



BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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In the Matter of the Petition of Level 3	:	Docket No.	T-01051B-05-0350
Communications, LLC for Arbitration of an	:		T-03654A-05-0350
Interconnection Agreement with Qwest	:		
Corporation Pursuant to Section 252(b) of	:		
the Telecommunications Act of 1996	:		
	:	LEVEL 3'S EXCEPTIONS TO	
	:	RECOMMENDED OPINION	
	:	AND ORDER	
	:		

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**BEFORE THE STATE OF ARIZONA
ARIZONA CORPORATION COMMISSION**

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	Docket No. T-01051B-05-0350 T-03654A-05-0350
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	:	LEVEL 3'S EXCEPTIONS TO RECOMMENDED OPINION AND ORDER
	:	
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Level 3 Communications, LLC ("Level 3") respectfully submits its exceptions to the Recommended Opinion and Order ("RO&O") issued on April 7, 2006.¹

Introduction

Through its over 24,000 route miles of one of the world's fastest optical Internet backbones, Level 3's network directly ties 13 countries together and indirectly connects the world. One out of every three people access the Internet on Level 3's network. That means that 1 out of 3 e-mails, 1 out of 3 web pages etc. passes through, or comes from our network.

Although not readily apparent, the RO&O will drastically increase Internet access rates for the 65% of Arizonans who cannot afford or do not have access to broadband – the Arizonans that still rely on dial up access to reach the Internet.² This will result

¹ In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation, *Opinion and Order* [recommended by Judge Rodda], Docket Nos. T-01051B-05-0350 & T-03654A-05-0350 (issued April 7, 2006) ("RO&O").

² There are approximately 2,115,090 residential telephone lines in Arizona. FCC Industry Analysis & Technology Division, Wireline Competition Bureau, *Local Telephone Competition*

despite uncontroverted evidence that Level 3's interconnection requirements will not increase Qwest's costs at all. Unless remedied, not only will rates go up, but choice will decrease for all Arizonans, including the remaining 738,322 Arizonans who now find high-speed Internet access attractive.³

With regard to these key, immediate issues, there is a middle path. So, rather than burdening the Commission with detailed analysis of every point in the RO&O with which Level 3 disagrees, Level 3 will focus only on those changes required to remedy what is otherwise immediate and irreparable harm to Arizonans and to competition. Level 3's recommended changes for treatment of ISP-dialup and VoIP services are consistent with Judge Rodda's recommendation for a "win-win" solution. Level 3's solution also addresses any immediate concerns Judge Rodda expressed about Qwest's transport costs.

In addition to the win-win solution Level 3 presents, there is one other issue critical to competition that must be addressed: the RO&O's wholly unsupported decision to require that Level 3 duplicate its vast interconnection network with Qwest. Not only is the RO&O's finding contrary to established industry practice, it is contrary to the law.

Status as of June 30, 2005, (April 2006) at Table 7 (total lines in service) and Table 12 (percentage residential lines). There are, however, only about 738,322 residential high speed Internet lines in Arizona. FCC Industry Analysis & Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access Status as of June 30, 2005*, (April 2006) at Table 13 High-Speed Lines by Type of User (Over 200 kbps in at least one direction). **This means that about 65% of Arizona residential customers rely on dial-up access to reach the Internet – if they reach it at all.**

³ Commission approval of interconnection requirements that subject Level 3's VoIP services to state regulatory requirements where Level 3 has no service-driven reason to create FGD capabilities or assume such costs into its operations not violate prohibitions against discriminatory interconnection requirements under Section 251(c)(2) of the Act, they fly in the face of 47 U.S.C. § 157(a), which expressly states that "the policy of the United States to encourage the provision of new technologies and services to the public" and "Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest."

Qwest is legally required to prove that Level 3's single interconnection network arrangements are infeasible. Qwest admitted on the record that Level 3's arrangements would work. Record evidence was presented that showed that Level 3 exchanges all forms of traffic on a daily basis with the nation's three largest incumbent local exchange carriers over a single interconnection network. Finally, the record shows that Level 3 is not a retail provider of long distance services; it seeks only to terminate small amounts of such services over existing facilities. Unless this constraint of the RO&O is cured, Level 3 will face further unnecessary costly and delaying disputes.

