distance
17 (interexchange) traffic. It did not question and did not alter this distinction. The issue decided
18 by the court was whether section 251(b)(5) of the Act applied reciprocal compensation
19 obligations on that subset of local calls that are delivered to an ISP (located in the same LCA as
20 the calling party) and sent along to Internet content providers (e.g., websites) throughout the
21 world. In the view of the court, the question of treatment of *interexchange* or *toll calls* that are
22 passed on to the Internet were not at issue.

23 Consistent with this interpretation, in *WorldCom, Inc. v. FCC*,⁹ the D.C. Circuit described
24 the *ISP Remand Order* as holding “that under § 251(g) of the Act it was authorized to ‘carve out’

25 ⁷ *ISP Remand Order* ¶¶ 67-76.

26 ⁸ *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).
⁹ 288 F.3d 429 (D.C. Cir. 2002).

1 from § 251(b)(5) calls made to *internet service providers* (“*ISPs*”) located within the caller’s
2 *local calling area*.”¹⁰

3 Attached as Exhibit A to Qwest’s Opening Brief is a diagram that shows the difference
4 between the issue that was addressed by the FCC and the issue presented in this case. End User
5 A dials a Phoenix number to reach a Phoenix ISP. End User B dials a Flagstaff number to reach
6 a Phoenix ISP. In the ISP Remand Order the FCC assumed and dealt with End User A and
7 assumed that toll charges would apply to End User B.

8 The FCC expressed a clear policy preference for bill and keep arrangements associated
9 with End User A. Given this context, it is not reasonable to suggest that, while struggling with
10 that issue, the FCC intended to completely reverse course and expand the opportunities for
11 economic distortion by requiring intercarrier compensation not only for local ISP calls, but also
12 for calls from remote locations as depicted in the diagram as End User B.

13 In this case, the Level 3 Interconnection Agreement defines ISP-bound traffic to have the
14 meaning “used in the [*ISP Remand Order*].”¹¹ Thus, the fact that the *ISP Remand Order* used
15 the term “ISP-bound traffic” to comprise only calls placed by a caller to an ISP in the same LCA
16 is dispositive.

17 Level 3’s Count I must be denied.

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

20 Level 3’s position that the *ISP Remand Order* applies to all ISP traffic relies primarily
21 upon a decision of a federal district court judge in Connecticut, *Southern New England*
22 *Telephone v. MCI WorldCom Communication* (“*SNET*”),¹² a case that misinterprets the *ISP*
23 *Remand Order*, and is not binding on the Commission. Level 3 also misinterprets other
24

25 ¹⁰ *Id.* at 430 (emphasis added).

26 ¹¹ ISP Amendment to Interconnection Agreement, Section 2, set forth as Exhibit D to
Qwest’s Answer.

¹² 359 F. Supp. 2d 229 (D. Conn. 2005),

1 governing authorities. Level 3 can only reach its conclusion by blatantly ignoring governing
2 language of *WorldCom*, (a case that is binding), and by ignoring complete sections of the FCC's
3 analysis in the *ISP Remand Order*. When read in its proper context, the only consistent reading
4 of the *ISP Remand Order* is that it applies only to "local" ISP traffic.¹³ Qwest's analysis is
5 directly supported by an August 16, 2005 decision of an administrative law judge ("ALJ") in
6 Oregon on the identical issue ("*Oregon ALJ Decision*"),¹⁴ by a decision rendered only a month
7 ago by the full Oregon commission ("*Oregon Pac-West Decision*")¹⁵ that confirms and
8 strengthens the analysis of the *Oregon ALJ Decision*, and by a decision rendered last Friday by
9 the Iowa Utilities Board in the Qwest/Level 3 arbitration (the "*Iowa Level 3 Order*").¹⁶

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

12 In the order before us the [FCC] held that under § 251(g) of the Act it was
13 authorized to 'carve out' from § 251(b)(5) calls made to internet service
14 providers ("ISPs") located within the caller's local calling area." 288 F.3d at
15 430 (emphasis added).

16 The *WorldCom* court's declaration that the FCC's holding applies only to local ISP
17 traffic is binding on all other courts and commissions because the *WorldCom* court is the Hobbs
18 Act reviewing court for the *ISP Remand Order*. Under the Hobbs Act, federal courts of appeal
19 have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the

20 ¹³ For purposes herein, "local" ISP traffic refers to ISP traffic that originates with the end
21 user dial-up customer and terminates with Internet equipment (e.g., modems, servers, and
22 routers) that is physically located within the same local calling area, as defined by the
23 Commission.

24 ¹⁴ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC*,
25 *Complaint for Enforcement of Interconnection Agreement*, IC 12 (OPUC ALJ Petrillo, August
26 16, 2005) ("*Oregon ALJ Decision*"). A copy is attached as Exhibit A to Qwest's Opening Brief.

27 ¹⁵ Order, *In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp., Complaint for*
28 *Enforcement of Interconnection Agreement*, Docket IC 9, Decision No. 05-1219 (Ore. Pub. Util.
29 Comm'n, November 18, 2005 ("*Oregon Pac-West Decision*"). A copy of this decision is
30 attached hereto as Exhibit A to this brief.

31 ¹⁶ Arbitration Order, *In re: Level 3 Communications, LCC, vs. Qwest Corporation*, Docket
32 No. ARB-05-4 (Iowa Util. Bd. December 16, 2005) ("*Iowa Level 3 Order*"). A copy of this
33 order is attached hereto as Exhibit B.

1 validity of (a) all final orders of the Federal Communications Commission made reviewable by
2 section 402(a) of title 47.”¹⁷ Thus, the Hobbs Act grants exclusive interpretive jurisdiction over
3 appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC
4 determination by a federal appellate court, federal district courts and state commissions are
5 obligated to apply and abide by the appellate court’s interpretation of FCC rules and orders.
6 Further, state commissions, under authority delegated by the Act, must follow decisions of
7 federal courts interpreting the Act and interpreting FCC decisions that implement the Act.¹⁸

8 Level 3 relies upon the *SNET* decision to argue erroneously that the *ISP Remand Order*
9 defines ISP-bound traffic to include calls placed to an ISPs located outside of the caller’s LCA
10 (i.e., VNXX calls). In *SNET*, the court quoted the critical language from *WorldCom* that
11 describes the holding of the *ISP Remand Order* (357 F.Supp.2d at 231), simply ignored it, and
12 then substituted its own judgment for that of the D.C. Circuit.

13 Without providing a reason, the *SNET* court dismisses the critical language from the
14 *WorldCom* decision with the unexplained conclusion that “these statements indicate that the FCC
15 *began by addressing*” whether local ISP traffic is subject to compensation. *Id.* (emphasis added).
16 Under no rational reading of the *WorldCom* language, can this conclusion be true. The
17 *WorldCom* court was *not* describing the *beginning* of the process; its language specifically
18 describes the *holding* of the *ISP Remand Order* - that is, the end of the process.

19 Under the Hobbs Act, the Court of Appeals of the D.C. Circuit was given “exclusive
20 jurisdiction” to review and interpret the *ISP Remand Order*. Thus, the *SNET* judge’s contrary
21 interpretation of the breadth of the *ISP Remand Order* violates the Hobbs Act and carries no
22

23 ¹⁷ 2 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific
exceptions to 47 U.S.C. § 402(a), none of which applies here.

24 ¹⁸ See 47 U.S.C. § 408 (Orders of the FCC “shall continue in force for the period of time
25 specified in the order or until the Commission or a court of competent jurisdiction issues a
superseding order.”); see also *Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm’n*, 827 F.2d 1264,
1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm’n*, 738 F.2d 901,
907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co.*
26 *v. Texas Pub. Util. Comm’n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

1 weight. As between the two interpretations, this Commission and the parties to this arbitration
2 docket are bound by the *WorldCom* court's interpretation of the breadth of the holding of the *ISP*
3 *Remand Order*.

4 **1. The *SNET* Decision Mischaracterizes the FCC's Decision to Use Statutorily-**
5 **Defined Terms in its Analysis and Thus not Rely on the Word "Local."**

6 Another erroneous argument advanced by Level 3 is similar to the *SNET* court's
7 misunderstanding of the FCC's decision to use statutory terms instead of the term "local" in its
8 *ISP Remand Order* analysis. The *SNET* court characterized this as the FCC's "express
9 disavow[al of] the term 'local.'" 359 F. Supp.2d at 231. Level 3 makes the same argument in its
10 brief. Again, this is a misinterpretation of the *ISP Remand Order*. In the *ISP Remand Order*, the
11 FCC was responding to the *Bell Atlantic* decision, which had criticized the FCC's use of the
12 local/long distance distinction in the *ISP Declaratory Order*. Thus, in paragraph 34, the FCC
13 stated that it would "refrain from generically describing traffic as 'local' traffic because the term
14 'local,' *not being a statutorily defined category*, is particularly susceptible to varying meanings
15 and, significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order*
16 ¶ 34 (emphasis added). But the FCC's decision to focus on statutorily defined terms is a far cry
17 from deciding to completely disavow the historical significance of the traditional differences
18 between local and long distance calling. The *SNET* court's characterization of the FCC's action
19 ignores the fact that statutorily defined terms in the 1996 Act retain the local/interexchange
20 traffic distinction. Contrary to Level 3's arguments, the federal Act does not eliminate the
21 concept of local traffic. The term "telephone exchange service,"¹⁹ a statutorily-defined term

22 ¹⁹ 47 U.S.C. § 153(47): "The term 'telephone exchange service' means (A) *service within a*
23 *telephone exchange*, or within a connected system of telephone exchanges *within the same*
24 *exchange area* operated to furnish to subscribers intercommunicating service of the character
25 *ordinarily furnished by a single exchange, and which is covered by the exchange service charge*, or
26 (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).

1 clearly refers to what is commonly called “local” service. There is nothing to suggest that the
2 FCC completely abandoned the concept of local service, nor is there anything to indicate that the
3 concept of local service is abandoned in the 1996 Act. Instead, as it clearly stated, the FCC
4 based the *ISP Remand Order* on statutorily-defined term, “information access,” as the rationale
5 for its decision to develop a separate compensation regime for calls made to ISPs “located within
6 the caller’s local calling area.”²⁰

7 It is also critical to note that in remanding, but not vacating, the *ISP Remand Order*, the
8 *WorldCom* court explicitly stated that it was not ruling on a host of issues that might have
9 bearing on the court’s decision not to vacate the order because “there is plainly a non-trivial
10 likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5)
11 and 252(d) (B)(i)).” The court stated:

12 [W]e do not decide whether handling calls to ISPs constitutes ‘telephone
13 exchange service’ or ‘exchange access’ (as those terms are defined in the Act), . .
14 . or neither, or whether those terms cover the universe to which such calls might
15 belong. Nor do we decide the scope of the “telecommunications” covered by §
16 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep
17 for ISP-bound calls pursuant to § 251(b)(5); see § 252(d) (B)(i) (referring to bill-
18 and-keep). *Indeed, these are only samples of the issues we do not decide . . .*²¹

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

25 **2. The *SNET* Decision Ignores Critical References in the *ISP Remand Order* to**
26 **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*

²⁰ 288 F.3d at 430.
²¹ *Id.* at 434 (emphasis added).

