**Qwest**
421 Southwest Oak Street
Suite 810
Portland, Oregon 97204
Telephone: 503-242-5420
Facsimile: 503-242-8589
e-mail: carla.butler@qwest.com

**Carla M. Butler**
Lead Paralegal

October 30, 2006

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: ARB 665

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Reply Brief, and its Motion to Have Exhibits 24, 25 and 26 Explicitly Admitted in the Record, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla M. Butler

CMB:
Enclosures
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**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**ARB 665**

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| In the Matter of LEVEL 3 COMMUNICATIONS, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communication Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions with QWEST CORPORATION | **QWEST CORPORATION'S REPLY BRIEF** |

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Qwest Corporation ("Qwest") hereby replies to the Opening Brief ("Level 3 Br.") filed by Level 3 Communications, LLC ("Level 3") on October 10, 2006.

## INTRODUCTION

In its Opening Brief, Level 3 states: "The entire telecommunications industry has been struggling with [the intercarrier compensation] issue for nearly a decade, but a fair, industry-wide solution remains elusive." (Level 3 Br., p. 1.) Whether Level 3's statement is true or not, this case is not about creating a *new* intercarrier compensation regime. It is about applying the existing federal and state rules. For ISP traffic, the existing rule requires Qwest to compensate Level 3 only when traffic is delivered to an ISP in the same local calling area ("LCA") as the originating caller. In *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1159 (9th Cir. 2006) ("*Peevey*"), the Ninth Circuit determined as a matter of federal law that a call is categorized as local or VNXX (interexchange) based on the where the CLEC hands the call off to the ISP.

The status quo with respect to VNXX ISP calls illustrates why the Commission should not try to create new intercarrier compensation rules in this proceeding. Today, as a result of Level 3's improper assignment of telephone numbers, Qwest receives no revenue for originating or transporting interexchange calls to ISPs. As a result, Qwest's costs of carrying these calls goes uncompensated. Nevertheless, Level 3 proposes that these calls be recategorized so that Qwest would pay Level 3 for terminating these calls. That would add insult to injury and leave Qwest in the position of either bearing origination, transport and termination costs without compensation or passing the costs onto customers who did not place the dial-up calls at issue. What Level 3 proposes is unjust and unreasonable and should not even be considered outside the context of industry-wide changes to intercarrier compensation and retail rates.

In this proceeding, Qwest seeks to enforce the existing rules. Level 3 seeks to change them. For the reasons that follow, Qwest's proposed contract language should be adopted.

## ARGUMENT

### I. QWEST'S PROPOSED CONTRACT LANGUAGE ON ISSUE 1 REFLECTS APPLICABLE LAW AND SHOULD BE ADOPTED (ISSUES 1A, 1B, 1D, 1F, 1G, 1H, AND 1J)

#### A. Interconnection Used By Level 3 To Deliver Interexchange Traffic To Qwest Is Governed by Section 251(g) And Qwest's Tariffs, Not by Section 251(c)(2) (Issue 1A) (Sections 7.1.1, 7.1.1.3, and 7.1.1.4)

[Level 3's position that the interconnection rules under Section 251(c)(2) apply to all traffic types is wrong. The interconnection rules under Section 251(c)(2) only apply when Level 3 is providing telephone exchange service or exchange access. When Level 3 receives exchange access from Qwest, as is the case when it delivers interexchange traffic to Qwest for termination, the terms of interconnection are governed by Qwest's interstate and intrastate tariffs, not by the ICA.]

Level 3's proposed changes to the agreed language for Issue 1A attempt to extend Section 251(c) and the provisions of the interconnection agreement ("ICA") to govern the delivery by Level 3 of interexchange traffic (referred to as switched access traffic in the ICA) to Qwest. However, interconnection for the purpose of delivering switched access traffic to Qwest for termination is governed by Qwest's interstate and intrastate tariffs pursuant to Section 251(g) of the Act. 47 U.S.C. § 251(g). The Commission does not have any authority to change the terms of Qwest's interstate tariffs and this is not a proper proceeding for the Commission to make changes to Qwest's intrastate tariffs. This does not mean that Level 3 may not combine traffic types on the same interconnection trunks. It means only that when traffic is combined, the rules applicable to the delivery of interexchange traffic—such as the requirement to use Feature Group D ("FGD") interconnection trunks—apply. Level 3 concedes this point when it states that it will agree to pay all applicable switched access rates when it delivers interexchange traffic to Qwest.

### B. OC Level Interconnection Should Be Implemented Only If Technically Feasible as Determined Pursuant to the ICA's Bona Fide Request ("BFR") Process (Issue 1B) (Section 7.1.2)

[Level 3 has no basis to object to the BFR process for OC-level interconnection given that Level 3 agreed to the terms of Section 17 of the Agreement that describe when the BFR process applies.]

Issue 1B is in dispute because Level 3 now, for the first time, objects to being required to follow the bona fide request ("BFR") process for OC-3 and higher speed optical interconnection. (Level 3 Opening Br., p. 45.) Yet Level 3 agreed to use the BFR process in the contract that it filed with its petition. Specifically, in Section 17.1 of the ICA, Level 3 agreed that:

> Any request for interconnection … or ancillary service that is not already available as described in other sections of this Agreement, including but not limited to Exhibit F or any other interconnection agreement, Tariff *or otherwise defined by Qwest as a product or service* shall be treated as a Bona Fide Request (BFR). (Level 3 Petition, Appendix C, p. 292 (emphasis added).)

Qwest does not presently offer OCn-level interconnection, a point Level 3 does not dispute. (Qwest/23, Easton/18.) Thus, to obtain OC-3 or higher speed interconnection, Level 3 is required to follow the BFR process. Level 3's contract addition is ambiguous on this point because it calls for the parties *to negotiate*, as one of four possibilities, "interconnection facilities via DS-1, DS-3, OC-3 and/or higher speed optical connections," but does not expressly denounce use of the BFR process as the framework for negotiation. Contrary to Level 3's assertion, Qwest's language does not restrict Level 3 to interconnection "only through a Qwest provided facility." To the extent that Level 3 has a right to high-speed interconnection facilities (a point Qwest does not concede), the BFR process does not limit that right.

### C. Level 3 Is Not Entitled To The Unlimited Right To TELRIC-Priced Transport (Issue 1D) (Section 7.2.2.1.2.2

[Level 3 has never had the right to purchase interconnection transport under Section 251(c)(2) for the exclusive purpose of carrying interexchange traffic. Further, the *Triennial Review Remand Order* ruled that Qwest has no obligation to provide unbundled entrance facilities, and Qwest's obligation to provide unbundled DS1 and DS3 transport has been limited. Thus,

Level 3 does not, as its language suggests, have the unfettered right to purchase TELRIC-priced transport.]

Issue 1D concerns Level 3's erroneous claim that it is entitled under all circumstances to transport at TELRIC pricing when it chooses "to interconnect with Qwest via Qwest-ordered facilities" or "to establish a POI." (Level 3 Opening Br., p. 46.) Level 3 has never had the right to purchase interconnection under Section 251(c)(2) that is used exclusively to carry interexchange traffic, as is the case with Level 3's operations in Oregon.[1] Moreover, in the *Triennial Review Remand Order*, the FCC reaffirmed its decision in the *Triennial Review Order* that ILECs are no longer required to provide unbundled transport for use as entrance facilities. The FCC also limited the circumstances in which Qwest is required to provide unbundled DS1 and DS3 transport.[2] In short, Level 3's proposed addition to Section 7.2.2.1.2.2 that appears to allow Level 3 to purchase transport at TELRIC rates without limitation is unlawful.

### D. Level 3 Failed to Address Issues 1F through 1J (Sections 7.2.2.9.6, 7.1.1.4, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, and 7.3.2.2.1)

Level 3's Brief did not address the tandem exhaust issue (Issue 1F), the relative use factor ("RUF") issues (Issues 1A, 1G and 1H), or the non-recurring charge issue (Issue 1J), discussed in Qwest's Opening Brief. (Qwest Opening Br., pp. 5-10.) Level 3 should not be permitted to make its arguments for the first time in its reply brief.

[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 190-91 (August 8, 1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999).

[2] Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*, 20 F.C.C. Rcd. 2533, ¶ 5 (2005), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

## II. IF ALL TRAFFIC TYPES ARE TO BE COMBINED ON THE SAME INTERCONNECTION TRUNKS, IT SHOULD BE DONE ON FGD INTERCONNECTION TRUNKS (ISSUES 2A AND 2B) (SECTIONS 7.2.2.9.3.1, 7.2.2.9.3.1.1, 7.2.2.9.3.2, AND 7.2.2.9.3.2.1)

[Level 3's arguments for combining all traffic types on LIS trunks are based on false premises. Qwest is not insisting that Level 3 create separate trunks groups. Rather, Qwest proposes to combine all traffic types on FGD interconnection trunks. Level 3 does not have the right to send interexchange traffic to Qwest over LIS trunks that lack the capability to properly record such traffic. Moreover, the fact that Level 3 may have successfully purchased concessions from other RBOCs to allow Level 3 to deliver such traffic over LIS trunks is not reason to require Qwest to do so, especially when Level 3 is unwilling to make appropriate concessions to Qwest. Finally, none of Level 3's solutions to problems that result from sending interexchange traffic over LIS trunks are workable.]

Level 3 bases its entire argument concerning Issue 2 on a series of false premises. The first false premise is that Qwest is attempting to require Level 3 to segregate different types of traffic on separate interconnection trunk groups. In fact, Qwest's proposed Section 7.2.2.9.3.2 clearly allows Level 3 to combine all traffic types on FGD interconnection trunks. It provides:

> CLEC may combine originating Exchange Service (EAS/Local) traffic, ISP-Bound Traffic, IntraLATA LEC Toll, VoIP Traffic and Switched Access Feature Group D traffic including Jointly Provided Switched Access traffic, on the same Feature Group D trunk group. (Issues Matrix, p. 23.)

Level 3 has never disputed that this provision encompasses all of the traffic types to be exchanged between Level 3 and Qwest. In its Opening Brief, Level 3 claims that Qwest's proposal will cost Level 3 millions of dollars. (Level 3 Br., p. 41.) However, the proposal that Level 3 is referring to is not Qwest's proposal. It is a proposal Level 3 has falsely attributed to Qwest (*i.e.*, that Qwest requires traffic to be segregated on separate interconnection trunks).

Level 3's argument for combining traffic on the same interconnection trunks is efficiency. However, if efficiency is truly what Level 3 is seeking, FGD interconnection trunks are clearly superior to LIS trunks. If FGD trunks are used, Level 3 can send all traffic through Qwest and does not have to send traffic destined for independent companies and CLECs over separate trunks. However, if LIS trunks are used, Level 3 acknowledges that it will have to send

traffic destined for independent companies and CLECs on separate trunks. Thus, maximum efficiency—Level 3's purported goal—is achieved with FGD trunks, not LIS trunks.

Level 3 has no legitimate basis for objecting to the use of FGD interconnection trunks and insisting on the use of LIS trunks. The difference between FGD interconnection trunks and LIS trunks is software in the switch. (Wilson, 8/29/06 Tr. 156-57.) FGD interconnection trunks have the capability to properly record switched access traffic, while LIS trunks do not. Thus, the only possible objection that Level 3 can have to FGD interconnection trunks is the recording capability that goes with those trunks. Simply stated, Level 3 seeks to deny Qwest the independent ability to measure and record traffic delivered to Qwest by Level 3.

It is quite apparent from the positions that Level 3 is taking in this proceeding that FGD interconnection trunks are necessary. Qwest and Level 3 have fundamental disagreements as to the applicability of access charges. Level 3, for example, asserts without support that all VoIP traffic is exempt from access charges. (Greene, 8/29/06 Tr. 44-48.) Given the parties' differences, it is disingenuous for Level 3 to assert that it will record the traffic exchanged and supply appropriate records to Qwest. Level 3's arguments that access charges do not apply to various traffic types demonstrates that Level 3 should not be trusted to provide the proper information that Qwest requires to properly rate and bill for calls in accordance with the applicable rules.

The second false premise is Level 3's argument that Qwest has a duty under Section 251(c) to configure its LIS trunks to handle switched access traffic. However, the FCC has interpreted Section 251(c) to govern only interconnection used by the CLEC to provide exchange access, not to receive exchange access. (See Qwest Opening Br., pp. 2-4.) Significantly, Level 3 witness Greene testified at hearing that the other RBOCs configured their LIS trunks the same way Qwest did, a clear indication that the other RBOCs share Qwest's view of what Section

251(c) requires. (Greene 8/29/06 Tr. 122-23.) In short, Level 3 has no rights under Section 251(c)(2) or the FCC rules implementing it (47 C.F.R. § 51.305) to deliver interexchange traffic to Qwest for termination.[3]

Level 3's third false premise is its reliance on the agreements with the other RBOCs. Those agreements are predicated on a set of circumstances that do not exist here. For example, in this case, Level 3 continues to seek compensation on ISP-bound traffic at the rate of $.0007 per minute-of-use ("MOU"). In the agreements with the other RBOCs, Level 3 agreed to reduce the rate it charged for ISP-bound traffic and/or capped the total number of ISP-bound minutes for which there would be a charge. (Qwest/23, Easton/ 43-44; Qwest/25, § 7.2.)[4] In this case, Level 3 is asking the Commission to impose upon Qwest the benefits to Level 3 of the RBOC agreements without imposing any concessions upon Level 3. That is a patently unreasonable proposal.

The agreements with the other RBOCs were also predicated on the assumption that only a small amount of traffic would be switched access traffic. At the beginning of this case, Level 3 claimed that there would be only a small amount of switched access traffic. (Level 3/500, Greene (DuCloo)/15.) However, during this proceeding, Level 3 has changed its tune and is now seeking to significantly increase the volume of interexchange traffic that it delivers to Qwest. (Greene 8/29/06 Tr. 102). Its acquisition of Wiltel, the fifth-largest purchaser of switched access from Qwest, evidences Level 3's intentions. (Wilson, 8/29/06 Tr. 158.) Thus, Level 3's change

[3] Where Level 3 provides exchange access, as is the case with jointly-provided switched access, Qwest's proposed contract language allows the traffic to be delivered over LIS trunks. See Qwest Proposed Section 7.2.2.9.3.1. (Issues Matrix, p. 21.)

[4] At hearing, Level 3 claimed that it made certain concessions so that it did not have to build out its network. (Greene 8/29/06 Tr. 72.) This claim is obviously false. There was no build-out requirement in the absence of the agreements. Indeed, the agreements create, rather than eliminate, requirements for Level 3 to establish POIs.

in plans calls into question what the other RBOCs would have agreed to had they known Level 3's intentions.

In its Opening Brief, Level 3 recognizes the weakness of its objection to FGD interconnection trunks and argues that Qwest should, at its own expense, convert the existing LIS trunks to FGD trunks. (Level 3 Br., pp. 40-41.) Level 3 concedes that this could be done and that it would not cause any material problems for Level 3. However, Level 3 is not entitled to free FGD interconnection. All other carriers who seek to send switched access traffic to Qwest pay both the nonrecurring charges to create FGD interconnection trunks and the tariffed recurring charges for FGD interconnection. (Easton 8/30/06 Tr. 104-05.) This is true even when they are exchanging local traffic over those trunks.

Finally, Level 3 argues (1) that it "can provide CDRs to Qwest covering the traffic the parties exchange" and (2) that it "has agreed not to send toll traffic that does not terminate to Qwest end users or UNE/resale customers to Qwest end office switches." (Level 3 Br., p. 42.) The first of these arguments fails because Level 3's contract language contains no requirement that it provide these records and, even if it did, Level 3 would dispute that such records need to be provided for long distance VoIP traffic. Level 3's second argument fails because there is no way that Level 3 can avoid sending traffic to Qwest destined for QPP™ customers, since these customers are served by Qwest's switches. (Qwest/32, Linse/24). Furthermore, without the use of FGD interconnection trunks, there is no way for Qwest to enforce Level 3's promise not to route calls destined for customers of other carriers.

The Iowa and Arizona commissions (the only commissions in Qwest states that have addressed this issue) both concluded that FGD interconnection trunks are necessary. This Commission should follow their lead and similarly require the use of FGD interconnection trunks if all traffic types are to be combined on the same interconnection trunks.