Summary of Level 3's Specific Concerns with the RO&O

1. *Compensation for ISP-Bound Traffic.* The key issue presented in the RO&O is the scope of intercarrier compensation for calls that Qwest's end users make to Internet Service Providers ("ISPs") enabled by Level 3. Everyone agrees that, where some of the equipment that is used to provide affordable dial-up Internet in Arizona are located in the calling party's local calling area, the FCC's compensation regime of \$0.0007 per minute applies. The dispute is over what to do when the modems are not located in the caller's local calling area – and, in particular, when the ISP receives calls using "virtual NXX" or "VNXX" arrangements.⁴ In this regard, Level 3 argued that the normal compensation regime still applies. The RO&O rejected that argument, but also

⁴ VNXX refers to the situation where a LEC assigns a local rate center NXX (say, Exchange A) to an ISP that does not have a modem bank physically located in Exchange A. This service allows the ISP in Exchange B to receive calls from Exchanges A without toll charges. Effectively, the ISP becomes a local Exchange A customer. VNXX service, for example, may be attractive in the situation where a business owner in one exchange seeks to eliminate toll charges to and from a customer base in another exchange.

suggested that – as with a traditional FX service⁵ – normal intercarrier compensation should apply if Level 3, rather than Qwest, takes on the cost of transporting the ISP-bound calls beyond the caller’s calling area. RO&O at 28-30.

In the long run, Judge Rodda’s suggestion unfairly benefits Qwest. First, the FCC’s low per-minute rate already compensates Qwest for its transport costs by giving Qwest a substantial discount off cost-based call termination rates. Second, the record shows that those transport costs are *de minimis*. Level 3 continues to believe that sound economic and public policy favors adopting Level 3’s position on VNXX; if the Commission is concerned about the long term impact of these and other issues, the Commission can initiate a generic proceeding regarding VNXX.⁶

But the **best future** process –a generic proceeding conducted by the Commission – must not become the enemy of a *workable present* result – the viable, competitive Internet marketplace that can exist under the interim solution proposed in the RO&O, but which simply cannot exist unless a compromise solution is implemented. To this end, Level 3 proposes within this filing a middle path. Because the RO&O *technically adopted* Qwest’s language, immediate positive Commission action is needed on Level 3’s proposal to avoid the discriminatory competitive harm and damage that Qwest’s language will work on affordable Internet access in Arizona.

2. *Compensation for VoIP Traffic.* The RO&O ruled that for voice-over-Internet-protocol (“VoIP”) traffic, the VoIP end of the call should be deemed to be at the

⁵ FX (foreign-exchange) service provides local telephone service from a central office which is outside (foreign to) the subscriber's exchange area. In its simplest form, a user picks up the phone in one city and receives dial tone in the foreign city.

⁶ See Recommended Opinion and Order in Pac-West Telecomm v. Qwest Corporation, Docket Nos: T-01051B-0495 and T-03693A-0495, Arizona Corporation Commission, docketed April 13, 2005 (proposing a generic proceeding on VNXX issues).

“VoIP POP” – a term left undefined in the Order, and which Qwest never actually defines in the contract. Level 3 assumes this is a reference to the location where a plain old telephone call is converted to VoIP format or vice versa, but other approved sections of the Agreement are contradictory or, at best, make this unclear. This lack of definition and clarity over a term that directly affects network planning decisions can only lead to costly and protracted future disputes – ultimately creating an uncertain and precarious business climate in Arizona that will inhibit investment in this vital Internet technology.⁷

Level 3 proposes that the Commission apply the same compensation rule to VoIP traffic that the RO&O suggested for ISP-bound traffic – that such traffic be deemed local or not (for compensation purposes) based on the relationship between the party on the public switched network (“PSTN”) and the location at which Level 3 assumes responsibility for transporting the call to or from Level 3. This would provide a clear and unambiguous “location” for both ends of the call that would also automatically and fairly reflect the amount of transport that Qwest has to do either to originate or terminate VoIP traffic. It harmonizes the compensation treatment of VoIP and ISP-bound traffic, easing contract administration and minimizing future disputes.