1 discloses the FCC's intent not to extend the interim compensation regime to ISP traffic to which
2 an existing compensation regime, such as access charges, already applies.²² The *SNET* judge
3 addressed this argument by stating incorrectly that the quoted language "only indicates that the
4 FCC did not want to disturb the FCC's *regulation* of access charges."²³ That is simply wrong.
5 In the *ISP Remand Order*, the FCC made it abundantly clear that it did not want to interfere with
6 intrastate access charges either. The FCC stated:

7 [W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude
8 traffic subject to parallel intrastate access regulations, because it would be
9 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.*²⁴

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

12 Congress preserved the pre-Act regulatory treatment of all access services
13 enumerated under section 251(g). These services remain subject to [FCC]
14 jurisdiction under section 201 (or, to the extent they are intrastate services, they
15 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.*²⁵

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

21 The FCC's expressed intent not to alter either interstate or intrastate access charge
22 regimes is a critical point. In so doing, the FCC recognized the difference between local traffic
23 (for which reciprocal compensation is paid) and interexchange/toll traffic (that has been subject

24
25 ²² 359 F. Supp.2d at 232.

26 ²³ *Id.* (emphasis added).

²⁴ *ISP Remand Order*, fn. 66 (emphasis added).

²⁵ *Id.* ¶ 39 (emphasis added).

1 to access charges for decades). VNXX attempts to stand these established intercarrier
2 compensation regimes on their heads. In last week's *Iowa Level 3 Order*, the Iowa board
3 concluded that VNXX (by requiring terminating compensation on interexchange traffic) results
4 in payments that are "opposite of the direction in which the payments should be made."²⁶ In
5 other words, VNXX is not only a scheme by certain CLECs to avoid paying appropriate charges,
6 it is also designed to actually reverse the flow of revenue, thus resulting in a windfall for
7 company that created the services that cause the one-way traffic to exist.²⁷

8 **3. The Commission Should Rely on Recent Authority from Oregon and Iowa.**

9 In cases similar to this docket in other states, Level 3 has cited decisions other than *SNET*
10 (an Illinois federal district court case, the *Virginia Arbitration Order*, and decisions of the
11 Washington commission) to support of its position on the breadth of the *ISP Remand Order*. As
12 discussed individually below, these decisions are either distinguishable (the Illinois case and
13 *Virginia Arbitration Order*) or rely on the flawed *SNET* analysis (the Washington commission
14 decisions). But far more important than these cases are the recent definitive decisions of the
15 Oregon commission and Iowa board that directly contradict *SNET* and the other authorities cited
16 by Level 3, and which present compelling reasons in support of Qwest's position that the interim
17 compensation regime of the *ISP Remand Order* applies only to local ISP traffic.

18 **a. The Oregon Pac-West Decision.**

19 In its opening brief, Qwest discussed two decisions from Oregon, one from an ALJ for the
20

21 ²⁶ *Iowa Level 3 Order*, fn. 16, *supra*, at 29.

22 ²⁷ From a cost-causer perspective, the Colorado commission saw through the oft-repeated
23 Level 3 claim that these calls are created by Qwest end users. In fact, they are created by end
24 users of the ISP customers of Level 3. When a customer dials the "local" ISP access number, he
25 or she is simultaneously the customer of Level 3's ISP customer. It is Level 3 and its ISP
26 customers who have created the services that have caused this traffic to be generated. The
Colorado commission, in a Level 3 arbitration, saw through Level 3's argument: "When
connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the
ISP, not as the customer of the ILEC." Order, *In the Matter of the Petition of Level 3
Communications LLC, for Arbitration Pursuant to Section 252(B) of the Telecommunications Act
of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Docket No. 00B-
601T, at 36 (Colo. PUC 2001) (emphasis added).

1 Oregon commission (the “Oregon ALJ Decision”)²⁸ and the decision of an Oregon federal
2 district court in *Qwest Corp. v. Universal*.²⁹ In mid-November, the Oregon commission added
3 another decision, (the “Oregon Pac-West Decision”),³⁰ to the authorities supporting Qwest’s
4 position in this case. The *Oregon Pac-West Decision*, however, is more definitive than the
5 *Oregon ALJ Decision* because it is a decision by the full Oregon commission. In the *Oregon*
6 *Pac-West Decision*, the CLEC (“Pac-West”) sought rehearing of an Oregon commission decision
7 that VNXX ISP traffic must be excluded from the two-way trunking relative-use provision of an
8 existing interconnection agreement; the effect of this decision was to obligate Pac-West to pay
9 for all LIS charges associated with ISP VNXX traffic. One of Pac-West’s arguments was that
10 “ISP-bound traffic, as used in the *ISP Remand Order*, includes VNXX.”³¹ The commission
11 observed that “[t]here is nothing in the *ISP Remand Order* or the judicial decisions interpreting
12 the FCC’s order to substantiate Pac-West’s assertion that the FCC’s definition of ISP-bound
13 traffic includes VNXX traffic. Indeed, there is no mention whatsoever of VNXX-type
14 arrangements in those decisions.”³² The commission also noted an inconsistency between Pac-
15 West’s argument and the FCC’s Intercarrier NPRM:

16 The *ISP Remand Order* specifically preempts States from regulating ISP-bound
17 traffic. At the same time, however, the FCC issued a *Notice of Proposed*
18 *Rulemaking* in its Intercarrier Compensation proceeding, wherein it acknowledges
19 that States may reject VNXX arrangements as a misuse of numbering resources.
20 If VNXX is included in the definition of ISP-bound traffic and therefore
21 preempted from State regulation, there is no rational reason why the FCC would
22 have made a contemporaneous statement recognizing that States may reject
23 VNXX arrangements as misuse of numbering resources. The only logical
24 conclusion is that the FCC did not contemplate that VNXX traffic would be
25 encompassed by its *ISP Remand Order*.³³

26 Finally, the commission noted that “Qwest’s tariffs define local traffic in a manner that is

28 See fn.14, *supra*.

29 *Qwest Corp. v. Universal Telecom, Inc*, 2004 WL 2958421 (D. Ore. 2004). See Qwest’s
Opening Brief at 17-19

30 See fn.15, *supra*. A copy of the *Oregon Pac-West Decision* is attached hereto as Exhibit

31 *Oregon Pac-West Decision* at 7.

32 *Id.* at 8, citing the *Oregon ALJ Decision*.

33 *Id.* (footnotes omitted).

1 explicitly tied to the physical location of the customer” and that, in an earlier order, the
2 commission had “held that a competitive provider would violate conditions in its certificate of
3 authority if it were to provide intrastate VNXX service.”³⁴

4 Thus, in addition to the comprehensive analysis of the breadth issue in the *Oregon ALJ*
5 *Order*, the Oregon commission has now independently concluded that the *ISP Remand Order*
6 applies only to local ISP traffic.

7 **b. The Iowa Level 3 Order.**

8 Last Friday (December 16, 2005), the Iowa Utilities Board entered its *Iowa Level 3*
9 *Order*³⁵ in an arbitration proceeding between Level 3 and Qwest. Level 3 made essentially the
10 same arguments that it has made in the current docket, claiming that the *ISP Remand Order*
11 applies to *all* ISP traffic, without regard to where it originates and terminates.³⁶ The Iowa board
12 soundly rejected that argument. The board defined VNXX traffic as “a situation wherein Level 3
13 obtains numbers for various locations within a state,” which are assigned to ISPs that have “no
14 presence within the local calling area (LCA) associated with each of those telephone numbers.”³⁷
15 This results in traffic being “routed to Level 3’s POI and then delivered to the ISP at a physical
16 location in a different LCA”³⁸

17 The board rejected Level 3’s argument that the *ISP Remand Order* applies to VNXX
18 traffic, noting that Level 3’s argument “ignores the fact that there are repeated references in the
19 *ISP Remand Order* clarifying that the FCC was only addressing the situation where an ISP server
20 or modem bank be located in the same LCA as the end-user customer initiating the call.”³⁹ Thus,

21 ³⁴ *Id.* at 8, 9. The Oregon commission also cited a recent Oregon federal district court
22 decision in *Qwest Corp. v. Universal Telecom, Inc.*, discussed in Qwest’s Opening Brief at p. 18.
23 In that case, the court held that reciprocal compensation is owed only on when the ISP modems
24 are located in the same local calling area as the calling party, concluding 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. (Emphasis added).

25 ³⁵ See fn.16, *supra*. A copy of the *Iowa Level 3 Order* is attached hereto as Exhibit B).

26 ³⁶ *Iowa Level 3 Order*, at 21-23.

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ *Id.* at 27.

1 the board found that

2 ISP-bound traffic does not include VNXX-routed ISP-bound traffic. The FCC
3 has consistently described ISP-bound traffic “as delivery of calls from one LEC’s
4 end-user customer to an ISP in the same local area that is served by the competing
5 LEC.” This definition was also adopted by the D.C. Circuit in both the *Bell*
6 *Atlantic* and *WorldCom* decisions. Despite Level 3’s argument that this
description of ISP-bound traffic was not meant to place a geographic limitation on
the placement of ISP servers or modem banks, the FCC has consistently held that
an ISP server or modem bank be located in the same LCA as the end user
customer initiating the call.⁴⁰

7 The board likewise rejected the argument that if VNXX calls are “locally dialed” it is
8 sufficient to bring them within the FCC’s definition of ISP-bound traffic, concluding that “this
9 argument is inconsistent with the characterization of ISP-bound traffic that has been used by the
10 FCC.”⁴¹ The board also noted that, “despite Level 3’s assertion that VNXX calls are locally
11 dialed because the end user makes a seven-digit call to access an ISP, this is not enough to bring
12 these calls within the definition used by the FCC and the D.C. Circuit.”⁴²

13 c. *AT&T v. Illinois Bell*

14 One of the cases relied on by Level 3 in other states is a federal district court case, *AT&T*
15 *Communications v. Illinois Bell*.⁴³ Level 3 has cited this case for the proposition that the *ISP*
16 *Remand Order* applies to all ISP-bound traffic, whether VNXX traffic or otherwise. This case is
17 easily distinguishable.

18 Qwest acknowledges that the term “ISP bound FX traffic” (as used in the *AT&T* opinion)
19 refers to “long-distance traffic that uses a virtual number so the party making the call is not
20 charged a toll” (which sounds very much like VNXX), and that, at least implicitly, the Illinois
21 judge appears to have concluded that ISP-bound FX is subject to the \$.0007 *ISP Remand Order*
22 rate. But the case is at best tepid authority for the Level 3 position because the judge never even
23 addressed the question of the breadth of the *ISP Remand Order*. There is no indication that the

24
25 ⁴⁰ *Id.* at 29-30.

26 ⁴¹ *Id.* at 27-28.

⁴² *Id.* at 30.

⁴³ 2005 WL 8214122 (N.D. Ill. 2005).

1 judge was even aware of the issue, let alone that he made a conscious decision on it. While the
2 judge used the generic term “ISP-bound traffic,” he never explicitly stated how broadly he was
3 construing that term nor did he examine the critical authorities on this issue. For example, the
4 judge did not cite either the *Bell Atlantic* or *WorldCom* decisions. In the *ISP Remand Order*, the
5 FCC likewise used the term “ISP-bound traffic,” but in context, and as explained by the D.C.
6 Circuit decision in *WorldCom*, the FCC’s use of the term was limited only to ISP traffic that
7 originates and terminates in the same LCA.