## III. ISSUE 3 (SUB-ISSUES 3A, 3B, AND 3C): QWEST'S LANGUAGE ON COMPENSATION ISSUES RELATED TO ISP VNXX TRAFFIC IS CONSISTENT WITH OREGON AND FEDERAL LAW, WHILE LEVEL 3'S LANGUAGE IS COMPLETELY INCONSISTENT WITH THESE AUTHORITIES

[Level 3's claim that ISP calls cannot be rated pursuant to Oregon's call rating rules is disingenuous. The *ISP Remand Order*, Commission decisions, and unanimous decisions from four federal circuit courts hold that ISP calls are rated based upon the *location* of the ISP customers of the CLEC. Specifically, recent Ninth Circuit authority (the *Peevey* decision) holds that the proper end-point for rating an ISP call is picked up by the ISP. Level 3's unsupported claim that a POI should be a rating point is merely a clever, but transparent, attempt to redefine the traffic subject to compensation under the *ISP Remand Order*, and would require that the law governing call rating be ignored by the Commission. Level 3's claim that Oregon call rating rules should be ignored because ISP traffic is interstate likewise ignores governing law, which holds that states continue to establish local calling areas. Level 3 mischaracterizes the *Peevey* case as requiring that ISP traffic be rated as though all traffic is local to the calling party. In fact, *Peevey* does nothing to undercut the principle that it is states that establish call rating rules. Oregon call rating rules, which are different from those in California that were the subject of the *Peevey* case, mandate that the location of the ISP is the relevant end point of an ISP call. Level 3 mischaracterizes the Arizona order, which is unresolved and which, in any event, does not purport to establish a final ruling on VNXX in that state. Level 3 also mischaracterizes QCC's Wholesale Dial Service, as well as the regulatory scheme under which QCC operates. In particular, Level 3 studiously ignores the critical fact that QCC cannot seek terminating compensation. Level 3 has chosen to operate as a CLEC and is therefore subject to the rules that govern CLECs—under those rules, it is not entitled to terminating compensation for VNXX traffic. Level 3's claim that its Oregon traffic is not VNXX is blatantly inconsistent with several recent rulings of the Commission. Finally, Level 3 ignores cost causation principles and the policy underpinnings of the compensation regime established in the *ISP Remand Order*. If accepted, Level 3's proposal would allow the cost causer to be free of economic responsibility for the costs imposed on Qwest, while requiring Qwest to bear costs that it did not cause.]

In its Opening Brief, Level 3 does not address specific ICA language on the VNXX issue. Instead, Level 3 makes general arguments to the effect that Level 3 should be exempt from the rules that govern the rest of the industry and that Level 3 is entitled to terminating compensation at $.0007 per MOU for virtually all Oregon ISP traffic, a position Level 3 incongruously characterizes as a compromise.[5] In fact, Level 3's arguments are inconsistent with governing Oregon and federal law and are a disguised attempt to validate its use of VNXX.

[5] Level 3's characterization of its proposal as a "compromise" brings whole new meaning to that term. Level 3's "compromise" would, by Level 3's own admission, result in nearly 100 percent of its Oregon traffic being

### A. The Oregon Commission And Several Federal Circuit Courts Have Ruled That The *ISP Remand Order* Prescribes Compensation Only for ISP Traffic Delivered To An ISP Located In The Same LCA As The Caller

Level 3 contends that ISP traffic has "no normal end point," and claims that it is "neither truly local, nor quite long distance." (Level 3 Br., p. 3; *see also id.*, pp. 25-30.)[6] From this premise, Level 3 makes two erroneous arguments. First, Level 3 incorrectly asserts that there can be no intermediate "termination" point for compensation purposes (such as an ISP server or modem or the point where the traffic is handed off to the ISP). Second, Level 3 then leaps to the irrational conclusion that the POI should be used as the relevant rating point. (*Id.*, p. 27.)

Level 3's premise and the arguments it makes based on that premise are based on a misreading of the FCC's *ISP Remand Order*[7] and a disregard of Commission[8] and federal court decisions that have concluded that the compensation regime of the *ISP Remand Order* applies only when a CLEC *delivers* calls *to an ISP* physically located in the same LCA as the calling party. The FCC did not, in the *ISP Remand Order*, prescribe terminating compensation for the delivery of ISP calls based on the location of websites, nor is there anything in the order to suggest that the FCC believes a POI is a relevant location for call rating purposes for wireline traffic. Instead, the FCC defined the issue as "whether reciprocal compensation obligations

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subject to terminating compensation. Under Level 3's theory, only a tiny amount of traffic from a few remote locations would be considered to be VNXX traffic. (Ex. Level 3/703.)

[6] Later, Level 3 argues that "it makes no sense to try to define either a specific 'customer' to whom the call is being placed or a specific places where the call 'ends.'" (Level 3 Br., p. 25.) This conclusion has no basis. Both Oregon and federal law are absolutely clear that for ISP calls, there is a specific customer (the ISP), and that identifying the ISP's specific location for call rating purposes not only makes sense, it must be done in order to apply Oregon call rating rules.

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

[8] The Commission, in three dockets, has explicitly concluded that the scope of the *ISP Remand Order* does not include VNXX-routed ISP traffic. ALJ Decision, docket IC 12 (August 16, 2005), pp. 9-12, *aff'd*, Order No. 06-037 (January 30, 2006), pp. 3, 5; Order, docket IC 9 (November 18, 2005), p. 8; Arbitrator's Decision, docket ARB 671 (February 2, 2006), pp. 12-15, *aff'd with modifications*, Order No. 06-190 (April 19, 2006).

apply *to the delivery of calls* from one LEC's end-user customer *to an ISP in the same local calling area that is served by a competing LEC*." *ISP Remand Order*, ¶13. (Emphasis added.) As the FCC stated, "[t]his Order, therefore, again focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to deliver traffic *to ISPs*." *Id.*, ¶ 9; *see also id.*, ¶¶ 2, 7, 66. (Emphasis added.)

It is undisputed that Level 3's customers are ISPs and that calls are delivered to those ISPs at specific, identifiable locations. Level 3 conceded at hearing that it knows where it hands calls off to its ISP customers.[9] Moreover, the FCC clearly concluded that ISP traffic is *delivered* to *ISP equipment*:[10]

> [A]n ISP's end-user customers typically *access the Internet* through *an ISP Server* located in the same local calling area, and . . . the end users pay the local exchange carrier for connections to the local ISP. Customers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to the local ISP. They also generally pay the ISP a flat monthly fee for access to the Internet. ISPs then combine "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *ISP Remand Order*, ¶ 10. (Citations omitted.)

Under call rating rules that have applied in Oregon for decades, calls are classified based on the *location* of the parties to a call. Here the parties to the call are the caller and the ISP from

[9] Level 3 knows where it hands off traffic to its ISP customers; indeed, Mr. Greene testified that Level 3 hands off traffic to AOL in Virginia, to Microsoft (presumably MSN) in Redmond, Washington, and to Earthlink in Chicago. (Greene, 8/29/06 Tr. 59-60.)

[10] The *ISP Remand Order* is replete with references to "delivery" of traffic to ISPs. See e.*g.*, *ISP Remand Order*, ¶ 1 ("In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic *delivered* to Internet service providers"); *id.*, ¶ 2 ("The regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because ISPs typically generate large volumes of traffic that is virtually all one-way -- that is, *delivered to the ISP*"); *id.*, ¶ 4 ("it is incumbent upon us to establish an appropriate cost recovery mechanism for *delivery* of this traffic"); *id.*, ¶ 5 ("We believe that this situation is particularly acute in the case of carriers *delivering traffic to ISPs* because these customers generate extremely high traffic volumes that are entirely one-directional"); *id.*, ¶ 7 ("Specifically, we adopt a gradually declining cap on the amount that carriers may recover from other carriers for *delivering* ISP-bound traffic"); *id.*, ¶ 9 ("This Order, therefore, again focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to *deliver traffic to ISPs*"). (Emphasis added.)

whom the caller has purchased dial-up Internet access service.[11] Thus, it is a simple matter to determine whether a call qualifies for compensation under the *ISP Remand Order*. This is governing federal law in the Ninth Circuit. In the *Peevey* decision, the CLEC claimed that it could not determine an end point for ISP traffic. The Ninth Circuit rejected that argument, concluding that a CLEC has both the ability and the obligation to know where its traffic "terminates":

> The CPUC's conclusion that Pac-West is able to distinguish VNXX traffic from local traffic that is first transported long-distance to a Pac-West switch and then back to the original calling area rests on statements by Pac-West witnesses that "Pac-West knows where its network ends" and the ***call is picked up by the customer***. *Since that is the end of Pac-West's responsibility for the call, it should also be the relevant end point of the call for purposes of determining whether the call is local or VNXX*." 462 F.3d at 1159. (Emphasis added.)

Thus, for purposes of determining whether traffic is local or VNXX, the Ninth Circuit holds that the relevant point is where the traffic is handed off by the CLEC *to its ISP customer*. This, of course, is an identifiable location, and it is not at the POI.[12] Thus, if the ISP call is delivered to an ISP located in the caller's LCA, it is compensable. Otherwise, it is not.

The Commission's conclusion that the *ISP Remand Order* prescribes compensation only for calls delivered by Level 3 to an ISP located in the same LCA as the calling party has been confirmed by every United States Court of Appeal to consider the issue. *WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002) was the ruling on the initial appeal of the *ISP Remand Order*. There, that court stated that the holding of the *ISP Remand Order* applies only to "*calls*

[11] The telephone number that the end-user customer dials to gain access to the Internet is assigned to the *ISP* and not to the websites the end-user seeks to access.

[12] Prior to *Peevey*, the holdings of this Commission's *GTE/ELI* decision (Order No. 99-218, docket ARB 91 (March 17, 1999), p. 9) and the federal court's *Universal* decision were that the ISP modems that answer the call are the relevant end point for intercarrier compensation purposes. In this case, the modem functionality is performed by Level 3 in Seattle for all traffic originating in Oregon. Thus, for purposes of this case, under no circumstances would Level 3's ISP traffic qualify as traffic delivered to an ISP in the same LCA as the caller. Significantly, the law both before and after *Peevey* does not support Level 3's theory that a POI should be used as an end point for purposes of applying the *ISP Remand Order's* compensation regime.

*made* ***to internet service providers ("ISPs")*** *located within the caller's local calling area*." *Id.*, at 430. (Emphasis added.) It is significant that the D.C. Circuit described the local traffic subject to the *ISP Remand Order* as "calls made *to . . . ISPs*," and not as calls to POIs or to websites.

As discussed on pages 18-19 of Qwest's Opening Brief, four more federal circuit court decisions this year have reached the same conclusion. These cases unanimously conclude that it is location of the ISP that matters. In *Global NAPs v. Verizon New England,* 444 F.3d 59 (1st Cir. 2006) ("*Global NAPs I*"), the First Circuit, referring to the *ISP Remand Order*, noted that the FCC characterized the issue before it as "'whether reciprocal compensation obligations apply to the *delivery of calls* from one LEC's end-user customer *to an ISP* in the same local calling area.'" *Id.* at 73, quoting *ISP Remand Order*, ¶ 13. (Emphasis added.) In *Global NAPs v. Verizon New England,* 454 F.3d 91 (2nd Cir. 2006) ("*Global NAPs II*"), the Second Circuit stated that "[t]he ultimate conclusion of the 2001 Remand Order was that *ISP-bound traffic within a single calling area* is not subject to reciprocal compensation." *Id.* at 99. (Emphasis in original.) In *In re Core Communications,* 455 F.3d 267 (D.C. Cir. 2006) ("*Core*"), the D.C. Circuit stated that in the *ISP Remand Order* the FCC "found that calls *made* ***to ISPs*** *located within the caller's local calling area* fall within those enumerated categories – specifically, that they involve 'information access.'" *Id.* at 271. (Emphasis added.) Finally, *Peevey* stated that the rate caps in the *ISP Remand Order* "are intended to substitute for the reciprocal compensation that would otherwise be due to CLECs for terminating *local* ISP-bound traffic. They do not affect the collection of charges by ILECs for originating *interexchange* ISP-bound traffic." *Peevey* also held that the relevant end-point for determining if traffic is VNXX determination is where "the call is picked up by the customer." *Id.* at 1159. (Emphasis added.) The location of the customer (the ISP), of course, is an identifiable location, and it is not at the POI, as Level 3 witness Wilson acknowledges. (Wilson 8-29-06 Tr. 147.)

Level 3 proposes that calls to ISPs be treated as local for purposes of the *ISP Remand Order* if they are passed through a POI between Qwest and Level 3 that is in the same LCA as the calling party. This is nothing more than a clever attempt to redefine the types of traffic that are compensable under the *ISP Remand Order*. To make this argument, Level 3 simply disregards the many Oregon Commission decisions to the contrary and ignores the federal circuit court decisions discussed above. Level 3's argument also requires the Commission to ignore Level 3's own testimony (1) that a POI "is the location where two carriers connect their networks for the purpose of exchanging traffic" (Level 3/800, Wilson/4) and (2) that a POI is not a customer location. (Wilson, 8-29-06 Tr. 147.)[13]

In other states, Level 3 has attempted to support its POI theory by citing two sentences from paragraph 1044 of the *Local Competition Order*, which address the origination point of wireless traffic:

> For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

This paragraph actually undermines Level 3's position for three reasons. First, paragraph 1044 is expressly limited to *wireless* traffic, and the FCC has not authorized such a rating arrangement for any type of wireline traffic. Second, the reason for paragraph 1044 is that the precise location of the wireless caller is not known, a circumstance that does not exist in this case. Level 3 clearly knows where it hands off its traffic to its ISP customers. Finally, if the POI is determined to be the location of the ISP, then Qwest would be handing traffic off directly to the

[13] In its Opening Brief, Qwest pointed out a series of other flaws, both legal and factual, in Level 3's POI theory. (Qwest Opening Br., pp. 14-22.)

ISP. Under such a circumstance, Qwest would be the carrier delivering the traffic to the ISP and Qwest, not Level 3, would be entitled to compensation under the *ISP Remand Order*.

### B. Level 3 Misstates The Commission's Authority Over Call Rating

Call rating in Oregon is based on the physical location of the parties to the call. (Qwest Opening Br., pp. 14-17.) Without citing any authority, Level 3 asserts that Oregon law should be disregarded because Level 3's ISP "[t]he service is interstate in nature so the Commission's policies regarding intrastate services don't really apply." (Level 3 Br., p. 30.) This argument, if true, would undermine the very conclusion that Level 3 attempts to rely upon it for. If the Commission does not have jurisdiction over ISP traffic because it is interstate, then it necessarily follows that Level 3's contract language must be rejected. That is so because Level 3 would then be requesting the Commission to prescribe intercarrier compensation for traffic over which Level 3, at the same time, claims is outside the Commission's jurisdiction. Level 3's argument thus creates a logical impossibility.

Furthermore, Level 3 once again ignores governing law. It is true that the FCC has held that ISP traffic is jurisdictionally interstate, but it does not follow that Oregon LCAs and call rating rules do not govern compensation for such traffic. Indeed, this precise issue was addressed in *Global NAPs II*. There, the CLEC argued that the FCC had preempted the states on all issues related to ISP traffic, including LCAs and rating rules. The Second Circuit, however, noted that the FCC, in the *Local Competition Order*, had concluded that state commissions have authority over call rating and LCAs.[14] The court then stated that, although many parts of the *Local Competition Order* had been superseded, there was nothing in the thousands of pages of later FCC orders upon which a credible argument could be made that the FCC had preempted states on LCAs and call rating. The court thus held that "the FCC has not disturbed the states'

[14] 454 F.3d at 98, *quoting Local Competition Order*, ¶ 549, and fn. 1824.

traditional authority to define local calling areas." 454 F.3d at 99. In other words, it is Oregon statutes, Commission rules, and Commission decisions that govern LCAs. Those authorities mandate that the physical location of the parties to a call govern the definition and classification of the traffic as local or interexchange.[15] Level 3's effort to ignore them should be rejected.

### C. Level 3 Mischaracterizes The *Peevey* Decision

Level 3 incorrectly asserts that in *Peevey*, the Ninth Circuit approved a "compromise approach," one element of which is that "ISP-bound traffic is rated as local to the end user." (Level 3 Br., p. 4; *see also id*., pp. 18-19.) Level 3's description and application of *Peevey* is contrary to the actual reasoning and holding of the Ninth Circuit's decision. In *Peevey*, the Ninth Circuit was reviewing a ruling of the California Commission that, under *California call rating rules*, calls would be rated based on their NXXs and not by customer location. 462 F.3d at 1148-49. But that is not a holding that California's call rating rules apply in other states. Nor is it a holding that the state law applicable for rating intrastate calls applies to interstate traffic. Indeed, *Peevey* holds that as a matter of federal law applicable to interstate traffic, the endpoint of a call to an ISP is determined by where the CLEC hands the call off to the ISP. *Id.* at 1159.

In *Peevey*, the Ninth Circuit did not even analyze whether the California Commission's application of California call rating rules was correct with respect to calls to ISPs exchanged pursuant to agreements entered into after the FCC's adoption of the *ISP Remand Order*. Indeed, the court's characterization of the California Commission's decision as "reasonable" was qualified by the statement that it is reasonable "within the meaning of the 1996 agreement," an agreement whose terms were not analyzed in the decision. As discussed above, it should come

[15] Level 3 also makes its "interstate" traffic argument in context of whether the Commission has the authority to ban VNXX. (Level 3 Br., p. 28 and fn. 91.) This argument likewise ignores the general principle stated in *Global NAPs II* that state commissions retain authority over LCAs. Even more to the point, Level 3's argument ignores the specific holding of *Global NAPs II* that the Vermont board could ban VNXX in Vermont, even though the ISP traffic being banned has been declared to be interstate traffic. 454 F.3d at 101 ("The Board . . . did not violate any federal rules . . . when it prohibited Global from using virtual NXX in Vermont").

as no surprise that the court deferred to the California Commission on that point, since defining LCAs is part of the ongoing authority of state commissions.

The *Peevey* court simply chose not to disturb the California Commission's application of California LCAs and call rating rules in the context of a 1996-vintage LCA. By the same token, *Peevey* would uphold Oregon's LCA and call rating determinations. Oregon call rating rules are clear that location of the parties to the call, and not NXXs, is the proper call rating method. (Qwest Opening Br., pp. 14-23.)