3. *Combined Traffic Types on LIS Trunks.* Another key issue for Level 3, and Internet-based carriers generally, is efficient trunking. Level 3 and Qwest will exchange a large amount of non-access traffic (that is ISP-bound and VoIP traffic) over the interconnection facilities. Level 3 proposes to exchange a small amount of traffic

⁷ The FCC has already rejected any requirement that a VoIP provider track physical location where there is no service driven reason for doing so. See In the matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion And Order* WC Docket No. 03-211, FCC 04-267, ¶¶ 25, 29 (rel. November 12, 2004), (“*Vonage Order*”). (“Rather than *encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape.*”)

subject to access charges. *See* RO&O at 64 (noting that most traffic will be ISP-bound). It makes sense in this situation to allow all the traffic to be carried over the “local interconnection service” (“LIS”) trunks that everyone agrees are appropriate for the predominant traffic types. Level 3 presented evidence that all the other major ILECs have agreed to this use of local interconnection trunks. Under governing federal law (47 C.F.R. § 51.305(e)), the fact that other ILECs can do this shifts the burden to Qwest of proving that it is (for some reason) not technically feasible for Qwest. Qwest made no such showing at the hearing, other than unsubstantiated guestimates of purported costs that Level 3’s proposal would cause.⁸ Despite Qwest’s vague and inadequate showing, the RO&O held that Qwest did not have to do what every other major ILEC has been willing to do and is doing. RO&O at 65-72. Beyond posing the common sense question of why Qwest would deny such a proposal from a competitor such as Level 3, this is legal error. It is also unfairly discriminatory, because Qwest’s “statement of generally applicable terms” (“SGAT”) for Arizona – the very SGAT that Qwest’s subsidiary company, QCC, could use to directly compete with Level 3 – expressly permits this use of LIS trunks. *See* SGAT at Section 7.2.2.9.3.2.⁹

As noted above, Level 3 believes that the RO&O did not reach the correct result, under applicable law, on numerous issues.¹⁰ If, however, the Commission modifies the RO&O in the three respects noted above, Level 3 will be able to operationalize the RO&O and continue to compete in Arizona.

⁸ Ducloo Rebuttal Testimony at p. 22.

⁹ The SGAT is available at: <http://www.qwest.com/wholesale/clecs/sgatswireline.html>. Matrix Issue No. 5 involved the relationship of Qwest’s SGAT to the parties’ arbitrated agreement.

¹⁰ Level 3 incorporates herein its comments in this Docket contained within its Post Hearing Brief (filed November 18, 2005) and Reply Brief (filed December 2, 2005).

I. THE COMMISSION SHOULD ACCEPT THE RO&O'S SUGGESTION REGARDING COMPENSATION FOR FX-LIKE ISP-BOUND TRAFFIC.

The fundamental problem with compensation for ISP-bound traffic is that the FCC's currently effective order regarding such traffic – the *ISP Remand Order*¹¹ – does not literally and expressly address how to handle VNXX-routed traffic. This is unfortunate because VNXX arrangements are the most efficient way to provide affordable dial-up Internet access over a wide area. The result has been numerous disputes between competitors like Level 3 (arguing that the correct reading of the *ISP Remand Order* is that it includes VNXX-routed traffic) and Qwest, the incumbent. (Qwest claims that compensation is limited to “local” ISP-bound traffic, where the modems that the ISPs use to provide Internet access are in the calling party's local calling area despite the fact that neither Qwest nor Level 3 deploy such devices in every local calling area. There are simply no technical, operational, or economic reasons to do so.)

Without Level 3's remedy, which follows Judge Rodda's recommendation, there will be no way to resolve these issues, except on terms that include requiring that Level 3 –the nation's large Internet backbone operator and one of the three largest suppliers of ISP dialup & VoIP in the United States (the other two suppliers of ISP dialup & VoIP Access are Qwest and Verizon) – simply resell Qwest's services (*i.e.* not use Level 3's extensive facilities at all).