8 Thus, if Level 3 argues that the judge in the *AT&T* case decided this issue, its argument
9 has no basis since there is no analysis (let alone any mention) of the breadth issue in the opinion,
10 and there is thus no reasoned analysis of the issue in the opinion.⁴⁴

11 On the other hand, when the breadth issue is subjected to a reasoned examination, as it
12 was in the *Oregon Pac-West Decision*, the *Oregon ALJ Order*, and the *Iowa Level 3 Order*, it is
13 clear that the most consistent and rational reading of the governing authorities, in particular the
14 *WorldCom* decision and the *ISP Remand Order*, stand for the proposition that only local ISP
15 traffic is governed by the *ISP Remand Order*. Given that the D.C. Circuit in *WorldCom* is the
16 reviewing court of FCC decisions under the Hobbs Act, the D.C. Circuit’s conclusion that the
17 only issue decided related to ISP traffic within the same LCA is not only correct, but it is also
18 binding. (See section I.A, *supra*.)

19 d. *Virginia Arbitration Order.*

20 Level 3 has also attempted to support its position elsewhere by relying on the *Virginia*
21 *Arbitration Order*,⁴⁵ a case that is easily distinguishable on this issue. In that case, the FCC’s

22 ⁴⁴ There is also a curious internal inconsistency in the *AT&T* decision that bears on this
23 issue. At one point, the judge notes that FCC regulations “no longer restrict reciprocal
24 compensation to ‘local’ traffic. 2005 WL 820412, at *5. Yet in another section of the opinion,
25 the judge states that “[t]he Act entitles AT&T to reciprocal compensation *only for local traffic* . .
26 . . .” *Id.* at *7. While neither of these statements were rendered in the context of ISP traffic, it
demonstrates that the judge was, at best, extremely unclear on the requirements of the law on
reciprocal compensation.

⁴⁵ See *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act
for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding*

1 Wireline Competition Bureau (“Bureau”) was sitting in place of the Virginia commission. Level
2 3 has argued that the Bureau did not limit the scope of the *ISP Remand Order* only to “local” ISP
3 calls, but that it applied to all ISP calls, regardless of where the call originated and terminated. A
4 complete reading of the order, however, reveals that the issue before the Bureau was not whether
5 VNXX ISP traffic is subject to terminating compensation under the *ISP Remand Order*, but
6 whether the Bureau could determine the rates that CLECs charged for transporting Verizon’s
7 telecommunications traffic on CLEC-provided transport facilities. Although the issue before the
8 Bureau dealt principally with the issue of a CLEC’s chosen Point of Interconnection (“POI”), the
9 Bureau recognized that “Verizon raised serious concerns about the apportionment of costs
10 caused by competitive LECs’ choice of points of interconnection,” but determined that it did not
11 have authority to determine CLEC rates. In short, the proposition that Level 3 has cited that
12 order for in other states has nothing to do with the issue in dispute here. In fact, Level 3 ignores
13 the only relevant portion of the *Virginia Arbitration Order*, the FCC’s statement “that ISP-bound
14 traffic is not subject to [reciprocal compensation under] section 251(b)(5).”⁴⁶

15 e. **Summary on the Breadth of the ISP Remand Order.**

16 The decisions of the Oregon and Iowa commissions represent comprehensive and
17 detailed analyses of the breadth issue and should be followed. The *SNET* decision, and other
18 cases that Level 3 has relied on elsewhere, are based on a flawed analysis that requires the
19 presumptuous conclusion that the FCC and the D.C. Circuit were incapable of articulating the
20 proper scope of the FCC’s ISP inquiry. The only reasonable reading of the governing authorities
21

22 *Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*,
23 Memorandum Opinion and Order, 17 FCC Rcd. 27039 (Wireline Competition Bureau, 2002).
24 (“*Virginia Arbitration Order*”).

25 ⁴⁶ *Virginia Arbitration Order*, ¶¶ 245, 256. Level 3 has also relied elsewhere on recent
26 decisions of the Washington commission on the same issue. Qwest submits that the analysis of
this issue in the Oregon decisions and the recent Iowa decision represent the only consistent
interpretation of the governing authorities. The last two Washington decisions rely heavily on
the *SNET* decision, which, as Qwest demonstrates in its opening brief, is a flawed and
inconsistent analysis that is not binding on the Commission.

1 is that the *ISP Remand Order* applies only to local ISP traffic.

2 **B. Level 3's Argument that its VNXX Traffic is Not Enumerated Under Section 251(g)**
3 **Does Not Help Substantiate its Position.**

4 At various places throughout its opening brief,⁴⁷ Level 3 argues that ISP traffic does not
5 fall within section 251(g). It is true that *WorldCom* rejected the FCC's reliance on section
6 251(g), at least insofar as the FCC relied on the "information access" language of section 251(g);
7 but as discussed above and in Qwest's opening brief, the *WorldCom* court made it clear that
8 various other theories could justify the compensation regime of the *ISP Remand Order*, including
9 whether ISP calls are fall under other language in section 251(g)—that is the reason the
10 *WorldCom* court remanded, but did not vacate, the *ISP Remand Order* or any of the FCC's rules.
11 Level 3's reliance on the *WorldCom* court's rejection of the underlying rationale of the *ISP*
12 *Remand Order* is an issue that Qwest does not challenge, but it is irrelevant to the breadth of the
13 *ISP Remand Order*. What Level 3 apparently does not understand is that Qwest's position that
14 the *ISP Remand Order* applies only to local ISP traffic is not premised on section 251(g); rather,
15 it is based on two simple facts: (1) the *ISP Remand Order* (by its terms) addressed only local
16 ISP traffic, and (2) the *WorldCom* court agreed that local ISP traffic was the only traffic subject
17 to the order (and then expressly refused to vacate the *ISP Remand Order* or the rules adopted
18 pursuant to it.). Hard as it may be for Level 3 to accept, the *ISP Remand Order* did not address
19 all ISP traffic and the order remains in effect (including its decision to subject only local ISP
20 traffic to its interim compensation regime).

21 **C. Qwest's Position is Not Based on the End-to-End Analysis.**

22 Level 3 claims that Qwest bases its position that ISP traffic is not subject to reciprocal
23 compensation on the end-to-end analysis rejected by the D. C. Circuit in *Bell Atlantic Cos. v.*
24 *FCC*, 206 F.3d 1 (D. C. Cir. 2000). Level 3 Brief at 10-11. This is a classic "straw man"
25 argument. Qwest does not base its position on the end-to-end analysis.

26 ⁴⁷ See Level 3 Opening Brief at 8, 10.

1 Rather, Qwest's position is based on the fundamental propositions that are addressed in
2 Qwest's opening brief and elsewhere in this brief. The *ISP Remand Order* applies only to local
3 ISP traffic (i.e., traffic that originates with a Qwest customer and terminates at ISP modems
4 located within the same LCA). Therefore, the interim regime for ISP traffic, whereby terminating
5 traffic is subject to compensation at \$.0007 per minute of use, dictates the compensation only for
6 local ISP traffic. The FCC in the *ISP Remand Order* expressly refused to change existing federal
7 and state access charge mechanisms. These positions do not depend on the end-to-end analysis
8 and Qwest has not relied upon that analysis as the basis for its positions in this docket.

9 **D. The Interconnection Agreement Does Not Address VNXX Traffic Bound for the**
10 **Internet.**

11 Level 3 argues that the interconnection agreement does not distinguish between local and
12 toll ISP Bound traffic.⁴⁸ The ISP Amendment that Level 3 and Qwest executed and that Level 3
13 refers to in its Petition provides that "ISP-bound traffic" is "as that term is used in the FCC ISP
14 Order" (ISP Amendment, § 2.). Thus, Level 3's argument fails for the same reason that its
15 arguments regarding the breadth of the *ISP Remand Order* fails. The term ISP-bound cannot be
16 split into local and toll pieces because the term ISP-bound included only local ISP traffic from
17 the beginning. At page 13 of its Opening Brief, Level 3 refers to the ratio test that permits Qwest
18 to presume that traffic above a certain ratio is ISP-bound. Again, however, that "mechanism"
19 does not purport to, and cannot, magically transform the VNXX traffic into local traffic. That
20 VNXX traffic is properly excluded from the ratio calculation. The *ISP Remand Order* did not
21 intentionally or accidentally include traffic destined for an ISP server physically located in a
22 different LCA than the originating caller as part of the "ISP-bound traffic" addressed in the
23 Order. Thus, VNXX traffic is not "ISP-bound" as discussed or defined in the ISP Amendment.

24 Level 3 argues, wrongly, that by addressing the VNXX exclusion at it did when Qwest

25 ⁴⁸ Relevant sections of the Interconnection Agreement are attached to Qwest's Answer,
26 Exhibits A, D and E. A copy of the ISP Amendment is attached to Qwest's Answer as Exhibit
D.

1 proffered language for an amendment addressing the *Core Forbearance Order*, Qwest tacitly
2 admitted that the ICA does not include such exclusion. Such an argument is trivial nonsense,
3 because at the time Qwest proposed its language to reflect the *Core Forbearance Order*, Level
4 3's practice of disguising toll calls to look like local calls had at last become well-known. As
5 any business prudently would do, Qwest's proposed language was crafted to put the other party
6 to the contract on notice, in a way that could not be overlooked or misconstrued, that Level 3 was
7 acting improperly. In any event, the fact that Qwest took precaution to eliminate further dispute
8 does not bear in any way on what the *ISP Remand Order* covers.

9 Further, Level 3's arguments about the "plain meaning" of the interconnection agreement
10 overlooks and contradicts the definitions in the interconnection agreement. Level 3's
11 interconnection agreement contains a definition of "Exchange Service" identical to the arbitrated
12 AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows:
13 "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is
14 originated and terminated within the same LCA which has been defined by the Commission and
15 document in applicable tariffs." The definition in Level 3's agreement (§ 4.22) is identical, and
16 the result in this proceeding should be the same result the Commission reached in the *AT&T*
17 *Arbitration Order*. Consequently, only traffic that is originated and terminated within the same
18 LCA shall be carried over LIS trunks. Level 3's VNXX traffic does not meet the definition of
19 local traffic and should not be terminated as local interconnection service.⁴⁹

20 Level 3 would have the Commission believe that the parties to the ICA voluntarily agreed
21 to a scheme in which Level 3 provides a service (VNXX), whereby a Qwest subscriber in one
22 LCA reaches Level 3's subscriber in a different LCA, and the call is treated as a local call. As
23

24 ⁴⁹ See Interconnection Agreement, Section 7.2.2.1.1, attached to Qwest's Opening Brief,
25 Exhibit A: "Exchange Service (EAS/Local) traffic will be terminated as Local Interconnection
26 Service (LIS)." In turn, the definition of "Local Interconnection Service (LIS) provided in
Section 4.33 of the Interconnection Agreement re-affirms, "Exchange Service (EAS/Local) calls
begin and end within a Local Calling Area or Extended Area Service (EAS) area which has been
defined by the Commission."