Further, it is clear from a review of other VNXX cases that the Oregon rules are far more typical than those in California. Indeed, in the vast majority of cases, state call rating rules are like those of Oregon. For example, in *Global NAPs I*, the First Circuit upheld a decision of the Massachusetts Commission that "VNXX calls will be rated as local or toll based on the *geographic end points of the call*." 444 F.3d at 66. (Emphasis added.) The New Hampshire Commission ruled that terminating compensation applies only to local calls. This conclusion, in turn, "leads ineluctably to a determination here that the parties did not intend reciprocal compensation to apply to calls that were *terminated to and ISP physically located outside the originating caller's local service area*."[16] The Colorado Commission ruled that the "calling party and the called party must both be physically located in the same local calling area for the call to be a local call subject for reciprocal compensation purposes."[17] In a Nebraska arbitration between AT&T and Qwest, AT&T proposed the call rating be done on the basis of NXXs and not customer locations. The Nebraska commission rejected this proposal because it would have "far reaching implications and unintended consequences by reclassifying a large number of

[16] Order, *Re New England Fiber Communications*, Nos. DT 99-081 and DT 99-085, 2003 N.H. PUC LEXIS 128, pp. *32-*33 (NH PUC 2003). (Emphasis added.)

[17] *In the Matter of Petition of Qwest Corp. for Arbitration of and Interconnection Agreement with AT&T of the Mountain States et al*, 2003 Colo. PUC LEXIS 1149, p. *45, fn. 52 (CO PUC 2003).

interexchange calls as local calls *in violation of state statutes and Commission rules*."[18] The Vermont Board ruled that "the determination of whether traffic is local or toll is based upon the physical termination points."[19] Many other similar cases could be cited.

Finally, as discussed in Qwest's Opening Brief, a recent recommended decision in Minnesota and the Ohio Commission's *Telcove* decision both explicitly reject the POI as a relevant rating point. (Qwest Opening Br., pp. 21-22.)

**D. Level 3 Mischaracterizes The Arizona Docket**

Level 3 likewise mischaracterizes the decision in Arizona, a decision that Level 3 does not attach to its Brief, but which Qwest attaches hereto as exhibit A Level 3 claims the Arizona Commission treated "all traffic Level 3 picks up . . . within the originating LCA" as "local" for compensation purposes. (Level 3 Br., pp. 18-19.) In fact, the Arizona said no such thing.

The Arizona Commission is one of only two commissions in Qwest's region that have interpreted the *ISP Remand Order* to apply to all ISP traffic regardless of where it originates or where it is delivered to the ISP.[20] The Arizona Commission reached its interpretation of the *ISP Remand Order* prior to the release of four of the five circuit court decisions cited in this brief. Thus, the fact that the Arizona commission required Qwest to pay $.0007 per minute of use ("MOU") on FX-like ISP traffic is meaningless. The Commission had already ruled incorrectly that Qwest was required to pay $.0007 on all ISP traffic.

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[18] Arbitrator's Recommended Decision, *In the Matter of the Petition of Qwest Corp. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha,* Docket No. C-3095, p. 18 (Neb. PSC, May 4, 2004). (Emphasis added.)

[19] Order, *Petition of Global NAPs, Inc. for Arbitration . . . With Verizon New England,* Docket No. 6742, 2002 VT PUC LEXIS 272 (VT PSB December 26, 2002).

[20] The Arizona Commission first reached this conclusion in its order in a complaint case between Pac-West and Qwest. Order, *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket Nos. T-01051B-05-0495 and T-03693A-05-0495, Decision No. 68820, pp. 8-11 (AZ Corp. Comm'n, June 29, 2006). It later reached the same conclusion in its order in a complaint case between Level 3 and Qwest. Order, *Level 3 Communications v. Qwest Corporation*, Docket Nos. T-01051B-05-0415 and T-03654A-05-0415, Decision No. 68855, p. 13 (AZ Corp. Comm'n, July 28, 2006).

The Arizona Commission's decisions are bad law.[21] This Commission, the Minnesota and Iowa commissions, and five circuit court of appeals decisions from four circuits, have all reached the conclusion that the *ISP Remand Order* only prescribes compensation for calls delivered to an ISP located in the LCA of the calling party. However, even the Arizona Commission has not done what Level 3 claims it did. The Arizona Commission ordered the parties to negotiate and develop an "interim" FX-like traffic proposal that would apply *only* while the Arizona Commission considers the whole VNXX issue in a generic docket (the Arizona decision does not, therefore, purport to be a permanent solution of any kind). Further, Level 3 fails to mention two other key facts: (1) the Arizona order bans the use of VNXX and (2) the parties have not been able to agree on the terms of the interim implementation plan.[22] As of the date of this brief, the Arizona ALJ was still considering how to proceed in the matter. In other words, the current situation in Arizona is ambiguous, unresolved, and, by its own terms, the Arizona order does not purport to provide permanent guidance on the issues in this docket.

### E. Level 3 Mischaracterizes QCC's Wholesale Dial Service

Level 3 asserts that QCC's Wholesale Dial service is discriminatory and that it somehow provides QCC with an inappropriate advantage. (Level 3 Br., pp 31-31.) This argument is obviously wrong since, if Level 3 chose to offer service in same way that QCC does, Level 3 would be entitled to do so on identical terms and conditions. (Qwest/37, Brotherson/8.) Thus, there is no basis in fact or law for Level 3 to claim discrimination.

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[21] The Washington Commission is the only other commission in Qwest's region that has interpreted the *ISP Remand Order* to apply to all ISP traffic. It, too, was rendered before four of the five circuit court decisions were issued.

[22] The portions of the Arizona order requiring the parties to negotiate an amendment related to "FX-like traffic" is addressed only in the Ordering provisions on page 82 of the order (attached as Exhibit A). This language was not in the ALJ's recommended decision, but was added as the result of an amendment made during the Commission's open meeting. As is readily evident from reviewing the language, it does not define "FX-like traffic" and it is clear the "FX-like traffic" language was not intended as a permanent resolution of VNXX issues in Arizona.

In any event, Level 3 mischaracterizes Wholesale Dial and, in so doing, fails to acknowledge the different regulatory construct under which QCC operates. Mr. Brotherson's testimony on this issue is undisputed. (Qwest/37, Brotherson/6-9; Brotherson, 8-30-06 Tr. 18-19, 26-34, 38.) In order to offer Wholesale Dial, QCC, Qwest's affiliate, purchases retail local exchange service in the originating LCA (which means that QCC pays to place and receive calls *within* that LCA) and retail private line transport from the originating exchange to one of QCC's NAS servers (which means that QCC pays for all transport *between* LCAs). Level 3 claims that, by paying TELRIC-priced LIS transport, it is doing the same thing. This is simply not true. Unlike QCC, Level 3 pays absolutely nothing to compensate Qwest for the costs Qwest incurs to originate calls to ISPs—specifically, the local loops, distribution facilities, and transport within the originating LCA. Moreover, LIS transport to a LCA is priced substantially lower than the retail private line rates that QCC pays.[23]

Moreover, QCC is not operating under an ICA. It provides its Wholesale Dial Product as an enhanced service provider ("ESP"), a status that gives it the right to be treated as an end user and to lawfully purchase service out of retail tariffs. *ISP Remand Order*, ¶ 11. Moreover, as an end user, QCC *is not* entitled to charge terminating compensation to the telecommunications carrier that delivers traffic to it. Qwest, therefore, is not granting some sort of nefarious preference to its affiliate.

Level 3 has chosen the benefits of being a CLEC (which include the right to interconnection under the Act, TELRIC pricing on certain local interconnection services, and the right to terminating compensation on *local* traffic). Having made that choice, it is bound to follow the rules applicable to telecommunications carriers rather than the rules applicable to end

[23] The prices for a PRI ($700 to $975 per month) plus retail private line ($380 plus $44 per mile for DS3 transport) (Qwest/22, Easton/4) are significantly higher than TELRIC-priced transport. Compare these rates to the LIS DTT rates in Exhibit A of the Qwest Oregon SGAT.

users. One of the rules is that it may not receive terminating compensation on traffic it carries as a CLEC that does not, as a matter of federal law, qualify as compensable traffic. In particular, Level 3 is not entitled to charge Qwest terminating compensation on ISP traffic that Level 3 delivers to ISPs located outside of the caller's local calling area.

### F. Level 3's Claim That Its Traffic Is Not VNXX Traffic Ignores Oregon Law And The Commission's VNXX Definition

In its Opening Brief, Level 3 makes the amazing claim that its traffic is not VNXX. (Level 3 Br., pp. 20-25.) Level 3's analysis of the historical oddities such as Division of Revenues and Judge Greene's creation of the LATA system is an irrelevant historical diversion. It ignores the large body of recent decisions by the Commission that defines VNXX and which, in Order No. 06-190 in docket ARB 671, bans the exchange of VNXX traffic. (See Qwest's Opening Br., pp. 14-30.) Qwest will not repeat its argument on these points other than to say that the Commission has adopted a clear definition of VNXX traffic applicable to LECs:

> "VNXX-routed ISP-Bound traffic" describes a situation wherein a CLEC, such as Level 3, obtains numbers for various locations within a state. Those numbers are assigned by the CLEC to *ISP customers even though the ISP has no physical presence (i.e., does not locate modem banks or server) within the local calling area ("LCA") associated with those telephone numbers. ISP-bound traffic directed to those numbers is routed to the CLEC's . . . POI and then delivered to the ISP's modem bank/server at a physical location in another LCA.* ALJ Decision, docket IC 12 (August 16, 2005), p. 3, *aff'd*, Order No. 06-037 (January 30, 2006). (Emphasis added.)[24]

It is preposterous, in the face of this definition, to suggest that Level 3's ISP traffic in Oregon is anything other than VNXX.

One other point bears mention. Level 3 devotes much of its brief to arguing that access charges should not apply to VNXX traffic. As Qwest noted in its Opening Brief, "Qwest is not seeking to collect access charges in this proceeding. Qwest asks only that the Commission not

[24] See Order No. 05-874, dockets IC 8 and 9 (July 26, 2005), citing with approval the federal district decision in *Qwest Corp. v. Universal Telecom*, 2004 WL 2958421, p. *14 (D. Or. 2004) ("*Universal*") ("VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs.").

reverse the compensation flow that should apply so as to require Qwest to pay rather than receive compensation." (Qwest Opening Br., p. 28.) The real issue in this docket is whether Level 3 may collect terminating compensation on interexchange ISP traffic. Federal law and Oregon law hold that Level 3 may not.

### G. Level 3 Ignores Cost Causation Principles, FCC-Articulated Policies Disfavoring Market Distortions And Arbitrage, And A Host Of Other Critical Issues

Level 3's Opening Brief makes no mention of the policy underpinnings of intercarrier compensation. Similarly, Level 3 presented no testimony to contradict Dr. Fitzsimmons' testimony as to how compensation for ISP traffic should work in a competitive market. As Dr. Fitzsimmons testified, the cost-causer for an ISP call is the dial-up customer. That customer acts as a customer of the ISP when it places a call to the ISP. The ISP, in turn, obtains a toll-free service from Level 3. Under sound economic theory, Level 3 should pay Qwest for costs that Qwest incurs and then charge the ISP such that the ISP can correctly price its service to the dial-up customers. As the Iowa Board recognized, the "concern with VNXX has always been that a CLEC like Level 3 would be using Qwest's network to carry interexchange calls for free; *any logical response to that concern would require some payment from Level 3 to Qwest*."[25]

Level 3 inappropriately seeks to reverse this compensation flow such that Qwest and ratepayers generally would bear the cost of providing service to dial-up customers served by ISP's on Level 3's network. As the FCC stated: "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access." *ISP Remand Order*, ¶ 87.

[25] *In re Level 3 Communications, LLC v. Qwest Corporation*, docket ARB-05-4, Order on Reconsideration, p. 40 (Iowa Util. Bd., July 19, 2006) (emphasis added), attached as Exhibit C to Qwest's Opening Brief.

## IV. VOIP ISSUES (DEFINITION OF VOIP (ISSUE 16), NEW ISSUE RELATED TO "PSTN-IP-PSTN TRAFFIC" DEFINITION); COMPENSATION FOR VOIP AND VOICE TRAFFIC (ISSUE 4) (SECTIONS 7.3.4.1 AND 7.3.4.2) (VOIP ASPECTS OF ISSUES 3A, 3B, AND 3C); QWEST ISSUE 1A (VOIP AUDIT AND CERTIFICATION REQUIREMENTS) (SECTIONS 7.1.1.1 AND 7.1.1.2)

[Level 3's suggestion that VoIP traffic also be subject to the POI theory that Level 3 advances for ISP traffic is subject to all the objections to the POI theory in the ISP traffic context, and should be rejected for VoIP for the same reasons. Furthermore, Level 3's proposal is completely inconsistent with the ESP Exemption. Level 3 inappropriately seeks far broader rights than are granted under the Exemption.]

Level 3 makes only one point on VoIP issues in its brief. It suggests that VoIP traffic should be treated just like ISP traffic—in other words, Level 3 wishes to apply the POI theory in reverse. For the same reasons that this theory is invalid for ISP traffic, it is equally invalid for VoIP traffic. Furthermore, it flies directly in the face of the FCC's mandate that ESPs be treated as though they were end users. (See Qwest Opening Br., pp. 37-41.) Level 3's proposal would violate the ESP Exemption and give Level 3 rights to which is not entitled. (See Qwest's entire discussion of VoIP in its Opening Br., pp. 31-41.) Both the Iowa and Arizona commissions have adopted Qwest's language on this issue. Furthermore, Qwest's position is actually more generous to Level 3 than the position the other RBOCs have taken. All three RBOCs have taken the position that VoIP traffic is just like any other traffic, and that switched access charges apply when the calls are between different local calling areas. (See *e.g.*, Ex. Level 3/713, pp. 11-12, ¶ 3.2 (Verizon); Qwest/26, p. 10, ¶¶ 7.3 and 7.4 (SBC).)

Level 3 did not address Sections 7.1.1.1 and 7.1.1.2 related to VoIP certification and audits. Qwest, therefore, stands by its discussion of those issues in its Opening Brief. (Qwest Opening Brief, pp. 41-42.)

For the reasons set forth in its Opening Brief, the Commission should adopt Qwest's language on VoIP issues.

## V. LEVEL 3'S PROPOSED SYSTEM OF JURISDICTIONAL ALLOCATION FACTORS IS PLAGUED WITH PROBLEMS AND SHOULD BE REJECTED (ISSUE 18) (SECTIONS 7.3.9, 7.3.9.1, 7.3.9.1.1, 7.3.9.1.2, 9.3.9.1.3, 7.3.9.2, 7.3.9.2.1, 7.3.9.2.1.1. 7.3.9.3, 7.3.9.3.1, 7.3.9.4, 7.3.9.4.1, 7.3.9.5, 7.3.9.5.1, 7.3.9.5.2, 7.3.9.6)

[Level 3's "factor" proposal does not correctly rate traffic and does not match the factors system created by BellSouth or the agreements with the other RBOCs. Level 3's factor proposal does not solve the problems that are created if switched access traffic is sent over LIS trunks.]

Level 3 acknowledges that its reason for using "factors" is to address the inability of LIS trunks to properly record and bill switched access traffics. However, it is not enough for Level 3 to defend the use of factors generically. Level 3 has to demonstrate that its system of factors will correctly rate traffic. Level 3 has not done so. In fact, Level 3's factor proposal does not correctly rate traffic. There is no factor for intrastate switched access traffic, and the factor for VoIP traffic does not separate out interexchange VoIP traffic from local VoIP traffic in accordance with proper application of the ESP Exemption.

Level 3 relies primarily upon the agreements with other RBOCs to support the use of factors. However, Level 3's specific proposal does not match any of the proposals used with the other carriers. For example, the BellSouth agreement does not use a separate factor for VoIP traffic. According to the BellSouth agreement:

> There are three basic jurisdictions related to BellSouth Access and Local Interconnection Services. These are the Interstate, Intrastate and the Local Jurisdiction. The jurisdiction is based upon the physical locations of the origination and termination points of the communication. (Qwest/25, pp. 505-06, ¶ 2.0.)

Level 3's proposed factor system is clearly structured only to implement Level 3's view of what the intercarrier compensation rules should be. It clearly does not address the problems that are created when switched access traffic is sent over LIS trunks, and will only make the disputes concerning appropriate intercarrier compensation more intractable.

## VI. LEVEL 3'S PROPOSED MODIFICATIONS TO SECTION 7.3.8 ARE NOT APPROPRIATE AND SHOULD BE REJECTED (ISSUE 20) (SECTION 7.3.8)

["IP origination" is not a technical limitation that prevents population of the charge number parameter. Level 3's proposed changes to Section 7.3.8 inappropriately attempt to deprive Qwest of information necessary to properly rate and bill VoIP traffic based on the location of the VoIP provider POP.]

The dispute with respect to Issue 20 concerns Level 3's attempt to insert language in Section 7.3.8 stating that "IP origination" is a technical limitation to providing valid origination information.[26] Qwest's billing systems use the charge number parameter as originating information for billing purposes. (Qwest/32, Linse/36.) "IP origination" is not a technical limitation that prevents population of the charge number parameter. (*Id.*, pp. 36-37.) Level 3's proposed change to Section 7.3.8 should be rejected because it seeks to deprive Qwest's billing systems of the information necessary to properly rate VoIP traffic based on the location of the VoIP provider POP. The offers at page 47 of Level 3's Opening Brief to provide records showing that traffic is "IP-originated" and to route certain traffic away from Qwest simply do not address this issue.