Recently the First Circuit ruled that the *ISP Remand Order* can be read to encompass either all traffic or non-VNXX traffic. As that court found, this converts the

¹¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

resolution of this issue from a "legal" matter into a policy question for state regulators.¹² Judge Rodda did not have the benefit of this ruling when she issued the RO&O, but this Commission does. Level 3 submits that for this reason, among others, this Commission should fashion a path forward that provides Internet competitors to Qwest some degree of business certainty in Arizona. As described below, the best near-term solution is to adopt the RO&O's suggested regime of "FX-like" calls being rated as "local." In the long term, the implications of either modifying the near term solution or adopting it as part of the long term policy of the Commission to encourage investment in advanced Internet services in the state can be handled by opening a generic docket to consider VNXX issues as proposed by the RO&O.

The key question before the Commission on this topic is how to craft a policy on compensation for ISP-bound calls that balances two important concerns. First, Qwest is legitimately concerned that it is not subject to unreasonable costs in delivering ISP-bound calls to Level 3. At the same time, however, if such unreasonable cost burdens for handling such traffic are placed on Level 3 and/or end user customers, the result will be that affordable, competitive dial-up Internet access in Arizona is placed in jeopardy. Level 3 believes that the suggestion in the RO&O is a reasonable means to harmonize these dual concerns. As Judge Rodda stated:

Although we disapprove Level 3's use of VNXX, as it has been described in this proceeding, ***Level 3 should be able to serve its customers through FX or an FX-like service.*** In addition, there may be ways whereby Level 3 could use "VNXX-like" arrangements ***and compensate Qwest for transport*** (perhaps by using a TSLRIC rate) that would alleviate our concerns about intercarrier compensation distorting the market by improper cost shifting. Evidence of how such a scheme might work, or if

¹² *Global NAPS, Inc. v. Verizon New England, Inc., et al.*, No. 05-2657, slip op. (1st Cir. April 11, 2006) at 34-37.

it could work, was not offered in this docket, but we would not want to eliminate such compensation scheme and encourage the parties to be creative in creating a “win-win” resolution and present a revised ICA for our approval.

RO&O at 29 (emphasis added). Putting aside Qwest’s attempts to rate calls to ISPs based upon the “physical location” of one of the pieces of equipment, despite the fact that both Level 3 and Qwest’s (via its subsidiary Qwest Communications Corporation) deploy such equipment not on a local basis, but on a state, LATA-wide or regional basis¹³ – the real question, as Judge Rodda noted, is how to ensure that Qwest is not unfairly burdened with the costs of transporting ISP-bound calls to the hand-off point with Level 3. This is why, in practical terms, everyone can agree that calls to equipment that is geographically “local” to the calling party are subject to the FCC’s \$0.0007/minute compensation scheme. In other words, Qwest does not have to carry those calls - at its own expense - any farther than it would carry a plain old traditional local call. The same is true, of course, of any call that Qwest hands off to transport provided by or paid for by Level 3 that is geographically “local” to the called party. Costs do not vary with the location of the end user or the equipment; they vary with the amount of transport that is used.

For this reason, Level 3 believes that Judge Rodda’s “creative” suggestion is actually reasonable and workable as an interim arrangement while broader questions about VNXX are sorted out. Specifically, the Commission should direct the parties to adopt “win-win” contract language that subjects ISP-bound calls to the normal \$0.0007/minute rate where Qwest is not required, at its own expense, to carry such calls

¹³ The *ISP Remand Order* repeatedly noted that the FCC’s traditional concern with whether traffic was “local” or not had been a “mistake” and had created “ambiguities” when applied to ISP-bound calling. See *ISP Remand Order* at ¶¶ 45-46. The D.C. Circuit had previously noted this same problem in *Bell Atlantic v. FCC*, 206 F.3d 1, 340 (D.C. Cir. 2000).

beyond the originating caller's local calling area. (See Appendix – Proposed Amendment No. 1) In practical terms this would occur in two situations: (1) where the caller is in the same local calling area as the physical POI at which Qwest hands off traffic to Level 3; and (2) where the caller is in a local calling areas served by a Qwest switch to which Level 3 has established (by paying Qwest a TELRIC rate) a direct end office trunk (DEOT). Because Judge Rodda determined that Level 3 should pay 100% of Qwest's TELRIC costs for DEOTS carrying ISP-bound traffic, the order need only acknowledge that this payment addresses concerns expressed about Qwest's transport costs.¹⁴

In each of these situations, Qwest gets to hand the ISP-bound traffic off to Level 3, either literally or in an economic sense, within the originating caller's local calling area. As a result, in neither situation can there be any possible claim that Qwest has to bear any unreasonable transport costs (or, indeed, any transport costs at all).