1 discussed at length in Qwest's opening brief (at pages 19-27), the Commission's long-standing
2 rules provide well-established concepts of LCAs, and Level 3's VNXX scheme is in flagrant
3 disregard of those rules. Qwest, for its part, wishes to advise the Commission that it did not
4 collaborate with Level 3 for Level 3 to violate those rules. Nor does Qwest believe that the
5 Commission, when it approved the ISP Amendment to the ICA, sanctioned Level 3 to depart
6 from the Commission's rules in favor of an unlimited LCA.⁵⁰ In fact, this Commission earlier
7 held, in considering VNXX in the AT&T Arbitration, that "it would [not] be good public policy
8 to alter long-standing rules or practice without broader industry participation."⁵¹ Having earlier
9 expressly considered the appropriateness and legality of VNXX, and concluding that it was
10 unwise to alter "long-standing rules," it is inconceivable that the Commission intended to bless
11 the VNXX practice through the approval of a single ISP Amendment, which became effective
12 without a hearing.

13 In any event, Level 3's claim about what the *ISP Remand Order* means when it comes to
14 VNXX, and by extension what the parties agreed to in the ICA, is erroneous. The ICA clearly
15 did not and could not legally sanction VNXX, and there is no ambiguity in the ICA.

16 **E. The Arizona AT&T Arbitration Order is Precisely On Point and Establishes the**
17 **Commission's Policy With Regard to All Types of VNXX Traffic**

18 Level 3 incorrectly argues that the Commission's *AT&T Arbitration Order*, in which the
19 Commission ruled that the definition of local exchange service is traffic that originates and
20 terminates within the same Commission-determined LCA and rejected AT&T's request for a
21

22 ⁵⁰ As the Commission is aware, all interconnection agreements entered into between Qwest
23 and CLECs relating to obligations under Section 251 (b) and (c) of the Act must be filed for
24 approval by the Commission under Section 252. The Commission shall reject any such
25 agreement or amendment for "lack of consistency with the public interest, convenience, and
26 necessity, or lack of consistency with applicable estate laws and requirements." See A.A.C.
R14-2-1508(1).

⁵¹ Opinion and Order, *In the Matter of the Petition of AT&T Communications of the
Mountain States, Inc. and TCG Phoenix, for Arbitration with Qwest Corporation, Inc. Pursuant
to 47 U.S.C. Section 252(b)*, Docket Nos. T-02428A-03-0553 and T-01051B-03-0553 (Ariz.
Corp. Comm'n, April 6, 2004), at 13 ("*AT&T Arbitration Order*").

1 definition based on the calling and called NPA/NXXs (i.e., VNXX), is not controlling with
2 respect to the issues in this proceeding. Level 3 does not properly understand the scope of the
3 *AT&T Arbitration Order*.

4 In the *AT&T Arbitration Order*, the Commission determined that “it would [not] be good
5 public policy to alter long-standing rules or practice without broader industry and public
6 participation,” and thus refused to adopt the definition of “local exchange service” urged by
7 AT&T, which would have accommodated AT&T’s VNXX.⁵² Level 3 states that in the AT&T
8 arbitration the parties sought clarification regarding the definition of “Exchange Service,” but did
9 not seek to arbitrate an ICA provision that addressed intercarrier compensation for VNXX
10 services.⁵³ A simple reading of the Commission’s demonstrates that this is plainly wrong. The
11 Commission was not engaging in an academic exercise. The effect of VNXX services on
12 intercarrier compensation was the essential reason for the dispute, as the Commission expressly
13 recognized. In addressing the VNXX issue, which turned on the definition of “Exchange
14 Service,” the Commission said: “The definition [Exchange Service] is important for determining
15 whether a call will be routed and rated as a local call, *and subject to reciprocal compensation, or*
16 *as a toll call subject to access charges.*”⁵⁴ In other words, the definition issue was important
17 because it would have defined the intercarrier compensation regime under which certain traffic
18 would fall.

19 Level 3’s statement that the parties were not arbitrating the appropriate intercarrier
20 compensation rate for VNXX and VNXX delivered ISP traffic is disingenuous if the intent is to
21 leave the impression that the issue of VNXX-delivered ISP traffic was not contemplated in the
22 *AT&T Arbitration Order*. AT&T advanced the argument that under the *ISP Remand Order*, the
23 FCC has established a separate compensation scheme for ISP-bound traffic as one of the reasons
24 why the Commission should not allow Qwest to require payment of access charges for such

25 ⁵² *AT&T Arbitration Order*, at 13.

26 ⁵³ *Id.* at 15.

⁵⁴ *Id.* at 7 (emphasis added).

1 traffic.⁵⁵ It is clear that AT&T raised the *ISP Remand Order*. By ruling in favor of Qwest's
2 definition of Exchange Service, and thus against VNXX, the Commission implicitly decided that
3 the *ISP Remand Order* is beside the point. VNXX delivered ISP traffic is not a local call, and
4 should be treated as toll traffic.

5 **F. Neither Qwest's FX Service Nor OCC's Wholesale Dial Service are VNXX.**

6 In its opening brief, Level 3 equates VNXX with Qwest's foreign exchange ("FX")
7 service.⁵⁶ In fact, FX service, which represents less than one tenth of one percent of all Qwest
8 lines in Arizona, is significantly different from VNXX. Level 3's VNXX product uses the PSTN
9 to route and terminate calls to end users connected to the PSTN in another LCA. In all respects,
10 except the number assignment, the call is routed and terminated as any other interexchange call.
11 Qwest's FX product, on the other hand, delivers the FX calls within the LCA with which the
12 number is geographically associated. In other words, a Qwest FX customer actually purchases a
13 local service connection in the LCA associated with the telephone number in the same manner
14 and at the same rate as all other local exchange customers. With FX, the calls are then
15 transported on what is, in effect, the end user's private network (private line) to another location.
16 The FX customer bears full financial responsibility for transporting the call at private line rates
17 to the location where it is actually answered by buying both parts of the FX service (the local
18 service and the private line service) at the appropriate rates for those services. Level 3, by
19 contrast wants no financial responsibility to provide the transport to the distant location. The
20 issue of financial responsibility for transport is at the heart of the most significant difference
21 between VNXX and FX. In calling its product "FX-like," Level 3 attempts to confuse this
22 critical distinction. Level 3 is simply using the assigned telephone numbers to disguise calls that
23 would otherwise be toll calls.⁵⁷ The adoption of Level 3's language would bring chaos to a

24 ⁵⁵ *Id.* at 12.

25 ⁵⁶ Level 3's Opening Brief, at 16.

26 ⁵⁷ This feature of VNXX was recognized by the Oregon federal court in the *Qwest v. Universal* decision, where the court described Universal's VNXX arrangement as allowing "the person making the call [to] be billed at the local rate for a call that was really long distance."

1 numbering system that has worked well for decades.

2 The differences between FX and VNXX has been the subject of litigation in other states.
3 For example, two Iowa board cases have addressed the issue; in both, the board held that VNXX
4 and FX are not the same. In a 2003 decision to which Level 3 was a party, the board firmly
5 rejected the CLECs' claim that that VNXX and FX are the same: "Sprint and Level 3 are
6 proposing to provide a service that is generically described as virtual NXX service (VNXX),
7 *which is not the same as FX or DID, and does not compensate the LECs for the use of their*
8 *networks.*"⁵⁸ More recently, in an arbitration between Qwest and AT&T, the board, hearkening
9 back to the earlier decision noted that the Board had "determined . . . that virtual NXX (VNXX)
10 calls (which appear to be included in the 'FX-like' calls at issue here) *are not local services but*
11 *interexchange in nature.*"⁵⁹

12 In another case, the Massachusetts commission, after evaluating the CLEC's argument
13 that VNXX and FX are indistinguishable, found the argument "unpersuasive. Verizon's FX
14 service uses dedicated facilities to transport FX traffic to the FX customer's location, and *the FX*
15 *customer pays Verizon for the cost of transporting that traffic.*"⁶⁰

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

18 Level 3 also infers that Wholesale Dial service, a product that QCC, an unregulated
19 affiliate of Qwest, offers to ISPs, is like VNXX. In this case, there is not even a superficial
20 resemblance. QCC offers Wholesale Dial by purchasing tariffed or catalog services (specifically
21

22 2004 WL 2958421, at * 9 (emphasis added).

23 ⁵⁸ Final Decision and Order, *In re Sprint Communications Company, L.P., and Level 3*
24 *Communications, LLC*, Dkt. Nos. SPU-02-11 and SPU-02-13, at 7 (Ia Util. Bd, June 6, 2003)
(emphasis added).

25 ⁵⁹ Arbitration Order, *In Re Arbitration of Qwest Corporation and AT&T Communications of*
26 *the Midwest, Inc. and TCG Omaha*, Docket No. ARB-04-01, at 7 (Ia. Util. Bd., June 17, 2004).

⁶⁰ Order, *Petition of Global NAPS, Inc. . . . For Arbitration to Establish an Interconnection*
Agreement with Verizon New England, D.T.E. 02-45, 2002 Mass PUC LEXIS 65, at 52 (Mass.
Dep't Telecom & Energy, December 12, 2002) (emphasis added).

1 Primary Rate ISDN service or "PRI") from Qwest (the ILEC) and then packaging these services
2 for ISPs. This means that Wholesale Dial customers pay private line transport rates to transport
3 calls from the LCA where the dial tone is provided to the location of the ISP. Thus, the calls are
4 handed off from the end user to QCC within the LCA where the local service is purchased. QCC
5 is simply aggregating traffic on bundled tariffed services and providing a service as a bundled
6 product to ISPs. QCC bears full financial responsibility (at tariffed rates) to transport traffic
7 from one LCA to another LCA where an ISP is located. QCC properly operates as an enhanced
8 services provider ("ESP") and not as a CLEC. Qwest does not offer free transport and does not
9 pay QCC at \$.0007 per minute of use for the calls it terminates.

10 **II. COUNT II. OF LEVEL 3'S COMPLAINT SHOULD BE DENIED**

11 In Count II of the Complaint, Level 3 alleges that Qwest has failed to negotiate in good
12 faith regarding changes in law brought about by the *ISP Remand Order* and the *Core*
13 *Forbearance Order*, and seeks an order from the Commission for the immediate approval of
14 Level 3's proposed amendment, with retroactive effectiveness.

15 The attachments to the Complaint, Qwest's Answer, and the testimony in this matter
16 document that the parties engaged in an exchange of proposals to amend the ICA to reflect the
17 *Core Forbearance Order*. It is clear that the issue about which the parties could not agree is
18 whether Qwest must pay compensation on VNXX traffic destined for Level 3's ISP customers.
19 Qwest participated in those negotiations in good faith and proposed amended language consistent
20 with the *Core Forbearance Order*. Furthermore, the ICA sets forth a specific process for
21 addressing changes in applicable law, and if negotiations are unsuccessful, the parties are to
22 bring the dispute to this Commission for resolution of appropriate amendment language.⁶¹

23 The interconnection agreement between Qwest and Level 3 contains no automatic
24 adjustment for rates resulting from actions of the FCC or other authoritative bodies. Instead, as
25 both parties agree, the Interconnection Agreement specifies as follows:

26 ⁶¹ Interconnection Agreement, Section 2.2.