[26] Level 3 also seeks to add language stating that VoIP traffic is "lawfully originated without CPN." However, FCC regulations appear to require the population of calling party number where a carrier uses SS7 for signaling and VoIP is not listed as an exception. (*See* 47 C.F.R. § 64.1601.) At hearing, Level 3 witness Greene admitted that Level 3's media gateway communicates with Qwest's switches using SS7 signaling. (Greene, 8/29/06 Tr. 30, 90.)

## VII. THE COMMISSION SHOULD REJECT LEVEL 3'S PROPOSED LANGUAGE RELATING TO QUAD LINKS (NEW ISSUE) (SECTIONS 7.2.2.6.1.1, 7.2.2.6.1.2, AND 7.2.2.6.1.3)

[Level 3's proposed quad links language is a new issue not raised in Level 3's petition or its response to the petition. It also does more than simply allow the use of a single set of quad links. Level 3's language should be rejected.]

In its Opening Brief, Level 3's sole justification for its new quad links language is its claim that only a single set of quad links is required. Qwest is on record that the language the parties agreed to use (Section 7.2.2.6.1) does not require more than a single set of quad links. (Qwest/32, Linse/41; Qwest/38, Linse/10.) Accordingly, there is no justification for Level 3's new proposed sections 7.2.2.6.1.1 through 7.2.2.6.1.3. These sections address matters other than the single set of quad links issue (which was not raised in Level 3's petition) and contradict the language the parties agreed to. (Qwest/32, Linse/41-43.)

## CONCLUSION

For the reasons set forth herein, Qwest respectfully requests that the Commission adopt Qwest's proposed language on all contested issues.

DATED: October 30, 2006

Respectfully submitted,


Alex M. Duarte, OSB No. 02045
Qwest
421 SW Oak Street, Room 810
Portland, Oregon 97204
503-242-5623
503-242-8589 (facsimile)
Alex.Duarte@qwest.com

Thomas M. Dethlefs, Colo. Bar No. 31773
Qwest
1801 California, 10th Floor
Denver, Colorado 80202
(303) 383-6646
303-298-8197 (facsimile)
Thomas.dethlefs@qwest.com
*Admitted Pro Hac Vice*

Ted D. Smith, Utah Bar No. 3017
STOEL RIVES LLP
201 South Main St. Suite 1100
Salt Lake City, UT 84111
801-578-6961
801-578-6999 (facsimile
tsmith@stoel.com
*Admitted Pro Hac Vice*

Attorneys for Qwest Corporation

EXHIBIT A

0000056627

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission
DOCKETED
JUN 29 2006
DOCKETED BY

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-03654A-05-0350

DOCKET NO. T-01051B-05-0350

DECISION NO. 68817

**OPINION AND ORDER**

| | |
|---|---|
| DATE OF ARBITRATION: | September 8 & 9, 2005 (Phoenix)<br>September 16, 2005 (Tucson) |
| PLACE OF ARBITRATION: | Phoenix, Arizona<br>Tucson, Arizona |
| ARBITRATOR: | Jane L. Rodda |
| APPEARANCES: | Mr. Thomas M. Dethlefs, Senior Attorney, Qwest Legal Department and Mr. Ted Smith, STOEL RIVES, on behalf of Qwest Corporation; and<br><br>Mr. Erik Cecil and Mr. Richard Thayer, Regulatory Counsel, Level 3 Communications, LLC, and Mr. Thomas Campbell, LEWIS AND ROCA, on behalf of Level 3 Communications. |

**BY THE COMMISSION:**

On May 13, 2005, Level 3 Communications, LLC ("Level 3") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration of certain terms, conditions and prices for interconnection and related arrangements with the Qwest Corporation ("Qwest") ("Petition") pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 ("Act" or "1996 Act").

On June 7, 2005, Qwest filed a Response to the Petition.

By Procedural Order dated June 16, 2005, the arbitration was set to commence on September

8, 2005, at the Commission's office in Phoenix, Arizona.

The arbitration convened as scheduled on September 8, 2005. Following two days of Arbitration, the proceeding was continued on September 16, 2005, at the Commission's offices in Tucson, Arizona. The parties filed Opening post-arbitration Briefs on November 18, 2005, and Reply Briefs on December 2, 2005. The parties included a Joint Arizona Matrix of issues ("Matrix") with their Opening Briefs.

On December 19, 2005, Qwest filed Supplemental Authority: Order of Iowa Department of Commerce Utilities Board Arbitration Order no. ARB-05-4, *In Re Level 3 Communications LLC v. Qwest Corporation*, issued December 16, 2005 ("*Iowa Arbitration Order*"). On December 20, 2005, Qwest filed a Notice of Errata that contained a complete copy of the *Iowa Arbitration Order*.

On January 23, 2006, Qwest filed its Second Filing of Supplement Authority: State of Minnesota Office of Administrative Hearing for the Public Utilities Recommendation on Motions for Summary Disposition No. 3-2500-16646-2, P-421/C-05-721, *In the Matter of the Complain of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic* issued January 18, 2006.

On February 1, 2006, Qwest filed its Third filing of Supplemental Authority: Order granting reconsideration of the *Iowa Arbitration Order*.

On February 1, 2006, Level 3 filed a Response to Qwest's Filing of Supplemental Authority, attaching Level 3's Application for Reconsideration of the *Iowa Arbitration Order* and the Iowa Board's Order Granting Reconsideration of that Order.

On February 2, 2006, Qwest filed its Fourth filing of Supplemental Authority: Recommendation on Motion for Summary Disposition entered on January 30, 2006, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, Docket No. IC 12, Order No. 06-037, Public Utility Commission of Oregon; and Arbitrator's Decision entered on February 2, 2006, *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.* ARB 671, Public Utility Commission of Oregon.

On February 17, 2006, Level 3 filed Supplemental Authority: Order Accepting Interlocutory

Review; Granting, In Part, and Denying in Part, Level 3's Petition for Interlocutory Review, *In the Matter of Level 3 Communications, LLC v. Qwest Corporation, Level 3 Communications, LLC's Petition for Enforcement of Interconnection Agreement with Qwest Corporation*, Docket No. UT-053039, Order No. 05 Washington State Utilities and Transportation Commission.

By Stipulation filed March 21, 2006, the parties agreed to extend the deadline for a final Commission Order until May 31, 2006.

* * * * * * *

Pursuant to Section 252(b)(4)(C) of the Act, the Commission hereby resolves the issues presented for arbitration.

Background

Level 3 is a facilities based Competitive Local Exchange Carrier ("CLEC"), and operates the largest end-to-end Internet Protocol ("IP")-based network in the United States. (Ex L-1, Ducloo Dir. at 4.) Level 3 states that it is not a traditional CLEC, but focuses its business not only on the traditional public switched telephone network ("PSTN"), but more directly on the Internet. Level 3 states that while it functions as a "local" exchange carrier, the scope of its operations is nationwide or more. (Ex L-1 at 14.) Level 3 claims it has over 16,000 route miles of fiber in the United States and 3,600 route miles in Europe. Riding on this fiber backbone, it maintains a separate, private IP network, composed of high-speed links and core routers. Its backbone is connected to the public Internet by means of hundreds of peering arrangements with other large Internet entities, located in approximately 30 different metropolitan areas. Level 3 has central offices in 70 major metropolitan areas where it terminates both local and intercity fiber networks and locates its high-speed transmission equipment, routers and Softswitch equipment. The Internet uses packet switching as opposed to circuit switching. (Ex L-1 at 13.) Softswitch technology bridges the gap between circuit-switched technology and IP-based networks. (Ex L-1 at 14-15.)

The disputes that lead to this Petition for Arbitration primarily arise from Level 3's desire to employ an arrangement known as VNXX to serve its customers, comprised mostly of Internet Service Providers ("ISPs") and Voice over Internet Protocol ("VoIP") providers. The use of VNXX leads to issues of intercarrier compensation for these calls and how to allocate network costs between carriers.

VNXX, or "virtual NXX", is an arrangement under which a CLEC assigns an NPA/NXX[1] (telephone number area code and prefix) to a customer that is not physically located in the rate center or exchange with which that NPA/NXX is associated. The effect of VNXX is that the call is rated as a local call even though the called party is not physically located in the same local calling area as the calling party.

Level 3 urges the Commission to approve its proposed language, which minimizes the cost burden on the CLEC in order to promote competition and the deployment of new technologies. Qwest, the largest Incumbent Local Exchange Carrier ("ILEC") in Arizona, opposes the use of VNXX by CLECs because it claims the practice undermines the state's established intercarrier compensation regime based on access charges for traffic exchanged between Local Calling Areas ("LCAs"). Qwest argues that VNXX is not good public policy, and urges the Commission to prohibit its use.

The parties have attempted to break down the issues to correspond to specific sections and language in the proposed interconnection agreement. The overarching disputes over the use of VNXX and intercarrier compensation for those calls, as well as facilities charges, transcend discreet issues and are at the core of almost all of the disputed language.

**Issue: Should Level 3 be permitted to use VNXX arrangements to provide functionality to ISP Providers? What is the appropriate compensation regime for ISP traffic? (Matrix issues 3a, 3b, 3c and 4)**

Level 3 currently services ISPs in Arizona through a Gateway switch and other equipment located in Phoenix. (Tr at 72.) Under Level 3's Connect Modem service, Level 3 provides ISPs with local dial-in numbers, complete network coverage for a specific region, modems to collect the incoming traffic and managed routers and traffic termination to the Internet. In order to provide "local" numbers for end users to call their ISP, Level 3 seeks to use VNXX arrangements for the origination and termination of ISP-bound and VoIP traffic. Level 3 states that for these types of traffic, as a practical matter, the location of the calling and called parties is unknown, unknowable or simply indeterminate. Level 3 argues that because this traffic is interstate in nature the FCC has taken

[1] The North American Numbering Plan provides for telephone numbers consisting of a three digit area code (known as the NPA), a three digit prefix (NXX), and a four digit line number. NXX codes are assigned to particular central offices or rate centers within the state and are associated with specific geographic areas or exchanges. Carriers use the NPA/NXXs of the calling and called parties to determine if a call is rated as local or as a toll call, and whether reciprocal compensation or switched access charges should apply.

jurisdiction over it, and the FCC's rulings on ISP-bound traffic apply to this agreement.

Qwest argues that because Level 3's equipment is most often located in a different Local Calling Area ("LCA") than the calling party, calls between an end user and a modem in a different LCA are not "local" calls and should be subject to toll charges rather than reciprocal compensation. Under the VNXX arrangements Level proposes, Level 3 does not pay for local access or for transportation of the call from the Qwest end user to the Point of Interconnection ("POI") where the call is handed off to Level 3. Depending on the location of the Qwest end user and the POI, the transport distance can be significant. Qwest argues that VNXX arrangements should not be allowed in Arizona.

Both Qwest and Level 3 agree that the FCC's intercarrier regime for ISP-bound traffic, as expressed in the *ISP Remand Order*,[2] is controlling, but they do not agree on what that FCC ruling means. Level 3 argues that all ISP-bound traffic, including VNXX ISP-bound traffic and VoIP traffic, is subject to the $.0007 per minute of use ("mou") rate established in the FCC's *ISP Remand Order*. Qwest argues that the FCC intercarrier regime established in the *ISP Remand Order* does not include VNXX ISP-bound calls, and that non-VNXX ISP-bound calls should be subject to a bill-and-keep arrangement.

Matrix issue 3A relates to competing paragraphs 7.3.6.3 in the section of the ICA that addresses ISP-bound Traffic. The parties' proposed language as follows:

| Level 3's proposed language | Qwest's proposed language |
|---|---|
| 7.3.6.3 If CLEC designates different rating and routing points such that traffic that originates in one rate center terminates to a routing point designated by CLEC in a rate center that is not local to the calling party even though the called NXX is local to the calling party, such traffic ("Virtual Foreign Exchange" traffic) shall be rated in reference to the rate centers associated with the NXX prefixes of the calling and called parties' numbers, and treated as 251(b)(5) traffic for purposes of compensation. | 7.3.6.3 Qwest will not pay reciprocal compensation on VNXX traffic. |

Under Level 3's proposed language, all traffic where the parties to the call have the same NPA-NXX

[2] Order on Remand and Report and Order, *In the matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*")

qualifies as "251(b)(5) traffic," and entitled to reciprocal compensation.

Matrix Issue 3B is the definition of VNXX traffic. Qwest opposes including references to "compensation" in the definition.

| Level 3's proposed language | Qwest's proposed language |
|---|---|
| VNXX Traffic Shall include the following:<br><br>"ISP-bound VNXX traffic" is telecommunications over which the FCC has exercised exclusive jurisdiction under Section 201 of the Act and to which traffic a compensation rate of $0.0007/MOU applies. ISP-bound VNXX traffic uses geographically independent telephone numbers ("GITN"), and thus the telephone numbers associated with the calling and called parties may or may not bear NPA-NXX codes associated with the physical location of either party. This traffic typically originates on the PSTN and terminates to the Internet via an Internet Service Provider ("ISP").<br><br>"VoIP VNXX traffic" is telecommunications over which the FCC has exercised exclusive jurisdiction under Section 201 of the Act and to which traffic a compensation rate of $0.0007/MOU applies. VoIP traffic includes calls that originate in Internet Protocol (IP) terminating to legacy circuit-switched networks in TDM (the IP-TDM) as well as traffic originating in TDM and terminating to IP (thus TDM-IP). VoIP VNXX traffic uses geographically independent telephone numbers ("GITN"), and thus the telephone numbers associated with the calling and called parties may or may not bear NPA-NXX codes associated with the physical location of either party. Because VoIP VNXX traffic originates on the Internet, the physical location of the calling and called parties can change at any time. For example, VoIP VNXX traffic presents billing situations where the (i) caller and called aprteis are physically located in the same ILEC retail (for purposes of offering circuit switched "local telephone service") local calling area and the NPA-NXX codes associated with each party are associated with different ILEC LCAs; (ii) caller and called parties are physically located in the same ILEC retail (for purposes of offering circuit switched "local telephone service") local calling area and the NPA-NXX codes associated with each party are associated with the same ILEC LCAs; (iii) caller and called parties are | "VNXX traffic" is all traffic originated by the Qwest End User Customer that is not terminated to CLEC's End User Customer physically located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether CLECs End User Customer is assigned an NPA-NXX associated with a rate center in which the Qwest End User is physically located. |

| | |
|---|---|
| physically located in the different ILEC retail (for purposes of offering circuit switched "local telephone service") local calling area and the NPA-NXX codes associated with each party are associated with same ILEC LCAs; and (iv) caller and called parties are physically located in the different ILEC retail (for purposes of offering circuit switched "local telephone service") local calling area and the NPA-NXX codes associated with each party are associated with different ILEC LCAs. Examples of VoIP VNXX traffic include the Qwest "One Flex" service and Level 3's (3) VoIP Enhanced Local service.<br><br>Circuit Switched VNXX traffic is traditional "telecommunications services" associated with legacy circuit switched telecommunications providers, most of which built their networks under monopoly regulatory structures that evolved around the turn of the last century. Under this scenario, costs are apportioned according to the belief that bandwidth is scarce and transport expensive. The ILEC offers to a customer the ability to obtain a "local" service (as defined in the ILEC's retail tariff) by paying for dedicated transport between the physical location of the customer and the physical location of the NPA-NXX. Thus, this term entirely describes a service offered by ILECs, but which cannot be offered by IP-based competitors as such networks do not dedicate facilities on an end-to-end basis. | |

Matrix Issue 3C relates to competing paragraphs 7.3.6.1. Qwest and Level 3 agree that ISP-bound traffic shall be subject to terminating compensation at the $.0007 per mou rate. They disagree on whether VNXX or VoIP traffic should be included as traffic subject to the reciprocal compensation rate the FCC established for ISP-bound traffic.

| Level 3's proposed language | Qwest's proposed language |
|---|---|
| 7.3.6.1 Intercarrier compensation for ISP-bound traffic, Section 251(b)(5) traffic, and VoIP traffic exchanged between Qwest and CLEC will be billed and paid as follows, 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 in the ISP Remand Order at a rate of | 7.3.6.1 Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC (where the end users are physically located within the same Local Calling Area) 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 |

| | |
|---|---|
| $.0007 per MOU. | the FCC $.0007 per MOU or the state ordered rate whichever is lower. |

Matrix Issue 4 involves VoIP compensation. The parties propose the following.

| Level 3's proposed language | Qwest's proposed language |
|---|---|
| 7.3.4 Compensation for ISP-Bound and IP-Enabled TDM and TDM-IP VoIP Traffic<br><br>7.3.4.1 Subject to the terms of this Section, intercarrier compensation for Section 251(b)(5) Traffic where originating and terminating NPA-NXX codes correspond to rate centers located within Qwest defined local calling areas (including ISP-bound and VoIP Traffic) exchanged between Qwest and CLEC will be billed as follows, without limitation as to the number of MOU ("minutes of use" or whether the MOU are generated in "new markets" as that term as been defined by the FCC: $.0007 per MOU.<br><br>7.3.4.2 ISP-Bound and any IP-TDM or TDM-IP VoIP Traffic will be compensated at the FCC mandated rate of $.007 per MOU, on a per LATA basis, so long as such traffic is exchanged between the Parties at a single POI per LATA. | 7.3.4.1 Intercarrier compensation for Exchange Service ("EAS/Local") and VoIP traffic exchanged between CLEC and Qwest (where the end users are physically located within the same Local Calling Area) will be billed at $.0007 per MOU or the state ordered rate, whichever is lower.<br><br>7.3.4.2 The Parties will not pay reciprocal compensation on traffic, including traffic that a Party may claim is ISP-Bound Traffic, when the traffic does not originate and terminate within the same Qwest local calling area ( as approved by the state Commission), regardless of the calling and called NPA-NXXs and specifically regardless of whether an End User Customer is assigned an NPA-NXX associated with a rate center different from the rate center where the customer is physically located (a/k/a "VNXX Traffic"). Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position that it has never agreed to exchange VNXX Traffic with CLEC. |

Level 3 objects to Qwest's proposed language that would allow a lower reciprocal compensation on VoIP based on a state commission approved rate for reciprocal compensation that applies to non-information services. Qwest objects to paying reciprocal compensation on VoIP traffic that does not originate and terminate at physical locations within the same LCA.