Level 3 notes that this approach is directly analogous to the FCC's suggestion for dealing with another situation where the actual "location" of one party to a call is unknown or hard to pin down – wireless calling. The FCC ruled back in 1996 that for traffic being exchanged between an incumbent local exchange carrier ("ILEC") and a wireless carrier, it would be reasonable to use the point at which the call is handed off between the carriers as a surrogate for the location of the wireless caller.¹⁵

Level 3 believes that, on careful consideration, Judge Rodda's proposal is actually overly generous to Qwest. This is so for at least two reasons. First, as the evidence in

¹⁴ While Level 3 continues to believe that the position taken by Judge Rodda in this regard is contrary to controlling federal law, the Level 3 proposal has been tailored to be consistent with the Judge's ruling.

¹⁵ 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) at ¶1044.

this case shows, the costs Qwest incurs in carrying traffic to a centrally-located physical POI are *de minimis*.¹⁶ Second, the FCC's low \$0.0007/minute rate for ISP-bound calling is already below a reasonable estimate of the costs of terminating such traffic (that is, the "normal" TELRIC-based call termination rate), and as such *already* implicitly -- by offering a discount off that rate -- makes an allowance for Qwest's transport costs.¹⁷ Should the Commission so desire, these and other matters can be addressed in the generic proceeding regarding VNXX traffic that Judge Rodda (and, in another case, Judge Bjelland) recommend.¹⁸ But as an interim solution, Judge Rodda's suggestion is pragmatic and reasonable.

Solution So, Level 3 urges the Commission to adopt, immediately, Judge Rodda's proposal. This could easily be implemented by the contract language shown below -- taken directly from the RO&O, with the reflected additions needed to implement the proposal regarding FX-like traffic. The added language is shown as double underlined for clarity:

Section 7.3.6.1: Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC, including FX-like traffic bound for ISPs, will be billed without limitation as to the number of MOU ("Minutes of Use") or whether the MOU are generated in "new markets" as that term has been defined by the FCC, at \$0.0007 per MOU. [Judge Rodda's resolution of Matrix Issue 3C. See RO&O at 30]

Section 7.3.6.3: Traffic exchanged between the parties should be rated in reference to the rate centers associated with the NXX prefixes, which are historically associated with the

¹⁶ See Exhibit RRD-22; Tr. 26-27.

¹⁷ Attachment A to Qwest's Arizona SGAT shows a per-minute call termination rate of \$0.00097 at the end office -- making the FCC rate a discount of almost 30%. If the \$0.0007 rate is used in place of Qwest's *tandem* transport and termination -- which would be a minimum of \$0.00231 per minute -- the FCC rate is a discount of more than 65%. See SGAT, Exhibit A, §§ 7.6 and 7.7, available at: <http://www.qwest.com/wholesale/clecs/sgatswireline.html>.

¹⁸ Recommended Opinion and Order, Pac-West Telecomm v. Qwest Corporation, Docket Nos: T-01051B-0495 and T-03693A-0495, Arizona Corporation Commission, April 13, 2005.

rate center within Qwest's defined local calling areas as determined by the Arizona Corporation Commission, of the calling and called parties. Unless and until, specifically authorized by the Arizona Corporation Commission, the parties shall not exchange VNXX traffic, as defined herein. [Judge Rodda's resolution of Matrix Issue 3A. See RO&O at 29.]

"VNXX traffic" is all traffic originated by the Qwest End User Customer located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, and CLEC's End User Customer is assigned an NPA-NXX in the Local Calling Area in which the Qwest End User Customer is physically located. VNXX does not include FX or FX-like traffic. [Judge Rodda's resolution of Matrix Issue 3B. See RO&O at 29-30.]