1 To the extent that the Existing Rules are changed, vacated, dismissed, stayed or
2 modified, then this Agreement and all contracts adopting all or part of this
3 agreement shall be amended to reflect such modification or change of the Existing
4 Rules. Where the Parties fail to agree upon such an amendment within sixty (60)
5 days from the effective date of the modification or change of the Existing Rules, it
6 shall be resolved in accordance with the Dispute Resolution provision of this
7 Agreement.⁶²

8 Given that the *Core Forbearance Order* became effective in October, 2004,⁶³ Level 3
9 could have immediately requested negotiations with Qwest, exercised its rights for dispute
10 resolution, and invoked the options contained in the Interconnection Agreement as early as mid-
11 December, 2004. Instead, it filed a complaint on June 10, 2005, some eight months after the
12 effective date of the *Core Forbearance Order*. Among the options available to Level 3, which it
13 has foregone, would have been to ask the Commission to arbitrate the dispute. Now, Level 3
14 seeks immediate, prospective, and retroactive relief, based on a legal theory that is deeply
15 flawed, as demonstrated by the foregoing arguments. The Commission should deny Count II of
16 Level 3's Complaint.

17 III. CONCLUSION

18 For the reasons stated herein, the Commission should deny Level 3's complaint and issue
19 an order prohibiting Level 3 from assigning NPA/NXXs in LCAs other than the LCA where
20 Level 3's customer has a physical presence, and requiring that Level 3 properly assign telephone
21 numbers based on the location where its customer has a physical presence. The Commission
22 should issue an order prohibiting Level 3 from utilizing LIS facilities to route VNXX traffic.
23 The Commission should find that the parties' ICA does not require any compensation for Level
24 3's VNXX traffic, and invalidate all Level 3 bills to Qwest seeking or charging reciprocal
25

26 ⁶² Level 3/Qwest Interconnection Agreement, Section 2.2.
⁶³ *Core Forbearance Order* ¶ 16.

1 compensation or the *ISP Remand Order* rate of \$0.007 per minute for any of the VNXX traffic
2 described above.

3 RESPECTFULLY SUBMITTED this 21st day of December, 2005.

4
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11 -and-

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EXHIBIT A

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

IC 9

| | | |
|------------------------------|---|-------|
| In the Matter of |) | |
| |) | |
| PAC-WEST TELECOMM, INC., vs. |) | ORDER |
| QWEST CORPORATION |) | |
| |) | |
| 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 §1.709(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.

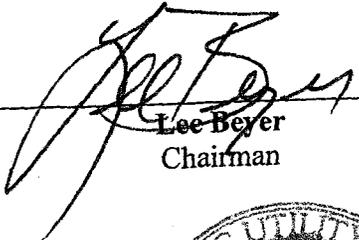
8. When applicant [Pac-West] is assigned one or more NXX codes, [Pac-West] shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.

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.

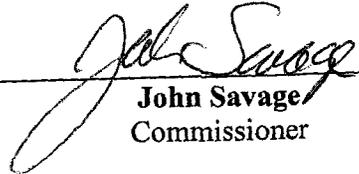
ORDER

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.

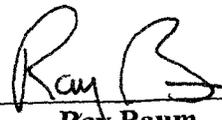


Lee Beyer
Chairman



John Savage
Commissioner





Ray Baum
Commissioner

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

EXHIBIT B

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

| | |
|--|--|
| <p>IN RE:</p> <p>LEVEL 3 COMMUNICATIONS, LCC,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="text-align:center">vs.</p> <p>QWEST CORPORATION,</p> <p style="padding-left: 40px;">Respondent.</p> | <p style="text-align:center">DOCKET NO. ARB-05-4</p> |
|--|--|

ARBITRATION ORDER

(Issued December 16, 2005)

BACKGROUND

Level 3 Communications, LLC (Level 3), asserts that it is in the process of enabling the next generation of Internet Provider (IP) enabled services, including Voice-over Internet Protocol (VoIP), nationwide. As such, Level 3 is attempting to establish a new interconnection agreement with Qwest Corporation (Qwest) for the provision of these new services in Iowa. Generally, Level 3 asserts that Qwest is attempting to use existing regulation to protect itself from intermodal competitors such as Level 3 and preserve its revenues and market share while Qwest claims that Level 3's goal is to maximize revenue recovery from Qwest (rather than from Level 3's customers) by attempting to obtain the use of Qwest's statewide network for free

for both Internet service provider (ISP) and VoIP traffic. Qwest and Level 3 are currently arbitrating similar issues in several other states, as well.

In its petition for arbitration, Level 3 set forth five unresolved "Tier One" issues that relate to the rates, terms, and conditions that will govern how Level 3 and Qwest interconnect their networks and compensate each other for the exchange of various types of traffic. The Tier One issues, according to Level 3, are the most fundamental interconnection issues. Level 3 also presented 17 "Tier Two" issues. Level 3 states that these Tier Two issues are derivative of fundamental points of business, law, and policy presented by the Tier One issues and the outcome of the five Tier One issues dictate the outcome of the Tier Two issues.

Following the hearing in this docket, the five Tier One issues have been narrowed to three primary issues: (1) interconnection architecture and cost responsibility related thereto; (2) Virtual NXX (VNXX) arrangements; and (3) intercarrier compensation for ISP-bound and VoIP traffic. This order will determine these three primary issues. Since the outcome of the 17 Tier Two issues remain dependent on the Board's decision in these three primary issues, the Board will not discuss the Tier Two issues individually. The parties should be able to determine the outcome of the Tier Two issues based on the Board's determinations in this order.

PROCEDURAL HISTORY

On June 3, 2005, Level 3 filed with the Utilities Board (Board) a petition for arbitration of unresolved terms in an interconnection agreement between Level 3 and Qwest. The petition was filed pursuant to the provisions of Board rules 199 IAC 38.4(3) and 38.7(3) and § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (1996) (hereinafter referred to as the "Act"). The petition has been identified as Docket No. ARB-05-4.

According to the petition, Level 3 requested negotiations with Qwest on December 25, 2004, to produce an agreement for interconnection services and network elements. Pursuant to 47 U.S.C. § 252(b)(1), either the incumbent local exchange carrier (ILEC) or the requesting carrier may petition a state commission to arbitrate any open issues by filing a request during the time period of 135 to 160 days after the date on which the request for negotiations was received. It is undisputed that the final date to petition for arbitration was June 3, 2005.

On June 13, 2005, the Board issued an order docketing the petition for arbitration and scheduled a pre-hearing conference. Qwest filed its response to the arbitration on June 17, 2005, pursuant to the deadline for responses established in the Board's June 13 order. Qwest supplemented its response on June 28, 2005.

On June 21, 2005, Level 3 and Qwest jointly filed a waiver of the provisions of 47 U.S.C. § 252(b)(4)(C) and a joint proposed procedural schedule. The proposed

procedural schedule extended beyond the time period within which a decision would normally need to be made pursuant to 47 U.S.C. § 252(b)(4)(C). As such, the parties jointly waived their rights to have the Board rule on the petition for arbitration within the time frame established by the federal statute. On June 30, 2005, the Board issued an order accepting the joint waiver and establishing a procedural schedule.

A hearing was held on August 30, 2005, for the purpose of receiving testimony and cross-examination of all witnesses. Both parties submitted initial briefs on September 20, 2005.

On September 29, 2005, Level 3 and Qwest filed a joint request to modify the procedural schedule, stating that they had been negotiating in good faith in an effort to reach a settlement on the terms and conditions of an interconnection agreement. Their request was granted by Board order issued September 30, 2005.

On October 14, 2005, Level 3 and Qwest filed another joint request to modify the amended procedural schedule, stating that they were still negotiating. Their request was granted by Board order issued October 18, 2005.

Reply briefs were filed by both parties on November 7, 2005, pursuant to the amended procedural schedule. A decision must be issued in this docket on or before December 16, 2005.

STANDARD FOR ARBITRATION AND REVIEW

This arbitration was conducted pursuant to 47 U.S.C. § 252, which states in part:

(c) Standards for arbitration. In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c).

Additionally, 47 U.S.C. § 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted to the state commission for approval. Section 252(e)(2)(B) provides that a state commission may reject any portion of an interconnection agreement adopted by arbitration "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

ISSUE 1: INTERCONNECTION ARCHITECTURE AND RELATED COST RESPONSIBILITY

Level 3 seeks to interconnect with Qwest using a single point of interconnection (POI) per LATA at a location physically located on Qwest's network. Level 3 states that under this arrangement, Qwest will not have to build facilities to haul traffic to or receive traffic from Level 3. Level 3 suggests that this POI will be a "meet point" with each party responsible for costs and operations on its side of the POI.

Level 3 also states that the physical transmission medium for interconnection will be a high-capacity fiber optic facility and that Level 3 will work with Qwest to efficiently divide traffic into direct end office trunks (DEOTs). Level 3 states that DEOTs are software-based routing arrangements that allow traffic to or from particular Qwest end office switches to flow directly to and from Level 3 without using Qwest's tandem switch. Level 3 asserts that the use of DEOTs is the most technically efficient means of linking the two networks.

Qwest opposes Level 3's proposed language regarding these arrangements. Qwest states that this issue is not about a single POI, but rather is about Level 3's compensation to Qwest for the use of Qwest's network. Qwest states that it provides several technically feasible points of interconnection on its network and that each party must be able to retain responsibility for the management, control, and performance of its own network. In addition, Qwest seeks to split the traffic sent by Level 3 to Qwest into separate trunk groups based on regulatory classifications.

The Board's discussion on this issue will be divided into three parts. First, the Board will discuss the issue of a single POI per LATA. Second, the Board will discuss compensation for that interconnection. Third, the Board will discuss the commingling of various types of traffic over a single set of trunks.

A. SINGLE POINT OF INTERCONNECTION PER LATA

Level 3 Position

Level 3 states that the Act and rules promulgated by the Federal Communications Commission (FCC) require an incumbent local exchange carrier (ILEC) such as Qwest to permit interconnection at "any technically feasible point" on the ILEC's network. 47 U.S.C. § 251(c)(2). Level 3 cites several FCC rulings in support of the position that a CLEC has the option to interconnect at a single POI per LATA.¹ Level 3 also states that the single POI would be a "meet point," meaning that each party is responsible for the operation of, and costs associated with, the facilities and equipment on its side of the POI. Level 3 claims that a meet point interconnection arrangement is permitted under FCC rules and is one of the technically feasible methods of interconnection.²

¹ See *In Re: Texas SBC 271 Proceeding*, CC Docket No. 00-65, ¶78 (Rel. June 30, 2000) (holding that a CLEC has the option to interconnect at only one technically feasible point in each LATA); *In Re: In the Matter of Developing a Unified Intercarrier Compensation Regime*, "Notice of Proposed Rulemaking," CC Docket No. 01-92, ¶ 112 (Rel. April 27, 2001) (holding that an ILEC must allow a requesting carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA); and "FCC Memorandum Opinion and Order," CC Docket Nos. 00-218, 00-249, 00-251, at ¶ 52 (Rel. July 17, 2002) (holding that CLECs may request interconnection at any technically feasible point including a single POI per LATA).