**Level 3 Position:**

Level seeks to use VNXX arrangements to provide in-bound traffic to ISPs and VoIP platforms. Level 3 argues that VNXX arrangements are permissible and should be allowed in Arizona. Level 3 asserts that the FCC has consistently ruled that calls to ISPs are within federal jurisdiction. See *ISP Remand Order* at ¶¶ 52-65. In addition, Level 3 asserts the FCC has declared that VoIP services are "inseparately interstate," and ruled that states may not interfere with their

operation and growth. See *Vonage Ruling*[3] at ¶¶ 1, 12, 14, 20-41. Thus, Level 3 argues that because ISP and VoIP services are under the jurisdiction of the FCC, state rules do not reach either ISP-bound calling or VoIP.

Level 3 asserts that unless a call is a "true" toll call where a carrier will impose a separate charge on its end user, the FCC reciprocal compensation rate of $0.0007 applies. Level 3 proposes language that would provide that the rating of traffic for purposes of intercarrier compensation will be based on whether the NXXs of the calling and called numbers are "local" to each other, and that the actual physical location of the calling and called parties will have no bearing on rating. Level 3 argues that rating calls based on the physical geographic location of the parties as traditionally identified by NXX codes, no longer makes sense under today's technologies. According to Level 3, the linkage between geographic location and the rating of a call as "local" has eroded over the last 20 years to a point where it is virtually meaningless. The erosion began with the introduction of the ESP exemption, which allowed access to distant computer services by means of dialing a local telephone number, and continued with the widespread growth of nationwide wireless services that allow a party to call anywhere with no toll charges. Level 3 believes the connection is made even more tenuous by the rise of IP-based telephony.

Level 3 argues that regardless of Arizona rules, federal law is the determinant of whether VNXX arrangement can be utilized to offer ISP and VoIP services. (Level 3 Reply Brief at 14.) Level 3 argues there are no restrictions under federal law on its ability to use its numbering resources to provide interstate, "geographically untethered" services. (Id.) Level 3 argues further that the *ISP Remand Order*, along with the court cases interpreting it – *WorldCom v FCC*[4] and *Pacific Bell v. Pac West Telecomm*[5] are controlling and support its position.

Level 3 asserts that its use of VNXX arrangements are entirely consistent with federal numbering policies and guidelines. In support, Level 3 cites 47 C.F.R. § 52.9(a), the federal rule governing the assignment of telephone numbers, which provides:

[3] 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 (rel. November 12, 2004)("*Vonage Ruling*").

[4] 288 F.3d 429 (D.C. Cir. 2002), *cert den*, 538 U.S. 1012 (2003).

[5] 325 F.3d 1114 (9th Cir. 2003)("*Pac-West*")

> (a) To ensure that telecommunications numbers are made available on an equitable basis the administration of telecommunications numbers shall in addition to the specific requirements set forth in this subpart:
>
> (1) Facilitate entry into the telecommunications marketplace by making telecommunications numbering resources available on an efficient, timely basis to telecommunications carriers;
>
> (2) Not unduly favor any particular telecommunications industry segment or group of telecommunications consumers; and
>
> (3) Not unduly favor one telecommunications technology over another.

Level 3 asserts that when it provides Public Switched Telephone network ("PSTN") connectivity to ISPs and VoIP providers, it is plainly a "telecommunications carrier," and that by seeking a ban on VNXX, Qwest is trying to keep it out of the market in violation of the Rule's second principle. (Level 3 Reply Brief at 16.) According to Level 3, this Rule uses the broadest terms to describe the type of entities to receive numbers and the markets into which those entities will enter. Additionally, Level 3 asserts the Rule provides that numbers must be assigned in a manner that does not discriminate. Level 3 notes that wireless carriers are entitled to numbers even though their end users are not geographically tethered, and that it should be entitled to numbers to provide services to ISPs and VoIP providers on the same basis. Level 3 also argues that the Rule restricts giving any particular technology, such as Qwest's circuit-based technology, a special right to numbers.

Level 3 argues that Qwest's reliance on FCC Rule 52.13 as support for its desired ban on VNXX, is selective and misleading. Level 3 states that Rule 52.13 provides that the North American Numbering Plan Administrator "shall assign and administer [numbering] resources in an efficient, effective, **fair, unbiased, and nondiscriminatory** manner consistent with industry-developed guidelines **and Commission regulations**." 47 C.F.R. § 52.13(b) (emphasis added). Level 3 claims that Rule 52.9 determines what it means to be "fair" and "nondiscriminatory" in the assignment of numbers. In addition, Level 3 argues Rule 52.15(g)(4) clearly permits states to authorize use of numbering resources that depart from their traditional uses, and empowers this Commission to authorize VNXX arrangements.

Level 3 argues further, that the FCC's encouragement of the deployment of IP-enabled services

erases any doubt that the FCC accepts non-geographic use of VNXX. In the *Vonage Ruling*, Level 3 argues, the FCC found that a beneficial feature of IP-enabled services is the ability of the consumer to use the service anywhere he can find a broadband connection to the Internet. Level 3 notes further that in the *VoIP E911 Ruling*,[6] the FCC did not find anything inappropriate from a numbering perspective about the service, but merely expressed displeasure with the then-existing E911-related limitations of the service. Level 3 reasons that if the FCC even remotely believed that it was wrong to assign NXX codes to IP voice devices that do not physically reside in the area associated with an NXX code, it would have said something.

Level 3 also argues that the *ISP Remand Order* fully embraced the use of VNXX ISP-bound traffic. Level 3 states that when it issued the *ISP Remand Order* the FCC was fully aware that CLECs were utilizing VNXX to provide service to ISPs. In paragraph 92, n. 189 of the *ISP Remand Order*, the FCC cites to letters received from Qwest and SBC informing the FCC how ISPs can strategically place their equipment in high-density, central business locations. Level 3 notes that SBC's comments specifically state that it is routine practice for CLECs to assign NXX codes to switches that are nowhere near the calling area with which that NXX is associated in order to market to ISP customers that the ISP subscribers will be able to connect through a local call. The FCC cited the Qwest and SBC materials in connection with its statement that the distance between a CLEC's switch and the ISP's equipment was "irrelevant" to the compensation regime it was establishing. *ISP Remand Order* ¶ 92.

Level 3 argues there is no reasonable basis to conclude that in issuing *ISP Remand Order* the FCC meant to exclude the class of VNXX-routed ISP-bound traffic. Indeed, according to Level 3, the FCC understood that ISP-bound traffic included, and includes, VNXX-routed ISP-bound traffic, and this recognition is sufficient reason to deny Qwest's effort to exclude VNXX-routed ISP-bound traffic from the intercarrier compensation regime. Level 3 argues that it would have been a simple matter for the FCC to indicate its disapproval of VNXX arrangements in the *ISP Remand Order*, but it did not do so.

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[6] *In the matter of IP-Enabled Service, E911 Requirements for IP-enabled Service Providers*, 20 FCC Rcd 10245 (June 3, 2005) ("*VoIP E911 Ruling*")

Furthermore, Level 3 argues there is no evidence that Level 3's use of VNXX arrangements, including ISP-bound calling, places any material additional costs on Qwest. (Tr 26-27.) Pursuant to Level 3's proposed contract language, Qwest would be responsible for delivering all Level 3-bound traffic, (whether the call is VNXX, ISP-bound, or voice), to a single Point of Interconnection ("POI") for the LATA. Once the call is handed off to Level 3 at the POI, Level 3 is responsible for all costs associated with delivering the traffic.

By seeking access charges on VNXX calls, Level 3 argues, Qwest is seeking "supra-competitive, subsidy-laden" access charges on traffic that leaves the geographically-limited local calling area. (Level 3 Opening Brief at 53.) But, Level 3 argues that the historic basis for access charges is not appropriate for these types of calls. Level 3 argues that access charges "have nothing to do with Qwest's costs." (Level 3 Opening Brief at 42.) Level 3 claims Qwest's costs will be the same to terminate any call to or from Level 3 regardless of whether it is classified as "toll" "local" or "information access." (Id.) Level 3 asserts that requiring it to abandon its use of VNXX, and requiring that VoIP and ISP-bound calls be dialed on a "1+" basis would be severely anti-competitive, with the likely effect that ISPs would not offer local dialing access in smaller communities and the cost of accessing the internet would increase for many Arizonans.

Level 3 states that the FCC's *ISP Remand Order* specifically addresses the intercarrier compensation regime for ISP-bound calls. Prior to issuing its current ruling on ISP-bound traffic the FCC had previously found that ISP-bound calls are jurisdictionally interstate, and as such could not be "local" for purposes of the reciprocal compensation requirement of Section 251(b)(5). *ISP Declaratory Ruling.*[7] The FCC found that it had no rule for this type of call, and thus it was fine for an interconnection agreement to have the effect of treating such traffic as though it were "local" and allowing reciprocal compensation. On review, the D.C. Circuit Court in *Bell Atlantic v FCC*, 206 F.3d 1 (D.C. Cir. 2000), vacated the *ISP Declaratory Ruling* and sent the matter back to the FCC. In April 2001, the FCC issued the *ISP Remand Order,* which noted that on its face Section 251(b)(5)'s reciprocal compensation requirement applies to all telecommunications, which would include all

[7] *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. 99-69, CC Docket Nos. 96-98, 99-69 (February 26, 1999) ("*ISP Declaratory Ruling*").

"information access" traffic, including specifically, calls to ISPs. *ISP Remand Order* at ¶ 31. Level 3 states that in this respect, the FCC noted that its original decision to limit the reach of Section 251(b)(5) to "local" traffic was a "mistake" that had created "ambiguity," because "local" was not a term that was used or defined in the underlying statute. *ISP Remand Order* at ¶ 34. Thus, Level 3 asserts, the FCC amended its reciprocal compensation regime to remove all references to "local" traffic. *ISP Remand Order* at ¶¶45-46. Level 3 argues that the FCC's disclaimer of its previous reliance on the idea that intercarrier compensation was limited to "local" traffic undermines Qwest's argument that the FCC only meant to include "local" ISP-bound traffic within the reach of its ISP compensation regime.

In the *ISP Remand Order*, the FCC found that ISP-bound traffic was excluded from the Section 251(b)(5) "telecommunications" pursuant to the exclusion in Section 251(g) for "information access." The FCC then established an interim compensation scheme for ISP-bound traffic as well as non-toll traffic. That scheme established a gradually declining cap on the amount that a carrier could recover from other carriers for terminating ISP-bound traffic, which rate is currently $0.0007/mou. Level 3 also argues that in the *ISP Remand Order*, the FCC rejected the idea that ISP-bound traffic should be payable, if at all, at a rate lower than the rate paid on "normal" Section 251(b)(5) traffic. The FCC was concerned that it would be unfair for ILECs, which have superior bargaining power, to be able to pay less for ISP-bound traffic but receive higher payment for termination of exchange traffic when traffic balances are reversed. *ISP Remand Order* at ¶¶ 89-90. Level 3 argues that given the clear FCC ban on establishing a different rate for ISP-bound traffic than for "normal" exchange traffic, Qwest's suggestion that ISP-bound traffic could be exchanged on a bill-and-keep basis while "normal" traffic would be subject to compensation, is unacceptable.

In addition, Level 3 argues, there is nothing in the FCC's rules that suggest that VNXX-routed ISP-bound traffic should be excluded from the FCC compensation regime. Level 3 argues that if the FCC wanted to exclude the majority to "information access" traffic because it did not get routed through "local" ISP modems, it would have said so. Level 3 asserts that by relying on language in the *ISP Remand Order*, that references ISP modems being located within the originators caller's local calling area, as Qwest does, elevates dicta in the Order over the actual reasoning the FCC used to

establish the interim compensation regime. Level 3 notes that in the first paragraph of the *ISP Remand Order*, the FCC without qualification, states that it is establishing the "proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service provides (ISPs)." In this statement the FCC did not refer to "traffic delivered to ISPs within an ILEC local calling area." Level 3 argues that if the FCC actually meant to limit its new regime to "local" ISP-bound traffic, it would have said so. In its *Intercarrier Compensation NPRM*[8], the FCC characterizes its *ISP Remand Order* as addressing "intercarrier compensation for traffic that is specifically bound for" ISPs. Level 3 states there is no qualification or concern expressed in that NPRM about where those ISPs might be located. Level 3 believes that a fair reading of this language is that the FCC thought it had resolved the disputes about compensation for all ISP-bound traffic.

In further support of its position, that the *ISP Remand Order* applies to all ISP-bound traffic, Level 3 cites the opinion of the District Court of Connecticut in *Southern New England Telephone Company, v MCI*, 359 F.Supp.2d 229 (D. Conn 2005)("*SNET*"). In that case, SBC specifically asked the court to re-examine its previous decision that held the *ISP Remand Order* applies to all ISP-bound traffic and that Foreign Exchange traffic is subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. SBC argued that the *ISP Remand Order* only covers "local" ISP-bound traffic. Level 3 states the *SNET* court declined to amend its earlier decision. The *SNET* court concludes that although the *ISP Remand Order* refers to ISPs located in the same "local calling area," that language merely indicates the start of the FCC's inquiry. Ultimately, the *SNET* court finds, the FCC decided that all ISP-bound traffic is in a class by itself and subject to the rates the FCC set in that order.[9]

Level 3 also argues that the focus in the *ISP Remand Order* is on LATAs and not LCAs. This, Level 3 claims, supports its position that VNXX-routed ISP-bound traffic is subject to the compensation scheme under that order. Level 3 states that the *ISP Remand Order* acknowledges that the term "information access" derives from the "*AT&T Consent Decree*"[10] that broke up the old Bell System, and that the *AT&T Consent Decree* was not concerned with local calling areas but with

[8] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, cc Docket No. 01-92 (released April 27, 2001).
[9] 359 F. Supp.2d at 232.
[10] *United States v. AT&T*, 552 F. Supp 131 (D.D.C. 1982).

LATAs (the divested Bell ILECs were not permitted to offer services across LATA boundaries). Level 3 argues that consequently, "information access" under the *AT&T Consent Decree* referred to the provision of links between an end user and an information service provider (such as an ISP) within the same LATA. Thus, according to Level 3, "[i]t follows that any intraLATA ISP-bound traffic, VNXX-routed or not, is "information access" covered by the *ISP Remand Order's* compensation regime." (Level 3 Opening Brief at 69)

Level 3 notes that the D.C. Circuit Court in *WorldCom* held that although the court thought the FCC was wrong to carve out ISP-bound traffic under Section 251(g), there is "a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i))."[11] Level 3 argues that by cutting out only the one element of the FCC's analysis (that "information access" traffic isn't covered by Section 251(b)(5)), the court eliminated any logical basis for excluding any "information access" traffic from reciprocal compensation under Section 251(b)(5). Furthermore, Level 3 argues, in *Pac West*, the 9th Circuit rejected the claim by Pacific Bell that because *WorldCom* did not vacate the *ISP Remand Order*, the exclusion for "information access" pursuant to section 251(g) remains intact. Thus, Level 3 argues, the 9th Circuit too has precluded arguments that rely on Section 251(g) to exclude information access traffic from the scope of Section 251(b)(5).

Level 3 argues that Qwest's analysis that focuses on the "ESP Exemption" is also misplaced. (Level 3 Reply Brief at 29, n. 48.) Level 3 asserts that the extensive FCC activity on the specific topic of intercarrier compensation requires that those specific rulings, and not the ESP Exemption, control on the issue of intercarrier compensation for ISP-bound traffic. Level 3 states that the basic point of the ESP Exemption is that information service providers are not to be treated like toll carriers subject to access charges, not that information service providers are to be treated exactly and for all purposes just like end users. Level 3 states that if the latter had been the law, then the FCC would never had held that calls between end users and geographically "local" ISP were not covered by the old "local" reciprocal compensation rule. Level 3 believes that Qwest pushes the ESP Exemption too far in its

[11] 288 F.3d at 434.

attempt to make the location of the Gateway switch the determining factor for purposes of intercarrier compensation.

**Qwest's Position:**

Qwest argues that the *ISP Remand Order* applies only to local ISP traffic, that is, traffic that originates and terminates in the same LCA, and did not address the treatment of VNXX traffic at all. According to Qwest, the clear statements of the FCC and the Circuit Court that reviewed that order demonstrate that it applies only to local ISP traffic. Qwest argues that any other reading of the Order violates the principles that it should be read in a consistent manner, giving meaning to all its parts and in the context in which it was decided by the agency and that orders should not be read as to ignore or obviate substantive portions.