"FX-like traffic" is all traffic (a) originated by the Qwest End User Customer located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, (b) where CLEC's End User Customer is assigned an NPA-NXX in the Local Calling Area in which the Qwest End User Customer is physically located, and (c) CLEC either (i) physically receives such traffic from Qwest within such Local Calling Area or (ii) receives such traffic over a direct end office trunk between its network and the Qwest end office serving such Local Calling Area established and paid for by Level 3 under the terms of this Agreement.

Directing the parties to adopt this language would allow Level 3 to provide reasonable, efficient service to ISPs offering affordable dial-up Internet access throughout Arizona, while at the same time eliminating any basis for Qwest to claim that it is being asked to bear, in any respect, any unfair costs associated with transporting such traffic outside the originating caller's local calling area.¹⁹

¹⁹ Because Qwest would not have to carry such traffic outside the local calling area at its expense, there is no basis for concern that this proposal would in any way put pressure on Qwest to increase any of its end user rates. See RO&O at 26. While it would not receive any access charges in connection with these ISP-bound calls, Qwest is not receiving any such access charges today, so its *revenues* would not be affected. And, since Level 3 would either be picking up the traffic without significant transport by Qwest, or paying the incremental cost of the transport it uses (by establishing DEOTs at a TSLRIC/TELRIC rate), this arrangement would not impose any uncompensated costs on Qwest either.

II. THE COMMISSION SHOULD USE THE SAME COMPENSATION ARRANGEMENT FOR VoIP TRAFFIC AS APPLIES TO ISP-BOUND TRAFFIC.

Judge Rodda correctly notes that there is no clear FCC guidance with regard to intercarrier compensation for VoIP traffic. RO&O at 36-37. Her recommendation on this topic is to adopt Qwest's notion that what matters is the location of the "VoIP POP," which appears to mean the location at which the VoIP-to-PSTN conversion of the call occurs. *Id.* There are several problems with this approach, and the Commission should reject it.

First, it is impossible from Qwest's proposed language to determine what a "VoIP POP" is, or where the relevant conversion actually occurs. The technology of VoIP is too new, too fluid, and too flexible to assume that any specific physical arrangement is or will remain typical.

Second, as a legal matter, for purposes of setting intercarrier compensation FCC precedent rejects reliance on the location of the VoIP provider as a surrogate for end user location. This was made completely clear in the FCC's original 1999 ruling about whether ISP-bound calls were subject to reciprocal compensation.²⁰ That ruling focused on the situation of ISPs that were physically "local" to the calling party. The CLECs serving those ISPs argued strenuously exactly what Qwest is arguing here – that the ISPs were subject to the Enhanced Service Provider (ESP) Exemption, so what mattered was where the ISPs themselves were located. Calls to physically "local" ISPs, the ILECs

²⁰ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, CC Docket Nos. 96-98, 99-69 (February 26, 1999).

argued, were “local” calls pure and simple, so calls to ISPs were subject to reciprocal compensation, not access.

The FCC rejected that argument.²¹ The fact that an ISP is treated as an end user when it buys its services from a carrier did not mean that the ISP is treated as an end user for purposes of deciding what compensation regime applies to two carriers working together to get a call from a normal end user to an ISP – a situation that not only the ESP Exemption didn’t address but wasn’t even possible when it was decided. The FCC confirmed that the ESP Exemption does not determine intercarrier compensation in the *ISP Remand Order*.²² This means that Judge Rodda erred in accepting Qwest’s claim that, under the ESP Exemption, the location of the ESP (here, the VoIP provider) is the touchstone for setting intercarrier compensation. Again, this is *precisely* the argument that the FCC *rejected*, both in 1999 and again in 2001.

Finally, as a purely practical matter, Level 3 itself will not necessarily know where the (undefined) “VoIP POP” might be, making it impossible to administer Judge Rodda’s proposed approach to this issue. Certainly, attempting to apply the “VoIP POP” concept will result in disputes and contention over time.