² 47 C.F.R. § 51.321(b).

Level 3 states that the language Qwest proposes in this regard implies that Level 3 may be required to establish multiple POIs within a LATA or that Qwest retains the right to claim that more than one POI is needed in some circumstances. Level 3 is concerned that Qwest's language may result in a refusal by Qwest to interconnect or may result in additional charges to Level 3.

Qwest Position

Qwest's position on this issue is that it is not about whether Level 3 is entitled to interconnection at a single POI within the LATA. Rather, Qwest states that this issue is really about compensation for the use of Qwest's network. Qwest does not dispute that it has a duty to provide CLECs with interconnection to its local exchange network in accordance with Section 252 of the Act. Qwest states, however, that there are three types of interconnection and that its proposed language anticipates all three: 1) when a CLEC builds facilities to a Qwest central office where it has collocation; 2) when the CLEC purchases entrance facilities from a Qwest central office to the CLEC's nearest premise; and 3) when both parties build to a meet point. Qwest states that each of these three options has its own compensation and that its proposed language includes the compensation rules for each of these three scenarios.

Analysis

Qwest and Level 3 agree that the Act allows Level 3 to interconnect with Qwest's network at a single POI per LATA at any technically feasible point. Level 3's

concern is that the alleged ambiguity of Qwest's proposed language may give Qwest the right to claim that more than one POI is needed in some circumstances. The Board finds that while Qwest's language may not be as explicit as Level 3 would prefer, the language does not preclude Level 3 from establishing a single POI per LATA and both parties agree that Level 3 has that right. Qwest's language, however, does provide additional flexibility to the parties should a situation arise where more than one POI is appropriate. The Board will approve Qwest's proposed language regarding a single POI.

B. COMPENSATION FOR THE INTERCONNECTION

Level 3 Position

Level 3 states that its proposed language identifies the single POI as a "meet point" and under a meet point arrangement, each party is responsible for the operation of, and costs associated with, the facilities and equipment on its side of the POI. According to Level 3, under this kind of arrangement, each party pays the other for terminating traffic, but neither party can export its traffic origination costs to the other; each party's end users are responsible for paying the cost of the traffic they originate.

Level 3 asserts that its proposed language plainly states that it will pay "intercarrier compensation in accordance with Applicable Law," which includes both reciprocal compensation and access charges. However, Level 3's proposed language also makes clear with respect to originating access charges for toll calls

where Level 3 is the interexchange carrier (IXC), that Level 3 will not pay Qwest when Level 3 carries calls originated by Qwest's customers. Level 3 states that paying for Qwest's facilities to reach the single POI would also be considered paying for traffic originated by Qwest's customers.

In support of its position in this regard, Level 3 cites federal regulations, which define a meet point as being "a point of interconnection between two networks ... at which one carrier's responsibility for service begins and the other carrier's responsibility ends." 47 C.F.R. § 51.5. In addition, Level 3 states that the FCC has specifically prohibited a LEC from charging an interconnected carrier for the privilege of receiving traffic that the LEC originates. Level 3 cites to 47 C.F.R. § 703(b), which states that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." With respect to any shared facilities, Level 3 states that federal regulations provide that the interconnecting carrier, Level 3, can only be charged for such shared facilities based on the proportion of its capacity that Level 3 actually uses. 47 C.F.R. § 51.709(b).

Qwest Position

Qwest states that § 252(d)(1) of the Act provides that determinations by a state commission of the just and reasonable rate for interconnection shall be "based on the cost ... of providing the interconnection" and "may include a reasonable profit." Qwest states that the FCC has recognized that CLECs must compensate ILECs for

the costs that ILECs incur to provide interconnection,³ which is true even when the costs are incurred on Qwest's side of the POI.

Qwest also states that Level 3 erroneously relies on rule 51.703(b) in support of its position. Qwest states that this rule is not applicable in this matter because the term "telecommunications traffic" as used in the rule has been defined by the FCC to exclude "information access traffic." 47 C.F.R. § 51.701(b)(1). Qwest also states that ISP-bound traffic, which is the kind of traffic that Level 3 intends to transport, is considered by the FCC to be "information access traffic."

Qwest states that whether Level 3 will incur expense on Qwest's side of the POI will depend on the form of interconnection that Level 3 chooses. Qwest states that if Level 3 chooses a mid-span meet point as its form of interconnection, each party is responsible for its portion of the facilities built to reach the POI. Qwest also states, however, that in the event Level 3 requires an entrance facility to bring its traffic from the POI to the Qwest switch, Level 3 will be required to pay for its use of that facility.

Analysis

The record demonstrates that both parties agree that each party is responsible for costs on its side of the meet point if a mid-span meet point is used. Level 3 appears to apply the meet point analysis to all types of interconnection. The Board agrees with Qwest's analysis that different types of interconnection require different

³ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, "First Report and Order," 11 FCC Rcd 15499 (1996) (*Local Competition Order*).

compensation schemes and that § 251(c)(2)(b) of the Act requires Level 3 to compensate Qwest for certain interconnection costs. The Board will approve Qwest's proposed language regarding compensation for interconnection.

C. TRAFFIC ORIGINATION CHARGES – RELATIVE USE FACTOR

Level 3 Position

Level 3 states that no relative use factor (RUF) charges should ever apply between Qwest and Level 3 because Level 3 will be establishing direct physical connections to Qwest at the POI and, as a result, there are no shared facilities to which any RUF should apply. Level 3 argues that Qwest's proposed language appears to apply the RUF to facilities that are entirely within Qwest's network and that such a proposal is inappropriate.

Level 3 also states that Qwest's proposed calculations using RUF violate the FCC's rules. Level 3 states that the governing FCC rule, 47 C.F.R. § 51.709(b), states that Qwest shall recover only the proportionate cost of trunk capacity it supplies and Level 3 uses to send traffic that will terminate on Qwest's network. Level 3 asserts that this rule does not give Qwest the right to charge Level 3 for capacity between the two networks in the abstract. Level 3 argues that this rule provides that Level 3 can only be charged for the proportionate amount of capacity it sends to Qwest and that it does not matter the kind of traffic that Level 3 sends to Qwest, merely that Level 3 has to pay Qwest for what it uses.

Qwest Position

Qwest states that any expense incurred by Level 3 due to the construction of facilities on Qwest's side of the POI depends on the form of interconnection that Level 3 chooses. Qwest concedes that a mid-span meet point will not utilize a RUF, but that the choice of an entrance facility will require Level 3 to pay for its use. Qwest also states that Level 3 may require direct trunked transport facilities, depending on whether interconnection facilities are extended directly to end offices, and the allocation of the cost of these facilities would be subject to the RUF. Qwest asserts that Level 3 has not satisfactorily addressed why it proposes to eliminate all references to the RUF from the agreement when such language has been approved in multiple Iowa interconnection agreements and has been approved by the FCC, particularly given that Level 3 testified that a RUF should be used to allocate the cost of jointly used facilities, entrance facilities, and direct trunked transport. (Tr. 33-34).

Qwest states that ISP-bound traffic should not be included in the RUF. Qwest states that the Board ruled on this issue in the *AT&T Arbitration Order*,⁴ holding that Internet-related traffic should be excluded from the relative use of entrance facilities. Qwest states that the Board concluded that including traffic destined for the CLEC's ISP customers in the RUF calculation creates uneconomic incentives and is contrary to public policy and § 252(d)(1). Qwest further asserts that state commissions in

⁴ *In Re: Arbitration of Qwest Corporation and AT&T Communications of the Midwest, Inc., and TCG Omaha*, Docket No. ARB-04-1 (issued June 17, 2004) (*AT&T Arbitration Order*).

Colorado, Arizona, Utah, and Oregon have also determined that ISP traffic should be excluded from the RUF calculation.

Analysis

The parties agree that RUF does not apply to an interconnection situation that involves a mid-span meet point. Furthermore, they appear to agree that RUF can be used to allocate the cost of jointly used facilities, entrance facilities, and direct trunked transport. Qwest argues that Level 3 may require interconnection at entrance facilities and, if so, a RUF is also applicable to this type of interconnection. Finally, Qwest states that if a RUF is used, then ISP traffic should be excluded from the calculations.

The Board finds that the inclusion of a RUF to handle the allocation of jointly used facilities, entrance facilities, and direct trunked transport, if Level 3 opts for a form of interconnection requiring these features, is reasonable. The inclusion of language regarding the use of an RUF may help to avoid future problems regarding whether the agreement actually covers this type of compensation for various forms of interconnection.

The Board has addressed the exclusion of ISP traffic from RUF calculations in Docket No. ARB-04-1. In that decision, the Board held that (1) the FCC has not explicitly determined whether ISP-bound traffic should be included in RUF calculations; (2) the FCC did not address this issue in the context of Qwest's § 271 proceeding; (3) the inclusion of this traffic would cause Qwest to incur a substantial

increase in its apportionment of costs; (4) this outcome is a violation of § 252(d)(1) of the Act regarding just and reasonable rates; and (5) the public interest would best be served by excluding ISP traffic. The Board finds that there is nothing in this record that changes the Board's previous determination about ISP-bound traffic and RUF calculations. Therefore, the Board will approve Qwest's proposed language regarding traffic origination charges and the use of a RUF.

D. TRAFFIC COMMINGLING – FEATURE GROUP D TRUNKS VERSUS LIS TRUNKS

Level 3 Position

Level 3 states that it agrees with Qwest regarding the establishment of separate trunks (DEOTs) to carry traffic between Level 3 and particular Qwest end office switches when traffic exceeds a certain volume threshold. Level 3 also states that it generally agrees with Qwest in that it is acceptable to include different types of traffic on the same physical trunk group. However, Level 3 argues that Qwest distinguishes between Feature Group D (FGD) trunks and local interconnection service (LIS) trunks and that Qwest is willing to receive all types of traffic from Level 3 over FGD trunks, but is unwilling to permit switched access traffic to terminate on LIS trunks. Level 3 states that it does not provide retail toll services and should be allowed to send all of its traffic over LIS trunks. Level 3 states that its proposed language allows all traffic types to be exchanged over a single trunking network regardless of whether it is comprised of LIS trunks or FGD trunks.

Qwest Position

Qwest states that it has agreed to allow all traffic, except for switched access traffic, to be carried over LIS trunks. Qwest also states that it has given Level 3 the option of combining all traffic types on FGD trunks. Qwest asserts that switched access traffic should be carried over FGD trunks for three reasons. First, Qwest states that switched access traffic must be exchanged over FGD trunks in order to allow Qwest to provide industry standard terminating records to independent telephone companies, CLECs, and wireless service providers. Without these records, these independents, CLECs, and wireless providers will not be able to bill Level 3 for interexchange traffic that a Level 3 customer originates. Second, Qwest states that it has the ability to receive all types of traffic over FGD trunks and that by routing all traffic over FGD trunks, Level 3 will achieve the same trunk efficiencies that would be gained by routing all traffic over LIS trunks, but without disabling Qwest's billing systems. Third, Qwest states that switched access traffic should be exchanged over FGD trunks in order to comply with § 251(g) of the Act. Qwest states that under § 251(g), Qwest is required to provide interconnection for the exchange of switched access traffic in the same manner that it provided interconnection for such traffic prior to passage of the Act, meaning exchange over FGD trunks. Qwest also contends that the cost to enable LIS trunks to record switched access traffic would be substantial.