Under Qwest's position, the starting point of the analysis is the FCC's 1996 *Local Competition Order*[12] in which the FCC concluded that reciprocal compensation under Section 251(b)(5) applies only to traffic that originates and terminates within a local calling area as defined by the state commissions. Thus, Qwest asserts from the beginning, the FCC defined the reciprocal compensation obligation in terms of local calls, which Qwest states was logical, as other compensation mechanisms had long been in place for interexchange calls. Qwest notes that since the breakup of the Bell system in 1984, states and the FCC have implemented, and continue to follow, tariffs that govern the appropriate compensation for interexchange traffic, and that Section 251(g) of the 1996 Act explicitly preserved the pre-existing compensation mechanisms.

Qwest states that the FCC issued its *ISP Declaratory Order* in 1999 in response to requests to clarify whether reciprocal compensation should apply to ISP-bound traffic, which typically is one-way in nature and involves longer hold times than typical voice traffic. In the *ISP Declaratory Order*, the FCC concluded that ISP traffic is interstate in nature based on the ultimate destination of ISP calls at websites located around the world. Qwest argues that in the *ISP Declaratory Order*, the focus of the FCC was entirely on local ISP calls as demonstrated by the following language in paragraph 4 of that order:

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

> ISPs purchase analog and digital lines from local exchange customers to connect to their dial-in subscribers. Under one typical arrangement, *an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.* The ISP, in turn, combines 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access internet content and service." (emphasis added).

The D.C. Circuit Court, in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000)("*Bell Atlantic*"), vacated and remanded the *ISP Declaratory Order* because the FCC had not provided explanation why its end-to-end analysis for jurisdictional purposes had any relevance to the reciprocal compensation issue. Qwest argues the *Bell Atlantic* Court could not have been more clear when it characterized the issue as the proper treatment of local ISP traffic as follows:

> In the [ISP Declaratory Order], [the FCC] considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves 'local.'[13]

Qwest asserts that on remand the FCC found that ISP-bound traffic fell under the rubric of "information access," and that Section 251(g) allowed it to carve out the ISP traffic under consideration from the provisions of Section 251(b)(5).[14] According to Qwest, because ISP traffic did not fall under Section 251(b)(5), the FCC found that it could define a separate compensation regime for such traffic.[15] By looking at the context of the *ISP Remand Order*, Qwest argues, the only ISP-bound traffic by the FCC in that Order was local traffic. Qwest further cites language in the background discussion (¶10) of the *ISP Remand Order*:

> An ISP's end-user customers typically access the Internet through an ISP service *located in the same local calling area.* Customers generally pay their LEC a flat monthly fee *for the use of the local exchange network,* including connections to their local ISP They also generally pay their ISP a flat monthly fee for access to the Internet. ISP's then combine 'computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.'" (Emphasis added).

Qwest notes that in the next paragraph of the *ISP Remand Order* FCC notes that ISPs qualify for the Enhanced Service Provider ("ESP") exemption, which allows them to be "treated as end-users for the purposes of applying access charges and are, therefore, entitled to pay local business rates for

[13] 206 F.3d at 2.
[14] *ISP Remand Order* ¶¶ 42-47.
[15] Id. at ¶ 17.

their connection to LEC central offices and the PSTN."[16] This discussion is important Qwest argues, because it demonstrates that the FCC was fixed solely on local ISP traffic. In paragraph 13 of the *ISP Remand Order* the FCC identifies the reason for opening the ISP docket:

> [T]he question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area that is served by the competing LEC.*" (emphasis added.)

Thus, Qwest argues, nothing in the FCC's analysis of the nature of the traffic or its implementation of the interim regime suggests that the FCC had broadened the scope of the inquiry in the *ISP Remand Order* to include anything other than local ISP traffic.

In addition, Qwest asserts that the D.C. Circuit Court in the *WorldCom* decision clearly indicates that the holding of the *ISP Remand Order* relates solely to local ISP traffic. The *WorldCom* court characterized the issue that was addressed in the *ISP Remand Order*:

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

Qwest notes that the *WorldCom* court found that Section 251(g) does not provide the FCC with a basis for its action, but, the court did not vacate the *ISP Remand Order* because there was a "non-trivial likelihood" that the Commission has authority to elect its chosen system of compensation for ISP-bound traffic. Qwest states that the *WorldCom* court specifically held that it was not deciding other issues that may be determinative and would justify the FCC's decision, including: (1) whether ISP calls are "telephone exchange service" or "exchange access" or either; (2) the scope of "telecommunications" under Section 251(b)(5); or (3) whether the FCC could adopt a bill and keep regime. Qwest states that because the *WorldCom* court is the Hobbs Act[17] court with exclusive jurisdiction for interpreting FCC orders, state commissions must follow its decisions on FCC orders.

Qwest states that its interpretation of the *ISP Remand Order* is also supported by a recent decision of the Oregon Public Utilities Commission. The Oregon PUC held that:

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[16] *ISP Remand Order* at ¶ 11.

[17] The Hobbes Act gives the federal court of appeals "exclusive jurisdiction to enjoin, set aside, suspend or determine the validity of all orders of the FCC that are reviewable by Section 402(a) of Title 47.

The ALJ correctly concluded that the FCC's definition of ISP-bound traffic in the ISP Remand Order does not encompass VNXX-routed traffic. The ALJ's decision is consistent with the language of the ISP Remand Order and the appellate decisions interpreting that order. It is also in agreement with decisions in several other states.

Qwest asserts that Level 3 primarily relies on the *SNET* decision, but Qwest argues the *SNET* court misinterpreted the *ISP Remand Order*. Furthermore, Qwest states, the *SNET* decision is not binding on this Commission, while the *WorldCom* decision is. Qwest believes that the *SNET* Court's fundamental error was to substitute its judgment on the breadth of the *ISP Remand Order* for that of the *WorldCom* Court. According to Qwest, by dismissing language in the *WorldCom* decision that described the scope of the *ISP Remand Order*, the *SNET* court relegated what Qwest considers a definitive holding in the *ISP Remand Order* to mere background information. Qwest argues it is presumptuous and wrong for Level 3 to conclude that the *WorldCom* court was incapable of correctly stating either the issue being considered by the FCC, or the FCC's holding.

Qwest argues the *SNET* court also misinterpreted the *ISP Remand Order* when it concluded that the FCC was disavowing the term "local."[18] In the *ISP Remand Order*, the FCC stated that it would "refrain from generally describing traffic as 'local' traffic because the term 'local' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."[19] Qwest claims the FCC's decision to focus on statutorily defined terms is a far cry from disavowing the historical significance of the differences between local and long-distance calling. Qwest states the Act does not eliminate the concept of local traffic, as the term "telephone exchange service," a statutorily-defined term, clearly refers to "local" service. (47 U.S.C. § 153(47).)

In addition, Qwest asserts that in the *ISP Remand Order* the FCC expressed its intent not to interfere with intrastate access mechanisms.[20] Qwest argues that while acknowledging that the FCC intended to avoid impacts on access charges, the *SNET* court ignored that intent and instead adopted an interpretation that displaces the applicable intrastate access charge regime.

Qwest also argues that Level 3's reliance on the *Pac-West*[21] case is misplaced. Qwest asserts

[18] 359 F.Supp.2d at 231.
[19] ISP Remand Order at ¶ 34.
[20] See *ISP Remand Order* at n. 66 and ¶39
[21] Pacific Bell v. Pac-West Telecomm, 325 F.3d 1114 (9th Cir. 2003)("Pac-West").

that the Ninth Circuit is not in a position to alter or contradict the *WorldCom* courts decision, as *WorldCom* was decided by the Hobbs Act reviewing court. Furthermore, Qwest states that in *Pac-West*, Pacific Bell relied directly on section 251(g) as support for its claim that subjecting ISP traffic to reciprocal compensation was unlawful.[22] That issue, according to Qwest, is very different from the issue before the Commission here. Qwest states that its position that the *ISP Remand Order* applies only to local ISP traffic is not premised on section 251(g), but rather is based on the fact that the *ISP Remand Order* addressed only local ISP traffic.

Moreover, Qwest argues there is nothing in the *ISP Remand Order* that indicates the FCC intended its ruling to encompass VNXX ISP Traffic. Qwest notes that Level 3's argument that the FCC knew about VNXX because of comments filed in that docket is based on a false premise that just because a commenting party raises an issue, or refers to VNXX, the FCC's order necessarily resolved the issue. The testimony from Qwest's expert filed in the ISP docket was not addressing the VNXX issue. Further, the context in which the FCC refers to the SBC and Qwest testimony, Qwest states, was not in connection with the VNXX issue, but rather related to whether the distance from a CLEC's switch to the ISP equipment was a factor relevant to its decision.

Qwest believes Level 3's assertion that Qwest does not incur material costs for transporting VNXX traffic is irrelevant. It ignores, Qwest charges, that Qwest has invested in facilities throughout the state and must maintain and augment this equipment. To suggest that Qwest incurs no cost to transport traffic from around Arizona to a centralized POI is wrong, but more fundamentally, Qwest asserts, the issue is not a cost issue, but a question of the proper intercarrier compensation mechanism to apply to calls between LCAs.

In addition to being inconsistent with federal law, Qwest asserts that Level 3's position concerning VNXX is inconsistent with Arizona statutes, Commission rules and decisions, and Qwest's tariffs approved by the Commission. According to Qwest, Arizona law overwhelmingly and explicitly rejects Level 3's argument that local calling is based on the NPA-NXXs of the parties to the call regardless of location, and directly requires that the local/interexchange distinction be determined by

[22] 325 F.3d at 1130.

the relative physical location of the parties to the call.

In support of its position, Qwest notes that Arizona has long recognized that "local" calls are defined by geographic proximity of the parties to the call. (See A.R.S. § 40-329 (granting the Commission authority to require that two telephone corporations connect to each other, and providing "where the purpose of the connection is primarily to secure transmission of *local messages or conversations between points within the same city or town.*" )(emphasis added.) Qwest notes too, that the Commission has consistently taken an active role in defining LCAs based on the existence of a community of interest among the residents and businesses of specific geographical locations. (Ex Q-2 at 36. Qwest Opening Brief at 18-20) Qwest asserts that A.R.S. § 40-282(C)(2)(a)-(b), which was enacted in the age of local competition, maintains the "local" distinction and contemplates separate certification for "local exchange" carriers and "interexchange" carriers.

In addition, Qwest asserts that Commission rules consistently and extensively define local and interexchange services in terms of geographic proximity of the parties to a call. The Commission's "Competitive Telecommunications Services" Rules tie local exchange traffic to traffic within exchange areas. Specifically, Commission Rule A.A.C. R14-2-1102(7) defines "Local Exchange Service" as "[t]he telecommunications services that provides a local dial tone, access line, and *local usage within an exchange area or local calling area.*" (emphasis added). Rule R14-2-501(23), the Commission's "Telephone Utilities" rule defines "toll service" as service "between stations in different exchange areas for which a long distance charge is applicable." The Commission's "Telecommunications Interconnections and Unbundling" Rule, R14-2-1305(a), states "the incumbent LEC's local calling areas and existing EAS boundaries will be utilized for the purpose of classifying traffic as local, EAS, or toll for purposes of intercompany compensation." Qwest argues that read together, these provisions could not be more clear in requiring that local and toll traffic be defined in terms of the geographical location of the parties to the call. Qwest states its proposed contract language is fully consistent with these Commission rules.[23]

Qwest argues that its position is consistent with recent Commission precedent in Decision No.

[23] In addition, Qwest states that its Arizona tariffs, which define "exchange" and "exchange service" in terms of geographic area, are also consistent with Arizona statutes and rules.

66888 (April 6, 2004)("*AT&T Arbitration Order*"), involving an arbitration between AT&T and Qwest. In that case, Qwest asserts, AT&T proposed to define "EAS/Local Traffic" in terms of "the calling and called NPA/NXXs", but the Commission rejected that definition:

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

Qwest states that, just as in the *AT&T Arbitration Order*, the changes proposed by Level 3 are not just minor adjustments to the language of an interconnection agreement, but rather are dramatic changes in policy that would ultimately affect the whole industry in Arizona.

Qwest asserts, the FCC has consistently ruled that it is the state commissions that have the authority to define local calling areas and determine whether reciprocal compensation or access charges apply to particular traffic. Qwest states that the following FCC's holding in the *Local Competition Order* remains the law:

> [S]tate commissions have the authority to determine what geographic areas should be considered 'local areas' for the purposes of applying reciprocal compensation obligations under section 251(b)(5), consistent with the commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside the applicable local area would be subject to interstate and intrastate access charges." *Local Competition Order* at ¶1035. [24]

Qwest argues that Level 3's position on the assignment of telephone numbers, with no relationship to geographic location, ignores LCAs. Qwest notes that no LCA in Arizona has been established without Commission approval, and geography and the location of called and calling parties have always been concepts inherent in the determination of LCAs in Arizona. Qwest asserts that geographic proximity has always been both the basis for assigning telephone numbers and the basis for rating calls as local or interexchange. According to Qwest, because they were historically linked with the exchange where the customer was located, telephone numbers were the means of assuring

[24] 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")

geographic proximity.

Qwest alleges that Level 3 engaged in a contrived analysis of the purpose and history of access charges as a way to use VNXX to avoid access charges. According to Qwest, Level 3 would have the Commission conclude that since there is no separate toll charge associated with VNXX, it cannot be "telephone toll service" and access charges could not apply. First, Qwest states 47 USC § 153(48) does not state that the "separate charge" must be a per minute charge; instead, Qwest alleges this provision states that a separate charge be imposed for the service that is "not included in contracts with subscribers for exchange service." Qwest states that Level 3 certainly charges its customers for service that includes access to multiple LCAs. Second, Qwest asserts, Level 3's argument produces the anomalous and illogical result of creating a category of traffic not covered by any definition of the Act. Under 47 USC § 153(47) telephone exchange service relates to traffic within the "same exchange area," "while "telephone toll service" relates to traffic "between stations in different exchange areas." Qwest claims that Level 3's reading of the statute creates a category of traffic not covered--namely "interexchange traffic for which no toll charge is imposed"—and thus, creates a hole in the statutory scheme.

In addition, Qwest states, Level 3 mischaracterizes access charges as a way to share toll revenue. (Level 3 Brief at 45). Qwest claims that Level 3's claim is wrong, and that access charges were designed first, to allow the LECs to recover their costs for originating or terminating calls for IXCs, and secondly as a way to maintain some of the subsidy that interexchange calling provided to local service. Qwest argues too that Level 3's claim that access charges are "subsidy laden" ignores the fact that interstate access charges have been reduced many times since first enacted in 1984, and that Qwest has made significant reductions in intrastate access charges as well.

Qwest urges the Commission to ban the use of VNXX in Arizona. Qwest notes that the Vermont board prohibited the use of VNXX in that state. On appeal of that decision, a federal district court, in *Global Naps, Inc. v. Verizon New England,* held:

> The Board's prohibition of VNXX service offends neither the "nondiscrimination strand" nor the "nonjusticiability strand" of the filed rate doctrine. The ban does not have the effect of discriminating, or requiring Global to discriminate, among Global's customers; it simply

> does not permit Global to offer the service to any of its customers. A ban on VNXX service likewise does not involve the Board or this Court in any determination of whether the rates or terms of the service are reasonable. The Board's ban has not varied the rates or terms of Global's tariff, nor has it attempted to enforce obligations between Global and its customers that do not appear in the federal tariff. The filed rates doctrine does not prevent the Public Service Board from prohibiting the use of VNXX within Vermont. 327 F. Supp.2d 290, 301 (D. Vt. 2004) ("*Global Naps*")

Qwest argues Level 3's proposed language is not consistent with the telecommunication industry's numbering resource guidelines. Qwest states that Section 2.14 of the Central Office Code (NXX) Assignment Guidelines ("COCAG") states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned. Exceptions exist, such as for tariffed services like foreign exchange services." (Emphasis added.) Qwest notes that VNXX is not identified as an exception. Qwest notes further that section 4.2.6 of the COCAG provides that '[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested.*" (Emphasis added.) In addition, Qwest notes that the COCAG makes a distinction between "Geographic NPAs" that correspond to discrete geographic areas within the North American Numbering Plan ("NANP") and "Non-geographic NPAs" which do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries (e.g. 800 service). Qwest asserts that Level 3's proposal to use Geographic NPA numbers in Arizona which, according to guidelines, should correspond to discrete geographic areas, violates industry guidelines.

Qwest also argues that in addition to being unlawful, VNXX violates sound public policy. Qwest asserts that Level 3's proposed language, creates the precise arbitrage opportunity the FCC wanted to avoid in its *ISP Remand Order*. Qwest alleges that Level 3 has an economic incentive to create as many usage minutes as possible, because every minute that an end-user spends connected to a Level 3 ISP generates additional compensation for Level 3. Qwest notes that in the *ISP Remand Order*, the FCC recognized that internet usage has distorted the traditional assumptions that local exchange traffic between carriers would be relatively balanced because traffic to an ISP flows exclusively in one direction, which creates an opportunity for regulatory arbitrage and leads to uneconomical results. *ISP Remand Order* at ¶ 21. The FCC found the situation with ISPs led to:

> Classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. *ISP Remand Order* at ¶ 21.