For these reasons, Level 3 believes that the Commission should apply the same approach to VoIP traffic that applies to ISP-bound calling, as described above. Specifically, VoIP traffic should be rated, for purposes of intercarrier compensation, on the basis of whether Qwest has to pay for transport outside the local calling area serving the Qwest end user making or receiving the VoIP call. This is a fair and workable way to

²¹ *Id.* at ¶¶ 16-17, 20, 26.

²² *ISP Remand Order* at ¶ 35.

allow VoIP service to grow – to the benefit of Arizona citizens – while the regulatory issues surrounding VoIP are sorted out at a national level.

Solution This proposal can be implemented with a simple additional modification to Judge Rodda’s proposed language for Section 7.3.6.1 of the agreement, discussed above in the context of ISP-bound calling. For clarity, in the box below, Judge Rodda’s proposed language is set out in plain type; the additions discussed above are set out in double underline type; and the additional changes needed to embrace VoIP calling within the same system are set out in *bold italic* type:

Section 7.3.6.1: Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic *and VoIP traffic* exchanged between Qwest and CLEC, including FX-like traffic bound for ISPs and FX-like traffic to or from VoIP providers, will be billed without limitation as to the number of MOU ("Minutes of Use") or whether the MOU are generated in "new markets" as that term has been defined by the FCC, at \$0.0007 per MOU. [Judge Rodda’s resolution of Matrix Issue 3C. *See* RO&O at 30]

Level 3 requests that the Commission direct the parties to adopt these changes as well. (See Appendix – Proposed Amendment No.1)

III. THE COMMISSION SHOULD DIRECT QWEST TO PERMIT THE TERMINATION OF BOTH “INTERCONNECTION” AND “ACCESS” TRAFFIC ON SO-CALLED “LIS” TRUNKS.

Most of the traffic that Qwest and Level 3 will exchange will be ISP-bound traffic coming from Qwest to Level 3. *See* RO&O at 64. There will be some VoIP traffic in both directions. Level 3 is not a retail interexchange carrier and so will not receive any “1+” outbound access traffic from Qwest. Level 3 does expect to deliver some traditional interexchange traffic to Qwest for termination.

There is no dispute with respect to this latter traffic: Level 3 will pay Qwest’s tariffed “Feature Group D” (“FGD”) access charges. The dispute is how to physically

configure the parties' interconnection trunking, given that there will be some FGD traffic exchanged.

Qwest takes a "tail wagging the dog" posture: no matter how little FGD traffic is in play, Level 3 has to receive and send that traffic on (expensive) FGD trunks, no matter how inefficient it is to do so. Qwest is perfectly willing to make Level 3 pay for lots and lots of such (expensive) trunks and to use those trunks for the exchange of all other types of traffic. But Qwest refuses to permit Level 3 to efficiently send the small amount of FGD traffic at issue over (less expensive) LIS trunks.

Judge Rodda sided with Qwest, claiming that Qwest had shown that it would be expensive to do what Level 3 wants. RO&O at 72 (access on LIS trunks would "require a substantial outlay of resources"). In so doing Judge Rodda simply and directly misapplied federal law. Level 3 presented uncontradicted testimony that all the other major ILECs are able to receive both "local" and FGD traffic on local interconnection trunks, and to sort out the proper billing of the different types of traffic by means of traffic factors.²³ The FCC's rules (47 C.F.R. §51.305(e)) make clear that if a means of interconnection is actually used by one ILEC, any other ILEC seeking to avoid using that same means of interconnection bears the burden of proving that the means of interconnection is not technically feasible. Qwest made no such showing, and Judge Rodda did not find that it had done so. The only legally correct conclusion, therefore, is that Level 3, not Qwest, should prevail on this issue.

This conclusion is cemented when considering what Qwest's SGAT says on this topic. SGAT 7.2.2.9.3.2 provides that:

²³ Ducloo direct testimony at page 42. See Ducloo direct testimony generally Section XI.