Analysis

Level 3 states that it wants to commingle all forms of traffic on LIS trunks, including switched access traffic subject to access charges. Qwest states that LIS trunks do not provide the functionalities it needs for proper rating and billing reports it supplies to rural LECs. The record demonstrates that LIS trunks are not set up to handle switched access service. They would also have difficulty handling certain types of VoIP traffic and would require costly overhauls of Qwest's and other LECs' billing systems. The Board finds that there is a need for the functionalities that FGD trunks offer and, therefore, the Board will approve Qwest's proposed language regarding the commingling of traffic.

ISSUES 2 AND 3: VNXX ARRANGEMENTS AND INTERCARRIER COMPENSATION

The determination the Board must make regarding VNXX arrangements is whether Level 3 can use such arrangements for the origination and termination of ISP-bound and VoIP traffic. Inextricably intertwined with this outcome is the kind of intercarrier compensation that should apply if Level 3 is permitted to utilize VNXX. Therefore, both issues will be discussed together.

The main area of dispute between Level 3 and Qwest in this arbitration centers around the issue of intercarrier compensation for two particular types of traffic: (1) calls that Qwest end users make to ISPs served by Level 3, and (2) calls that Qwest end users either make or receive by means of VoIP providers that

connect to the public switched telephone network (PSTN) through Level 3. Level 3 states that ISP-bound traffic, VoIP traffic, and VNXX-routed ISP-bound traffic should all be subject to a single uniform compensation rate applied reciprocally. Qwest states that Level 3's proposal exploits the one-way traffic flow of ISP traffic and manipulates the North American Numbering Plan.

A. BACKGROUND OF VNXX

A VNXX occurs when a CLEC assigns a "local" rate center code to a customer physically located in a "foreign" rate center. For example, a customer physically located in Ames might order a phone number from Level 3 with a Des Moines NXX rate center code. Calls between that Ames customer's phone and other Des Moines area customers would be treated as if they were local calls, even though the calls between Des Moines and the customer's physical location in Ames is a distance of some 30 miles. Thus, under Level 3's VNXX arrangement, all Des Moines customers would be paying a flat, monthly, local rate, even though they are calling Level 3's Ames customer. When those same customers call Qwest's Ames customers, served out of the same central office as Level 3's Ames customer, they are charged toll charges.

A VNXX call also raises questions regarding the efficient use of the network. In a regular local exchange calling scenario with an ILEC and a CLEC, if the call volumes between Qwest's customers in Ames and Level 3's customers in Ames reach a certain level, both Qwest and Level 3 would have an economic incentive to

establish a new or additional POI in Ames, in order to save the costs of hauling calls to and from the POI in Des Moines. In a VNXX situation, however, Level 3 would never have an incentive to establish a POI in Ames, no matter what the traffic level, because Qwest would be doing all the hauling of traffic from Ames to Des Moines.

For purposes of this case, "VNXX-routed ISP-bound traffic" describes a situation wherein Level 3 obtains numbers for various locations within a state. Those numbers are assigned by Level 3 to its ISP customers even though the ISP has no physical presence within the local calling area (LCA) associated with each of those telephone numbers. ISP-bound traffic directed to those numbers is routed to Level 3's POI and then delivered to the ISP at a physical location in a different LCA than the one to which the number is assigned.

In the past, the Board has not approved the use of VNXX architecture in certain applications. *In re: Sprint Communications Company L.P. and Level 3 Communications (LLC)*, "Final Decision and Order," Docket Nos. SPU-02-11 and SPU-02-13 (issued June 6, 2003),⁵ the Board determined that "VNXX is not an authorized local service and the proposed use of telephone numbers would be inconsistent with applicable industry standards and guidelines." (*Sprint/Level 3 Decision*, p. 1). However, in that order the Board also determined that VNXX or similar services may be appropriate and useful if offered by alternative means that

⁵ Hereafter referred to as *Sprint/Level 3 Decision*.

addressed the Board's concerns regarding efficient use of telephone numbering resources and intercarrier compensation. (Id.)

In addition, the Board also denied Level 3 a certificate of public convenience and necessity earlier this year concluding that "the services Level 3 proposes to offer [i.e., VNXX] do not appear to be the type of service intended to be regulated under a § 476.29(1) certificate." (*In re: Level 3 Communications, LLC*, "Order in Lieu of Certificate," Docket No. TF-05-31, Issued June 20, 2005). As part of that order, the Board stated that while a certificate would not be issued to Level 3, Level 3 would be authorized to obtain telephone-numbering resources for use in providing certain wholesale services. (Id., p. 6). The Board based its decision in part on Level 3's assertion that it would not "use telephone numbering resources to provide dial-up ISP-bound non-voice traffic using a Virtual NXX architecture until such time as this Board, the Federal Communications Commission, or any court of competent jurisdiction in Iowa issues a final ruling, no longer subject to appeal, that such use of numbers is permitted." (Id., pp. 5-6).

In this arbitration, the record demonstrates that both Qwest and Level 3 agree a VNXX call originates in one LCA and terminates in another. The record also demonstrates that Level 3 and Qwest agree that with VNXX, the physical location of the end-user customer who is being called bears no relationship to the local number that is assigned to the call. Where the parties are in dispute is in the determination of compensation and trunking for VNXX traffic.

Level 3 Position

Level 3 states that it seeks to use VNXX arrangements for the origination and termination of ISP-bound traffic and VoIP traffic, over which, Level 3 claims, the FCC has exercised substantial (if not exclusive) jurisdiction.⁶ Level 3 states that as a practical matter, the location of the calling and called parties is unknown, unknowable, or simply indeterminate, and that the interstate nature of this traffic means that the Board should look to federal statutory and regulatory provisions to determine whether VNXX arrangements should be permitted and which intercarrier compensation arrangements should apply.

Level 3 states that the Board should permit its use of geographically independent telephone numbers, specifically VNXX, for Level 3's VoIP and ISP-bound services. Level 3 states that it believes the Board's past reluctance to endorse VNXX for use with ISP-bound traffic has been based on three concerns: (1) an interest in retaining a connection between an NXX and a specific geographic community; (2) concerns about potential exhaust of numbering resources; and (3) concerns about whether use of VNXX provided fair intercarrier compensation.

In response to those concerns, Level 3 states that the connection between an NXX code and a small, geographically determined community is no longer relevant.

⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at ¶¶ 52-65 (hereinafter *ISP Remand Order*); Vonage Holdings Corporation, Memorandum Opinion and Order, WC Dkt. No. 03-211 (rel. Nov. 12, 2004. (hereinafter *Vonage Ruling*)).

Level 3 states that NXX codes were introduced to identify particular PSTN switches, but that for the last several years that purpose has steadily eroded and is now essentially gone. Level 3 states that the introduction of the enhanced service provider (ESP) exemption⁷ allowed access to distant computer services by means of dialing a local telephone number. In addition, Level 3 states that the connection between NXX codes and location began crumbling with the widespread growth of wireless services and continued to crumble with the development of IP-based telephony.

Level 3 also asserts that the Board's previous concerns about number utilization have been addressed by Level 3's VoIP offerings. Level 3 argues that the use of numbering resources is no longer a significant concern regarding VNXX arrangements for voice traffic and that to the extent there is a concern about the use of number resources, it has been in the context of ISP-bound traffic.

Level 3 contends that since the Board has granted authority for Level 3 to provide voice services, Level 3 needs to open one or more blocks of numbers for its VoIP services. Level 3 asserts that its utilization of numbering resources will track that of any other voice carrier and in this situation, using a small handful of additional numbers from the same block for ISP-bound local routing numbers (LRNs) is not even a noticeable impact.

⁷ See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd. 2631 (1988), at ¶ 2 n.8; ¶ 20 n. 53).

Level 3 also states that the Board can manage the intercarrier compensation aspects of VNXX in part because there is no real cost to Qwest. Level 3 asserts that the record in this proceeding demonstrates that Level 3's use of VNXX arrangements, including for ISP-bound calling, does not place any additional material costs on Qwest. (Level 3 Brief, p. 39). Level 3 states that under its proposed contract, all Level 3 terminated traffic will be carried by Qwest to the single POI for that LATA, which is true whether VNXX is used or whether the call is a voice call or an ISP-bound call. Level 3 asserts that Qwest's only task is to properly route the traffic to the single POI and that task is the same for all Qwest-originated locally-dialed calls whether VNXX, VoIP, or ISP-bound. Level 3 states that the record shows that the cost to Qwest of performing this task is close to zero. (Level 3 Brief, p. 39).

As an overall matter, Level 3 asserts that in establishing the terms of an interconnection agreement, the Board must apply the directives of §§ 251 and 252 of the Act and related FCC rulings. Level 3 asserts that federal regulations require numbers to be made available in a manner that accomplishes three purposes: (a) facilitating entry into the market; (b) not unduly favoring any particular group of consumers or providers; and (c) not unduly favoring any particular technology. 47 C.F.R. § 52.9(a). Level 3 also claims that Qwest is seeking to damage Level 3's ability to enter the market by denying Level 3 the right to use numbering resources for its IP-based services.

Qwest Position

Qwest states that Level 3's claim that "VNXX should not be a cause of concern to the Board because it does not place any material additional costs on Qwest" is not true and is based on the false premise that there is no difference between local traffic and interexchange traffic. Qwest states that in making this argument, Level 3 ignores the investments that Qwest has made in its switches and interoffice facilities throughout Iowa. Qwest states that its equipment must be maintained, repaired, and augmented when traffic exceeds capacity and that the FCC has indicated that Qwest is entitled to a reasonable return on those assets pursuant to 47 U.S.C. § 252(d) and the FCC's forward-looking total element long-run incremental cost (TELRIC) methodology.

Qwest also states that the question before the Board is not really a cost issue as Level 3 presents, but rather a question of the proper intercarrier compensation mechanism to apply to interexchange calls. Qwest asserts that if the cost of transport is essentially free as suggested by Level 3, then there is nothing to prevent Level 3 from building its own facilities to any area it wishes to serve in Iowa. Qwest states that Level 3 should not be allowed the free use of Qwest's network.

Qwest asserts that by using its authority 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 a circumstance where calls appear to be local but in any other context would be interexchange calls, thus fooling the billing

system and avoiding the payment of appropriate charges for the use of Qwest's network to carry interexchange traffic. Qwest explains that this re-routing of the billing system occurs because the toll and access charges billing systems are activated by the customer dialing "1+" at the inception of the call; VNXX, however, allows the customer to dial a "local" number and avoid routing the call to the customer's interexchange carrier (IXC). Qwest states that it cannot know in advance whether the local number being dialed is a number assigned to a 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 some other LCA.

Qwest also states that the ESP exemption discussed by Level 3 did not end the relevance of LCAs. Qwest asserts that the ESP exemption recognizes that certain ESPs are treated as though they are end users and, as such, access charges do not apply to them for originating and terminating traffic in the LCA in which they obtain service. Qwest further states that Level 3's argument that wireless service also contributed to the relevance of LCA's is equally irrelevant, as this docket is not related to wireless service.