Qwest further asserts that its own FX service and the Wholesale Dial and OneFlex services of its affiliate are not the same as VNXX, as each of these services recognizes and conforms to the existing LCA structure. Qwest states that Level 3's VNXX product uses the PSTN to route and terminate calls to end users connected to the PSTN in another LCA, but in all respects, except for number assignment, the call is routed and terminated as any other toll call. Qwest states that its FX product delivers the FX calls within the LCA with which the number is geographically associated. Thus, the Qwest FX customer actually purchases a local service connection in the LCA associated with the phone number in the same manner and at the same rate as all other local exchange customers. With FX, Qwest explains, the calls are then transported on a private line that is purchased by the end user to another location. The FX customer buys both the local service and the private line service. Qwest's affiliate QCC offers a service known as Wholesale Dial by purchasing Primary Rate ISDN service or "PRI" from Qwest at a tariffed rate, which means that the Wholesale Dial customers pay private line transport rates to transport calls from the LCA where the dial tone is provided to the location of the ISP. Qwest explains these calls are handed off from the end user to QCC within the LCA where the local service is purchased. Qwest states that QCC's VoIP service known as OneFlex also respects the LCA, as all calls are exchanged between the VoIP provider's Point of Presence and the caller within the same LCA. Qwest states that under VNXX, neither Level 3 nor its customer, bears financial responsibility to provide the transport to the distant location.

**Resolution:**

The dispute over VNXX in this proceeding is an example of how technology can outpace regulation. The use of VNXX arrangements (as they have been used and are proposed to be used by Level 3), and the intertwined issue of intercarrier compensation, raise the important public policy question of whether this Commission will approve use of a method of provisioning service and intercarrier compensation that departs from the historic concept of local calling areas as the

determinants of whether calls will be rated as local (no extra charge) or toll (subject to access charges).

Level 3 argues that VNXX is critical to its ability to serve its ISP and VoIP customers and is one of the technological innovations that is encouraged under the 1996 Act. End users who use dial up to reach a Level 3 ISP customer do not have to pay toll charges even if that ISP does not have a presence in the same LCA as the end user. As Level 3 would propose to use VNXX, Level 3 would not pay Qwest for the transport of the calls between LCAs and Qwest would pay Level 3 reciprocal compensation at $0.0007 /mou for all ISP calls terminated by Level 3. The problem with VNXX is that it disregards the concept of LCAs and avoids the compensation regime that the state has established for calls between LCAs. As it has been proposed by Level 3, Qwest would receive no revenue from access charges on VNXX traffic to cover its costs of transport. Level 3 argues Qwest must recover these costs from its end users, but as we have seen in Qwest's recent rate case in which we approved a new price cap plan for Qwest (Docket No. T-01051B-03-0454 & T-00000D-00-0672), lower access charge revenues can result in higher prices for consumers for other services. Our recent approval of a $12 million reduction in intrastate access rates, resulted in allowing Qwest to raise the prices of other services by a commensurate amount. Level 3's position allows ISPs to keep their rates low, but may force Qwest telephone subscribers to pay more for their telephone service. This raises issues of equity and whether cost causers are paying their fair share. The Qwest end users who are using dial up modems to reach ISPs are not just Qwest customers, they are also the customers of the ISPs that they dial. Not all Qwest phone customers use their phone lines to call ISPs and not all are customers of ISPs served by Level 3. On the other hand, we acknowledge that current access charges are not cost-based. For years they have subsidized the cost of local service. While we may recognize that ultimately and ideally, the current access charge regime should be overhauled, we also believe it must be done systematically and fairly.

Level 3 has argued in this proceeding that pursuant to the *ISP Remand Order*, the FCC has not only endorsed VNXX as an appropriate arrangement but determined that ISP-bound traffic exchanged through a VNXX arrangement is subject to the compensation scheme established in that Order. The *ISP Remand Order* makes no mention whatsoever of VNXX. VNXX is a departure from the historic method to provision service. It is different than the FX service provided by Qwest, for in FX service,

the ISP pays for local access and for transport of the traffic to its equipment in a distant LCA. If the FCC had intended the *ISP Remand Order* as an endorsement of the use of VNXX, we believe it would have at least mentioned it.

The FCC did specifically address the use of VNXX in the *Verizon Virginia Order.*[25] In that arbitration, Verizon was advocating language that would rate calls according to their geographic end points. *Verizon Virginia Order* at ¶ 301. The FCC rejected Verizon's proposed language because Verizon had offered no viable alternative to the current system under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. Id. The FCC noted that all parties to that case acknowledged that rating calls by their geographic starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[26] Id. Nothing in the *Verizon Virginia Order* diminishes the authority of the states to determine whether VNXX arrangements are appropriate. In that Order, the FCC states: "state commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation for those areas where the LECs service areas do not overlap."[27] The FCC did not reject Verizon's concerns that VNXX was a means by which the CLECs were thwarting Verizon's access compensation regime, but concluded that there was no other practical way advanced in the case for rating traffic other than based on the NPA-NXXs of the calling and called parties.

The FCC has left the decision of whether VNXX should be permitted to the states. In the *ISP Remand Order* the FCC noted that when Congress enacted the 1996 Act it did not intend to disrupt the compensation regimes that states had established for access services. *ISP Remand Order* at ¶ 37. The FCC has also made clear that:

> State commissions have the authority to determine what geographic areas should be considered "local access" for the purpose of applying

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

[26] Verizon had evidently proposed that the CLECs conduct a traffic study or develop a factor to identify the percentage of virtual FX (or VNXX) traffic, and that it would then exchange the identified proportion of traffic either pursuant to the governing access tariff or on a bill and keep basis. The FCC found that Verizon had not laid out how such mechanism would work in sufficient detail. *Verizon Virginia Order* at ¶ 302.

[27] *Verizon Virginia Order* [27] at ¶ 549.

> reciprocal compensation obligations under section 251(b)(5), consistent with the state commission's historical practice of defining local service area for wireline LECs. . . . we expect the states to determine whether interastate transport of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different. *First Report & Order*[28] ¶ 1035.

The Vermont district court in *Global NAPs*, held that "[t]he historical practice of allowing state commissions to define local service areas was not altered by the FCC's ruling in its Initial and Remand Orders that ISP-bound traffic was inherently interstate in character." *Global Naps*, 327 F.Supp.2d at 298.

This Commission has never explicitly determined that the use of VNXX is in the public interest, we touched on the issue in the *AT&T Arbitration Order* when we declined to alter historical practice of rating calls without a more thorough investigation. We continue to believe that it is not good public policy to depart from our established form of intercarrier compensation based on the record before us. To determine if the VNXX arrangement is in the public interest, requires a weighing of the benefits and burdens on the individual carriers and their Arizona customers. VNXX appears to be a way to provide lower cost Internet access and it may facilitate the use of new technologies such as VoIP, but as it has been applied by Level 3, it may also deprive Qwest of revenues and may shift some of the costs of serving ISPs to Qwest's end users. Qwest is the provider of last resort for much of Arizona, and we must be concerned with the effect on Qwest's end users, not all of whom may access the Internet through dial up service or have a choice of local carriers. Because this issue has come before us in the context of arbitrating an ICA, we do not have the benefit of the participation of other stakeholders, and especially Commission Staff. Consequently, the record before us does not contain sufficient information to allow us to make a complete analysis of the public interest as it relates to VNXX.

Consistent with our understanding of federal law, our existing rules and our holding in the *AT&T Arbitration Order*, we decline to alter a long-standing regime for rating calls. Level 3 proposes the use of VNXX arrangements that undermine that compensation regime. Thus, we find that Level 3

[28] *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 1996 WL 452885) 11 F.C.C.R. 15,499, 16,013-14 (Aug. 8, 1996)("First *Report & Order*") aff'd in part, vacated in part, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part rev'd in part AT&T Corp. v. Iowa Bd., 525 U.S. 347, 119 S. Ct. 721.

should not use VNXX to provide service to ISPs and VoIP providers. As we have noted herein, VNXX is not the equivalent of FX service provided by Qwest. Under FX service the customer purchases local access and provides its own transport, via a private line, or similar arrangement, to its equipment. By this means the customer is able to provide local calling to end users, but not have to locate facilities (e.g. modems) in every LCA. 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 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.

Because we do not permit the use of VNXX arrangements as Level 3 has proposed them in this case, we do not reach the issue of whether the *ISP Remand Order* only apples to "local" ISP traffic. By having a physical presence in the LCA associated with the assigned NPA/NXX, Level 3 would be entitled to reciprocal compensation pursuant to the *ISP Remand Order* as well as pursuant to the language of the proposed ICA.

Thus, to resolve Matrix Issue 3A, the parties shall revise Section 7.3.6.3 to incorporate, or substantially reflect the meaning of, the following:

> 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 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.

With respect to Matrix Issue 3B, the definition of VNXX, Level 3's proposed definition of VNXX traffic confuses the definition with compensation issues. Qwest's definition is phrased as a negative statement and appears to encompass more than the VNXX situation with which we are concerned here. We believe the definition is more precisely phrased as follows:

> "VNXX traffic" is all traffic originated by the Qwest End User Customer

> that is terminated to CLEC's End User Customer who is not physically 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.

To resolve Matrix Issue 3C, we adopt the following language for Section 7.3.6.1:

> 7.3.6.1 Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC 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.

In connection with Matrix Issue 4, Level 3's proposed language does not reflect our findings concerning VNXX. The FCC has not determined how VoIP traffic should be treated, and it appears that it is more appropriately included in Section 7.3.4.1, although we recognize some similarities with ISP-bound traffic. Given our ruling on VNXX, we do not perceive a distinction for the purposes of compensation. We approve the following language for Section 7.3.4.1:

> Intercarrier compensation for Exchange Service ("EAS/Local") and VoIP traffic exchanged between CLEC and Qwest (where the end users are physically located within the same Local Calling Area) will be billed at $.0007 per MOU.

**Issue: What is the appropriate definition of VoIP traffic? What is the appropriate compensation regime for VoIP traffic? (Matrix issues 16, 3b, 3c 4 and 1a)**

The language of Qwest's PSTN network is Time Division Multiplexing ("TDM"). Level 3's network operates in the language of Internet Protocol ("IP"). For voice traffic to be exchanged between a TDM network and an IP network it must be converted from one protocol to the other. VoIP traffic between Qwest and Level 3 is converted at Level 3's Gateway switch.

The parties agree that calls that both originate and terminate in IP are VoIP calls (IP-IP calls), and agree that this type of call that never touches the PSTN network is irrelevant to this proceeding. A second type of call is one that originates in IP, on IP compatible equipment but terminates on a traditional TDM line on the PSTN (IP-TDM calls). The third type of call originates in TDM on the PSTN network and terminates on the IP network. These are TDM-IP calls. Level 3 appears to want both IP-TDM and TDM-IP calls included within the definition of VoIP. See also Level 3's proposed "VoIP VNXX traffic" addressed in Matrix Issue 3B.

The fourth type of call is TDM-IP-TDM, or IP in the middle. The FCC has ruled in the *AT&T Declaratory Ruling*[29] that this type of call is not a VoIP call.

Specifically, the language at issue in Matrix issue 16 (definitions) is as follows:

| Level 3's proposed language[30] | Qwest's proposed language |
|---|---|
| "VoIP" (Voice over Internet Protocol) traffic is traffic that originates in Internet Protocol ***at the premises of the party making the call*** using IP-Telephone handsets, ***end user premises*** Internet Protocol (IP) adapters, CPE-based Internet Protocol Telephone (IPT) Management "plug and play" hardware, IPT application management and monitoring hardware of such similar equipment and is transmitted over a broadband connection to **or from** the VoIP provider.<br><br>**VoIP is one of the services the Parties exchange by means of interconnection at a Single POI. Compensation for VoIP is governed by (Level 3 proposed) Section 7.3.4.1 and 7.3.4.2.** | "VoIP" (Voice over Internet Protocol) traffic is traffic that originates in Internet Protocol at the premises of the party making the call using IP-Telephone handsets, end user premises Internet Protocol (IP) adapters, CPE-based Internet Protocol Telephone (IPT) Management "plug and play" hardware, IPT application management and monitoring hardware of such similar equipment and is transmitted over a broadband connection to the VoIP provider.<br><br>7.2.2.12 VoIP traffic as defined in this agreement shall be treated as an Information Service, and is subject to interconnection and compensation rules and treatment accordingly under this Agreement based on treating the VoIP Provider Point of Presence ("POP") as an end user premise for purposes of determining the end points for a specific call.<br><br>7.2.2.12.1 CLEC is permitted to utilize LIS trunks to terminate VoIP traffic under this Agreement only pursuant to the same rules that apply to traffic from all other end users, including the requirement that the VoIP Provider POP must be in the same Local Calling Area as the called party. |

**Level 3's Position:**

One of the inherent characteristics of VoIP service is the ability of the consumer to make calls from anywhere he or she can find a broadband connection to the Internet. Level 3 notes that it is impossible to know the location of the VoIP call originator, or where VoIP customers are located when they receive calls. Level 3 submits that it is administratively unworkable and bad public policy to focus on the location of the end user and/or the VoIP Gateway as a proxy for the "IP end" of the call. Instead, Level argues that the sensible approach is to subject all VoIP traffic to reciprocal

[29] Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (April 14, 2004) (*AT&T Declaratory Ruling*").

[30] Agreed upon language is in normal type, Level's proposed language is in bold underline type.

compensation under the same terms as any other Section 251(b)(5) traffic. (Level 3 Reply Brief at 31.)

As discussed above in connection with VNXX traffic, Level 3 argues that in the *ISP Remand Order*, the FCC established a separate, parallel compensation regime for ISP-bound traffic, on the ground that such traffic constitutes "information access." *ISP Remand Order* at ¶ 42. Level 3 states although that ruling was not literally directed to "information access" traffic connecting VoIP providers (as opposed to ISPs) to the PSTN, Level 3 asserts there is no reason to assume that the FCC would support a different regime for the VoIP form of "information access."

Level 3 acknowledges that the *Vonage Order* did not unequivocally hold that VoIP was an "information service" which would be predicate to finding that calls to or form VoIP entities are "information access." Level 3 states that the *Vonage Order* did find that VoIP traffic is "inseparately interstate," and argues that if VoIP services are not information services, then to determine their status vis-a-vis compensation, we should look at Rule 51.701(b), the reciprocal compensation rule, which provides that except for "exchange access" and "information access," all telecommunications traffic is subject to reciprocal compensation. If VoIP traffic is "information access," then Level 3 asserts the logical conclusion is to expand the FCC intercarrier compensation regime for ISP-bound traffic to it. And, the argument proceeds, if VoIP traffic is not "information access" then reciprocal compensation would apply pursuant to the FCC's rule and associated statutory definitions.

Level 3 argues its conclusion is supported by the *WorldCom* decision, wherein the Court found that the FCC was wrong to base its decision on carving out "exchange access" and "information access" from Section 251(b)(5). The *WorldCom* court, however, left the FCC's parallel compensation regime in place because the court believed that the FCC could justify establishing the regime under Section 251(b)(5) and 252(d)(2). Level 3 argues that the *WorldCom* ruling eliminates any claim that VoIP "information access" traffic is in some kind of compensation limbo. According to Level 3, if the compensation regime in the *ISP Remand Order* only applies to ISP-bound traffic and not to interstate "information access", then Level 3 states the question is whether such "information access" traffic is subject to Section 251(b)(5). Because the *WorldCom* Court held that Section 251(g) does not act to limit the scope of Section 251(b)(5), Level 3 argues the only reasonable conclusion is that Section 251(b)(5) applies to such traffic.

Level 3 states that "exchange access" is specifically defined in 47 U.S.C. § 153(16) as using a LEC's facilities or services to originate or terminate a "telephone toll service" call. According to Level 3, under 47 U.S.C. § 153(48) for a call to be a "telephone toll service," it must meet a two-part test. First, it must be a "long distance" call that begins and ends in different local calling areas, and secondly, it must also be subject to a separate toll charge not included as part of the customer's local service contract. Level 3 asserts that a call that does not meet both tests cannot be "telephone toll service." Level 3 also states that it is widely known that VoIP providers do not normally assess toll charges, but offer nationwide calling at a flat rate. Thus, Level 3 argues, as a matter of federal law, a LEC's job of handling such traffic is not, and cannot be, the provision of "exchange access." If not "exchange access," Level 3 continues, then as a matter of federal law VoIP traffic is not excluded from the scope of reciprocal compensation. (Level 3 Reply Brief at 33-34.) Further, Level 3 asserts, without toll charges, access charges are economically inappropriate.

In addition to relying on federal law for support, Level 3 also argues that it is poor public policy to apply access charges to VoIP traffic. Level 3 states that the purpose and legal basis of access charges is to require toll carriers to share their toll revenues with LECs involved in originating or terminating toll calls. Level 3 argues that there are no toll charges to share in the case of VoIP traffic, so no basis to subject it to access charges.

The point of the 1996 Act, Level 3 states, is to encourage competition and the deployment of new technology. Level 3 argues that VoIP represents one of the few significant challenges to Qwest's domination of the local exchange market. Level 3 urges the Commission to encourage the growth and development of this innovative technology. In the absence of a clear mandate to do so, Level 3 argues the Commission should not reach out to extend access charge obligations to VoIP traffic.

**Qwest's Position**:

Qwest objects to Level 3 removing two phrases from the VoIP definition ("at the premises of the party making the call" and "end user premises"). Qwest states that it includes these phrases to make clear that VoIP calls must originate in IP, on IP-compatible end user equipment. Qwest argues that if the IP equipment is not at the premises where the call originates, then the call must originate in TDM and be converted to IP elsewhere, and thus would not meet the test for a proper VoIP call.