Exchange Service (EAS/Local) traffic *and Switched Access traffic including Jointly Provided Switched Access traffic, may be combined on the same trunk group.* If combined, the originating Carrier shall provide to the terminating Carrier, each quarter, Percent Local Use (PLU) factor(s) that can be verified with individual call record detail. Call detail or direct jurisdictionalization using Calling Party Number information may be exchanged in lieu of PLU if it is available.

(emphasis added). In other words, while Qwest was resisting Level 3's effort to use LIS trunks for all traffic – with factors to sort out what billing applies – Qwest's SGAT provides for exactly that.²⁴

This means that the RO&O's approach to this issue presents serious problems of discrimination. Why should carriers operating under the SGAT be able to combine all their traffic on LIS trunks while Level 3 cannot? In this regard, the FCC long ago made clear that the requirement of nondiscrimination applicable to interconnection arrangements under the 1996 Act is much more stringent than the traditional, somewhat lax "nondiscrimination" requirement applicable to an ILEC's retail services.²⁵ The latter requirement permits discrimination as long as it is "reasonable" in the circumstances; the 1996 Act, however, permits *no* discrimination in interconnection arrangements, whether arguably "reasonable" in the circumstances or not.²⁶

Solution Given this, the Commission's only legally sound option is to reject the RO&O's recommendation on this topic (Matrix Issue 18) and direct the parties to use Level 3's proposed language. (See Appendix – Proposed Amendment No. 2)

²⁴ The SGAT is a publicly available document of which the Commission may properly take administrative notice in this matter. Note also that the relationship of the SGAT to this contract was at issue below in Matrix Issue No. 5.

²⁵ Local Competition Order at ¶¶ 217-18.

²⁶ Id.

Conclusion.

For the reasons stated above, Level 3 requests that the Commission modify the RO&O in the three respects discussed above. Proposed forms of amendment to modify the RO&O as requested are attached.

RESPECTFULLY SUBMITTED this 24th day of April 2006.

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Appendix

Proposed RO&O Amendment No. 1

Page 30, line 3, **INSERT** at the end of the sentence: "or FX-like traffic."

DELETE Page 30, lines 4-7 of the RO&O and **INSERT** in its place:

"In light of our ruling above that Level 3 should be able to serve its customers through FX or FX-like service, we also believe that "FX-like Traffic" should be defined as:

"FX-like traffic" is all traffic (a) originated by the Qwest End User Customer located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, (b) where CLEC's End User Customer is assigned an NPA-NXX in the Local Calling Area in which the Qwest End User Customer is physically located, and (c) CLEC either (i) physically receives such traffic from Qwest within such Local Calling Area or (ii) receives such traffic over a direct end office trunk between its network and the Qwest end office serving such Local Calling Area established and paid for by Level 3 under the terms of this Agreement.

Thus, to resolve Matrix Issue 3C and to ensure that Level 3 is able to serve its customers through FX-like service as discussed above, we adopt the following language for Section 7.3.6.1:

Section 7.3.6.1: Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic and VoIP traffic exchanged between Qwest and CLEC, including FX-like traffic bound for ISPs and FX-like traffic to or from VoIP providers, will be billed without limitation as to the number of MOU ("Minutes of Use") or whether the MOU are generated in "new markets" as that term has been defined by the FCC, at \$0.0007 per MOU."

Proposed RO&O Amendment No. 2

Page 71, line 28: **DELETE** Page 71, line 28 through Page 72, line 4 of the RO&O and **INSERT** in its place:

“Level 3 has agreed to pay Qwest’s tariffed Feature Group D (FGD) access charges for FGD traffic. The primary point of dispute is the nature of the physical interconnection between Level 3 and Qwest to allow FGD traffic to be exchanged. Level 3 presented evidence that other ILECs are able to receive both local and FGD traffic on the same local interconnection trunk and Qwest has made no showing that similar means of interconnection is not technically feasible. See 47 CFR § 51.305(e). Level 3’s position on this issue also is consistent with Qwest’s Arizona Statement of Generally Available Terms (SGAT). Under the Arizona SGAT, other carriers would be entitled to what Level 3 is seeking here. Therefore, in order to achieve efficiency of interconnection, to avoid discrimination and to satisfy 47 CFR § 51.305(e), we adopt Level 3’s proposed language for Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1.”