Qwest's position regarding intercarrier compensation for ISP traffic is that the FCC's integrated intercarrier compensation regime excludes ISP-bound calls that are dialed on a VNXX basis and that it is acceptable to exchange all ISP-bound traffic on a bill and keep basis. Qwest states that the FCC's decision regarding ISP-bound traffic in the *ISP Remand Order* comprises only those circumstances where an ISP

modem bank or server is physically located in the same LCA as the end user customer initiating an Internet call. Qwest argues that the *ISP Remand Order* defines ISP-bound traffic to comprise only those situations in which the customer initiating an Internet call and the ISP equipment to which that call is directed are located in the same calling area.

Analysis

As discussed earlier, the Board has been careful in the past regarding the use of VNXX arrangements in Iowa for ISP-bound non-voice traffic. (See Docket Nos. SPU-02-11, SPU-02-13, "Final Decision and Order" issued June 6, 2003, and Docket No. TF-05-31, "Order in Lieu of Certificate" issued June 20, 2005). The Board has been primarily concerned with the inefficient use of numbering resources and fair intercarrier compensation when determining whether to approve VNXX arrangements. (*Id.*)

Level 3 states that the FCC specifically addressed the intercarrier compensation regime for ISP-bound calls. Level 3 asserts that in the *ISP Remand Order*,⁸ the FCC affirmed its interstate jurisdictional authority over ISP-bound traffic as a form of information access and set up a special intercarrier compensation regime applicable to it. Level 3 states that under that regime, ISP-bound traffic and non-toll traffic are to be treated the same with the specific rate chosen by the ILEC. According to Level 3, under the FCC's rule, the ILEC can choose whether the rate

⁸ *ISP Remand Order*, at ¶¶ 77-78.

that applies is a state-determined "reciprocal compensation" rate or the FCC's own rate, now \$0.0007 per minute, but the same rate applies to all non-toll traffic.

Level 3 also states that the *ISP Remand Order* not only eliminated discrimination against ISP-bound traffic, it fully embraced VNXX-routed ISP-bound traffic. Level 3 states that commentors in the *ISP Remand Order* docket, including Qwest, discussed VNXX arrangements in their attempt to pay for ISP-bound traffic at a lower rate. Level 3 states that the FCC's awareness of VNXX in this context indicates that the FCC understood that ISP-bound traffic includes VNXX-routed ISP-bound traffic. Level 3 also asserts that there is nothing in the FCC's rules that suggests this traffic should be excluded

Level 3 argues that the descriptions of ISP-bound traffic used by the FCC and the D.C. Circuit are not intended to place a geographical limitation on the placement of ISP servers or modem banks. But this argument ignores the fact that there are repeated references in the *ISP Remand Order* clarifying that the FCC was only addressing the situation where an ISP server or modem bank be located in the same LCA as the end-user customer initiating the call. (*ISP Remand Order* at ¶¶ 10, 13, 24).

Level 3 also suggests the fact that VNXX calls are locally dialed is sufficient to bring those calls within the FCC's definition of ISP-bound traffic, and as long as an end-user customer makes a seven-digit call to access an ISP, it is unnecessary to impose a geographical limitation on the location of the ISP's server/modem bank.

But, this argument is inconsistent with the characterization of ISP-bound traffic that has been used by the FCC in the *ISP Remand Order*, as described above.

In addressing the Board's concern about the exhaustion of numbering resources, Level 3 argues that the use of numbering resources is no longer a significant concern regarding VNXX arrangements for voice traffic. In the *Sprint/Level 3 Decision* issued in 2003, the Board determined that for a new exchange, the VNXX entity (Level 3) must have a separate set of 10,000 numbers (1,000 in exchanges with thousands-block number pooling (TBNP)) even though the VNXX entity will only use a small portion of those numbers. (*Sprint/Level 3 Decision*, p. 22). That concern was somewhat alleviated in the Board's 2005 decision which gave Level 3 many of the rights, privileges, and obligations associated with a certificate. (*In Re: Level 3 Communications, LLC, "Order in Lieu of Certificate"* Docket No. TF-05-31, issued June 20, 2005). In that order, the Board permitted Level 3 to seek numbers from the North American Numbering Plan Administrator (NANPA), provided that "Level 3 will not use telephone numbering resources obtained pursuant to this order to provide dial-up ISP-bound non-voice traffic using a Virtual NXX architecture" (*Id.*, pp. 5-6). The Board further finds that the fact that Qwest offers TBNP in each of its exchanges also goes some way toward alleviating those numbering efficiency concerns, at least in Qwest's exchanges.

However, the final Board concern regarding the provisioning of VNXX addressed by Level 3 is that of an appropriate intercarrier compensation scheme.

That issue will be discussed in greater detail below, but for the moment it is sufficient to say that the Board does not agree with Level 3's assertion that the FCC addressed this issue in the *ISP Remand Order*. First, as described above, the FCC order is addressed only to calls to ISPs within the same LCA as the calling party. Second, the FCC order provides for payment by the receiving carrier (Qwest, in this case) to the originating carrier (Level 3), the opposite of the direction in which the payments should be made. This is further evidence that the FCC's *ISP Remand Order* is not addressed to VNXX traffic.

The record demonstrates that the most important of the Board's concerns regarding the implementation of VNXX architecture in lowa intercarrier compensation, is still relevant and the parties have offered little to alleviate that concern. As such, the Board will adhere to its previous position regarding the implementation of VNXX architecture by Level 3 and holds that VNXX is not an authorized local service, but that VNXX may be appropriate and useful if offered by means that adequately address the Board's concerns regarding intercarrier compensation.

The Board finds that ISP-bound traffic does not include VNXX-routed ISP-bound traffic. The FCC has consistently described ISP-bound traffic as "the delivery of calls from one LEC's end-user customer to an ISP in the same local area that is served by the competing LEC."⁹ This definition was also adopted by the D.C. Circuit in both the *Bell Atlantic* and *WorldCom* decisions. Despite Level 3's argument that

this description of ISP-bound traffic was not meant to place a geographic limitation on the placement of ISP servers or modem banks, the FCC has consistently held that an ISP server or modem bank be located in the same LCA as the end user customer initiating the call. In addition, the FCC has consistently held that ISP-bound traffic is predominately interstate for jurisdictional purposes.¹⁰

The Board finds that Level 3's interpretation of the *ISP Remand Order* and the D.C. Circuit's *WorldCom* decision does not advance Level 3's position regarding VNXX traffic. Because VNXX-routed ISP-bound traffic does not fall within the FCC's definition of ISP-bound traffic, it is irrelevant whether ISP-bound traffic is telecommunications traffic subject to reciprocal compensation as Level 3 asserts. In addition, despite Level 3's assertion that VNXX calls are locally dialed because the end user makes a seven-digit call to access an ISP, this is not enough to bring these calls within the definition used by the FCC and the D.C. Circuit.

In determining the proper compensation scheme for ISP-bound traffic in a single calling area, the Board turns to the *ISP Remand Order* where the FCC determined that the reciprocal compensation mechanism that is applied to local telecommunications traffic should not apply to ISP-bound traffic. The FCC also determined that a more economically efficient cost recovery mechanism for ISP-bound traffic would be a bill and keep mechanism. However, the FCC did not require carriers to do a flash-cut to a bill and keep mechanism and ordered interim cost-

⁹ *ISP Remand Order* at ¶ 13.

¹⁰ *ISP Remand Order* at ¶ 57.

recovery rules with each step capped at a lower rate. The current rule calls for intercarrier compensation for ISP-bound traffic to be capped at \$0.0007 per minute of use.

Historically, Iowa has applied the bill and keep mechanism to ISP-bound traffic. The Board finds that this mechanism should be maintained. The Board notes that as bill and keep implies a rate of \$0.00, which is lower than the FCC's mandatory cap of \$0.0007, the bill and keep mechanism is consistent with the intent of the *ISP Remand Order*. Therefore, the Board will approve Qwest's proposed language regarding compensation for ISP-bound and VNXX-routed ISP-bound traffic.

B. INTERCARRIER COMPENSATION FOR VOIP TRAFFIC

Level 3 Position

Level 3 states that VoIP traffic is "information access" traffic and should be subject to reciprocal compensation, not access charges, just like ISP-bound traffic. Level 3 states that VoIP traffic is not traditional toll traffic where there are access charges for origination and termination.

Level 3 states that VoIP services are inherently geographically indeterminate, as the user may not even be in the same location on consecutive calls. Level 3 states that the FCC's reciprocal compensation rule, 47 C.F.R. § 51.701(b), states that "exchange access" and "information access" are not subject to reciprocal compensation. Level 3 states that VoIP traffic does not meet the definition of

"exchange access" traffic because it fails to meet the definition of a telephone toll service where the call is subject to a separate toll charge.

Qwest Position

Qwest states that Level 3's proposed language in this regard would essentially allow Level 3, or its third party VoIP provider, to place VoIP calls on the PSTN and never pay access charges that would apply to any other carrier despite the fact that many of the calls are neither local in nature nor qualify for the enhanced service provider (ESP) exemption. Qwest states that its proposed language describes how VoIP traffic will be treated as well as establishing the interconnection compensation rules.

Qwest states that Level 3 seeks reciprocal compensation on all VoIP traffic at the FCC mandated rate of \$0.0007 per minute of use, no matter where the VoIP provider point of presence (POP) is located or where Qwest must transport the call to terminate it. Qwest states that the effect of this scenario would be to fundamentally change the compensation regime by making access charges inapplicable to VoIP calls. Qwest states that the ESP exemption exempts a VoIP provider from terminating access for delivering calls to PSTN customers in the LCA in which the VoIP provider's POP is purchasing local exchange service. Qwest asserts that Level 3's interpretation of the exemption is to effectively exempt ESPs from access charges everywhere.

Qwest states that a voice call between customers located in separate LCAs is a toll call and this applies to VoIP services. Qwest states that the ESP exemption does not extend beyond the LCA in which the ESP has a POP by purchasing local exchange service. Qwest states that the VoIP provider's POP is the relevant point to measure the end point of the traffic as the VoIP provider is treated as the end user under the ESP exemption.

Analysis

The proper classification of VoIP for purposes of intercarrier compensation is an evolving question. Nevertheless, the Board agrees with Qwest's position on compensation for VoIP traffic. Traditionally, a voice call between separate LCAs is a toll call and must be treated as such. The Board finds that this rule applies equally to all calls regardless of the technology used, including VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the ESP is located, but the call is being sent for termination to another LCA, the provider is not entitled to free transport to the terminating LCA under the ESP exemption or on any other basis, nor is it allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a physical presence in that LCA. The Board also agrees that the VoIP provider POP is the relevant point to measure the end point of the traffic since the VoIP provider is treated as the end user under the ESP exemption. Therefore, the Board will approve Qwest's proposed language regarding compensation for VoIP traffic.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The interconnection agreement between Level 3 Communications, LLC, and Qwest Corporation shall incorporate the language adopted by the Board in this Arbitration Order.
2. Within 30 days of the issuance of this order, the parties shall submit an interconnection agreement consistent with the terms of this Arbitration Order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 16th day of December, 2005.