Qwest states that it was not its intention to require that VoIP calls originate from only one place. Qwest acknowledges that VoIP calls can originate on any computer with a broadband connection. For purposes of identifying VoIP, Qwest does not care where the end user is physically located, only that the call originates in IP from IP-compatible equipment over a broadband connection.

Qwest also objects to Level 3's attempt to add the words "or from". Qwest asserts that it is a physical impossibility for a call to originate in TDM and IP simultaneously so that Level 3's proposed language is inconsistent. The issue is whether TDM-IP calls should be categorized as VoIP. Qwest states that the FCC has not ruled on this issue, but argues that the indications so far are that the only calls that should be considered VoIP are ones that originate in IP.

Qwest argues that Level 3 is trying to use definitions to exempt its traffic from applicable state and federal access charges, that is, seeking VNXX authorization for VoIP traffic. Qwest asserts that Level 3's proposal is inconsistent with the ESP Exception as well as sound public policy.

Qwest argues that by attempting to define VoIP VNXX traffic as "telecommunications over which the FCC has exercised exclusive jurisdiction under section 201 of the Act", Level 3 is not stating a definition, but rather making a legal conclusion. Qwest states that in Section 7.3.6.1 of the ICA, Level 3 proposes language that suggests that VoIP traffic is related to the *ISP Remand Order*, but offers no authority for the proposition.

According to Qwest, in Matrix issue 4, Level 3 proposes that reciprocal compensation be paid on VoIP traffic on the basis of telephone numbers, but elsewhere, proposes that all VoIP traffic be subject to reciprocal compensation irrespective of telephone numbers. Qwest argues these are inconsistent proposals.

Qwest finds that neither of Level 3's proposals regarding VoIP traffic and reciprocal compensation are acceptable, and both, Qwest argues are contrary to Arizona and federal law. In essence, Qwest states, Level 3 is arguing that access charges never apply to VoIP traffic.[31] Qwest

[31] Qwest cites an example from the cross examination of Mr. Ducloo, involving a VoIP customer with a Phoenix number calling a Qwest PSTN customer in Page, Arizona. Phoenix and Page are in different LCAs and are about 275miles apart. Mr. Ducloo described that the call would be routed over the IP network to the Level 3 Gateway switch in Phoenix where the call would be converted from IP to TDM. From there Level 3 would deliver the call in TDM to Qwest at the POI, which is near the Qwest tandem in Phoenix. Level 3 would then expect Qwest to carry the call to the end office that serves that end user and terminate that call to the end user in Page. Level 3 would compensate Qwest reciprocal compensation of $0.0007 per minute for that call. (Tr at 182.) Qwest states that Mr. Ducloo acknowledged that this call was not "locally

asserts that reciprocal compensation has traditionally been limited to those cases where the physical end points of a call are within the same LCA, but both of Level 3's proposals abandon that limitation and would require reciprocal compensation on VoIP traffic in far more situations than is paid for other traffic. Through its proposals, Qwest argues that Level 3 is trying to avoid the existing carrier compensation system that governs compensation for interexchange calls.

Qwest states that Level 3 takes the position that the Point of Presence ("POP") of the VoIP provider has no relevance to intercarrier compensation for VoIP calls. (Tr at 165-97.) Thus, according to Qwest, Level 3 takes the position that access charges should never apply to a VoIP call originated on Level 3's IP network, without regard to where it enters the PSTN and without regard to where Qwest must transport the call for termination. Qwest argues that the ESP exemption, which Level 3 seems to argue exempts all VoIP traffic from access charges in all circumstances is not supported by law, nor is it fair to Qwest.

Qwest asserts that while establishing the access charge regime in use today for all IXCs, the FCC permitted Enhanced Service Providers ("ESPs") to connect their POP to the local network via local exchange service as opposed to access services (e.g. feature Group D) that IXCs were (and still are) required to purchase. Qwest states that the most critical aspect of the exemption is that the ESP is treated like an end user. Qwest cites two different portions of the *ESP Exemption Order* [32] as support:

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

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

dialed" under Level 3's theory that telephone numbers, and not physical location, should govern the categorization of the call, because Level 3's position is that traditional access charges and local boundaries do not apply to VoIP; that geography does not matter. If this were a call from a Phoenix PSTN customer to a Page PSTN customer, Qwest would receive terminating access charges from the customer 's interexchange carrier. (Tr at 184-85.)

[32] Order, In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 , 91988)("*ESP Exemption Order*".)

users. *ESP Exemption Order* ¶ 20, n. 53.

Qwest asserts that Level 3's language is a direct attempt to avoid the FCC's ruling. Instead of standing in the place of an end user, whose local service gives it the right to originate and terminate to VoIP traffic calls within the LCA without extra charge, Qwest states that Level 3 believes, without authority for its position, that it is entitled to terminate traffic throughout the same LATA without incurring access charges. The proper application of the ESP exemption, according to Qwest, is to exempt a VoIP provider from terminating access charges for delivering calls only to PSTN customers within the local calling area in which the VoIP provider is purchasing local exchange service.

Qwest argues that under Arizona law, a voice call between separate LCAs is a toll call that must be treated as such, and this rule applies equally to VoIP. Thus, Qwest asserts, a call that originates in IP format, on IP compatible equipment and is handed off to Qwest within a LCA where the ESP is located, and 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, Qwest argues, 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 the LCA. Qwest states such calls are classified as interexchange traffic and must be handed off to an interexchange carrier ("IXC"), which must connect to Qwest via a Feature Group connection.

Qwest states Level 3 is trying to use the ESP exemption to effect a VNXX scheme for VoIP calls, and would turn an interexchange call into the equivalent of a local call. For the same reasons Qwest set forth in its opposition to VNXX, Qwest urges the Commission to reject Level 3's position. According to Qwest, Level 3 offers no authority for its position and no meaningful reasons why this voice traffic should receive special regulatory treatment.

**Resolution:**

The categorization of VoIP traffic is even more ambiguous than ISP traffic. There is no clear ruling that classifies VoIP traffic or that determines compensation for this traffic. In the *Vonage Order* the FCC preempted an order of the Minnesota Public Utilities Commission applying traditional "telephone company" regulations to Vonage's Digital Voice service, which provides VoIP service and other communications capabilities. The FCC concluded that Vonage's service cannot be separated into

interstate and intrastate communications. The FCC found that in contrast to traditional circuit-switched telephony, with VoIP service it is not relevant where the broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service, rather it is a service that is fully portable. Even the VoIP providers do not know where in the world its users are when using the service. *Vonage Order* at ¶ 5.

Although, the VoIP service uses NPA-NXX numbers as an identification mechanism for the user's IP address, the number is not necessarily tied to the user's physical location in contrast to most wireline circuit-switched calls. In contrast to traditional circuit-switched telephony, a call to a Vonage customer's NANP number can reach that customer anywhere in the world and does not require the user to remain at a single location. *Vonage Order* at ¶ 9. In holding that federal law pre-empted Minnesota from imposing economic regulations on Vonage, the FCC did not reach a determination of whether VoIP was "telecommunications" or "information service" under the Act. *Vonage Order* at ¶ 14. The FCC found that pre-empting the Minnesota regulations was compelled to avoid thwarting valid federal objectives for innovation of new competitive services. Regardless of the definitional classification of VoIP under the Act, the FCC found that the Minnesota regulations directly conflicted with the FCC's pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from the regulations. *Vonage Order* at ¶ 20.

We extend our finding that VNXX is not an appropriate means of provisioning service to ISPs to encompass VoIP providers. We agree that the VoIP provider's POP is the appropriate point to determine the end point of the call. Although the *Vonage Order* describes how VoIP service is provisioned, it did not address the issue of intercarrier compensation. In that Order, the FCC is concerned that state regulation not burden the growth of this new technology. *Vonage Order* at ¶ 2. We do not believe that our preservation of LCAs burdens, or discriminates against, VoIP providers. We are merely retaining the existing intercarrier compensation regime until we can engage in a more thorough investigation. Thus, we adopt Qwest's proposed definition as well as Section 7.2.2.12 and 7.2.2.12.1.

**Issue: What is the proper definition of "Interconnection" (Matrix issue 10)**

The dispute over the definition of "interconnection" is intertwined with the dispute over the classification of traffic. The parties propose the following language:

| Level'3 Proposed Language: | Qwest's Proposed language |
|---|---|
| "Interconnection" is the physical linking of two networks for the mutual exchange of Telecommunications, which includes but is not limited to Telephone Exchange Service, Exchange Access traffic, Telephone Toll traffic, ISP-Bound traffic and any Information services traffic such as VoIP. | "Interconnection: is as described in the Act and refers to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic and Jointly Provided Switched Access traffic. |

**Level 3's Position**:

Level 3 asserts that its proposed language most closely matches the definition in FCC Rule 51.5 which provides: "Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." Level 3 states that the FCC's definition places no limitation on the type of traffic that may or should be exchanged. Level 3 believes that its use of the term "telecommunications" is included within the FCC's general term "traffic." Level 3 explains that it includes types of traffic that would be included to avoid doubt.

Level 3 objects to Qwest's proposed language as it limits the class of traffic by excluding VoIP traffic, and should be rejected as an impermissible attempt to regulate the types of traffic that may be exchanged between the parties.

**Qwest's Position**:

Qwest argues that its proposed language is the commonly accepted definition in most of Qwest's interconnection agreements and in SGATs. Qwest asserts that it is not an attempt to regulate the types of traffic that may be exchanged between the parties as alleged by Level 3. Qwest asserts that Level 3's proposal appears aimed at its larger objective of overhauling the intercarrier compensation arrangements established by the Commission and the FCC.

Qwest objects to Level 3's definition because it is inconsistent with the 1996 Act, FCC rules and the *ISP Remand Order*. Qwest asserts that FCC Rule 51.701(b) expressly excludes "exchange access" from the definition of "telecommunications traffic," yet Level 3 includes exchange access in its proposed definition.

**Resolution:**

The FCC defines "interconnection" as "the linking of two networks for the mutual exchange of traffic. This term does not include the transport or termination of traffic." For purposes of transport and termination rules, "telecommunications traffic" excludes "exchange access." 42 CFR 51.701(b)(1). Neither party's proposed language reflects the FCC definition. Level 3's proposal appears too broad and Qwest's too restrictive. The status of VoIP traffic is indeterminate at this time, but we believe should be included among the types of traffic included. We believe that the parties have agreed that for the purposes of this ICA, VoIP is "information service," but such status may or may not be enacted under federal law.[33] We believe that the definition of interconnection should be as flexible as possible while providing guidance. Thus, we adopt Qwest's proposed definition with the added clarification that it should specifically encompass VoIP traffic:

> "Interconnection" is as described in the Act and refers to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic, VoIP traffic and Jointly Provided Switched Access traffic.

**Issue: What is the Proper Definition of "Interexchange Carrier"? (Matrix Issue 11)**

**Issue: What is the proper definition of "IntraLATA Toll Traffic? (Matrix Issue 12)**

**Issue: Should the Commission adopt Level 3's proposed definition of "Telephone Toll Service"? (Matrix issue 15)**

The parties proposed the following definitions:

| Level 3's Proposed Language: | Qwest's Proposed Language: |
|---|---|
| "Interexchange Carrier" or "IXC" means a Carrier that provides Telephone Toll Service. | "Interexchange Carrier" or "IXC" means a Carrier that provides InterLATA or IntraLATA Toll services. |
| "IntraLATA Toll Traffic" describes IntraLATA Traffic that constitutes Telephone Toll Service. | "IntraLATA Toll Traffic" describes IntraLATA Traffic outside the Local Calling Area. |
| Telephone toll service – the term "telephone toll service" means telephone service between stations in different exchange areas for which | |

[33] While we address how VoIP traffic shall be treated for purposes of interconnection and in intercarrier compensation in this Order, we make no ruling on classifying VoIP.

| | |
|---|---|
| there is made a separate charge not included in contracts with subscribers for exchange service. | |

**Level 3's Position:**

Level 3 asserts that the proposed definitions of Interexchange carrier are similar, but the distinction between them matters. Level 3 states that its definition tracks the definition in federal law. 47 U.S.C. § 252(c)(1). Level 3 objects to Qwest's proposed definition because its definitions of "InterLATA" and "IntraLATA toll services" are not consistent with federal law. As argued above, Level 3 asserts that to constitute a "Telephone Toll Service" a call must meet both a geographic test and a pricing test, i.e. there must be a toll charge. Level 3 argues that Qwest's proposed definitions ignore the pricing portion of the test.

**Qwest's Position:**

Qwest does not believe that a definition of "telephone toll service" is necessary in the agreement.

Qwest argues that its proposed definition is the current, standard language included in interconnection agreements with CLECs and has been approved by every commission (including Arizona) in Qwest's region. According to Qwest, an interexchange carrier is an access customer of a LEC, and typically purchases Feature Group D access trunks to originate and terminate "interLATA and intra LATA" toll calls. Qwest states the terms "InterLATA" and "IntraLATA" have been and still are widely used and understood within the industry.

Because Level 3 does not impose a charge for VNXX calls, under Level 3's proposed definition VNXX calls could not be categorized as interexchange (or toll) calls, and thus could not be subject to access charges. Further, Qwest states, under Level 3's logic, if not subject to access charges these calls should be subject to reciprocal compensation. Thus, Qwest charges, a carrier that offers an interexchange service but does not charge its customers on a per-minute basis, would exempt itself from FCC or state prescribed access charges.

**Resolution:**

Qwest's definitions preserve the role of the LCA in determining compensation of toll traffic. We continue to believe that until there is a comprehensive review of an alternative carrier compensation regime, the historic regime that should be maintained. We do not have any other way to administer intercarrier compensation. Although Level 3's proposed definitions match the definitions in the FCC rules, and are not unlawful or incorrect, we find that Qwest's proposed definitions do not conflict with applicable federal rules and are more in harmony with our rulings in the context of this agreement, and should be adopted.

**Issue: What is the Proper Definition of "Exchange Service" or "Telephone Exchange Service" (Matrix issue 7 and 14)**

The parties seem to propose two different definitions of Exchange Service.

Under Matrix issue 7, they proposed the following definitions:

| Level 3's Proposed Language | Qwest's Proposed Language: |
|---|---|
| Telephone Exchange Service is as defined in the Act. | "Basic Exchange Telecommunications Service" means, unless otherwise defined in Commission rules and then it shall have the meaning set forth therein, a service offered to End User Customers which provides the End User Customer with a telephonic connection to, and a unique local telephone number address on, the public switched telecommunications network, and which enables such End User Customer to generally place calls to, or receive calls from, other stations on the public switched telecommunications network. Basic residence and business line services are Basic Exchange Telecommunications Services. As used solely in the context of this Agreement and unless otherwise agreed, Basic Exchange includes access to ancillary services such as 911, directory assistance and operator services. |

The parties did not refer to Issue 7 in their briefs. Qwest asserts that its proposed definition has been included in its SGATs throughout its 14 state region. Level 3 states that it provides IP enabled services and Qwest's proposed definition would exclude the types of IP enabled traffic that is exchanged with Level 3.

For Matrix Issue 14, the parties proposed the following definitions:

| Level 3's Proposed language: | Qwest's proposed language: |
|---|---|
| Telephone Exchange Service – The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. | "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the Local Calling Area as determined by the Commission. |

**Level 3's position:**

Level 3 states that its proposed definition is a word-for-word rendition of the term as it is used in 47 U.S.C. § 153(47). Level 3 objects to Qwest's proposed definition as it contains a purely geographic definition that is not consistent with federal law. Level 3 states that while the federal definition contains a subpart "A" that is geographic, it also contains subpart "B" which is broader and includes any "comparable" service. Level 3 believes its proposal should be adopted because it offers new, flexible services that are reasonably comparable to traditional "exchange service."

**Qwest's position:**

Qwest asserts that Level 3 offers no explanation for excluding the term "exchange service" and replacing it with "telephone exchange service." And this, despite the fact that "exchange service" is used in provisions throughout the agreement. Qwest states that its proposed definition is commonly used in Qwest interconnection agreements and is consistent with the definition of local traffic in Arizona law.

**Resolution:**

Because the parties did not mention Matrix issue 7 in their briefs, we assume that this issue is no longer in dispute, or that they will be able to find mutually agreeable language that comports with the findings made in this Order. Level 3's proposed definition of "telephone exchange service" does match the definition in the Act, however, it is not clear to us how this definition assists in clarifying

terms used in the ICA. This definition appears aimed at preserving its ability to use VNXX arrangement and perhaps to encompass new technologies. Qwest's proposed definition accurately reflects the definition of "Exchange Service" in accord with Arizona law. Qwest's definition does not preclude the use of new technologies, nor do we believe is it in conflict with federal law. Qwest's proposed definition in Matrix Issue 14 is most harmonious with the ICA and the findings in this Order. Consequently, we approve Qwest's proposed definition.

**Issue: Is the proposed language consistent with the requirement that interconnection be allowed at any technically feasible point of interconnection. (Matrix issues 1, 1A-1F, 1I and 1J)**

Level 3 characterizes this issue in terms of efficient network architecture while Qwest characterizes the dispute as concerning how it will be compensated for the use of its network.

Matrix issue 1A:

| Level 3's Proposed Language | Qwest's proposed Language |
|---|---|
| 7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Telecommunications Including Telephone Exchange Service And Exchange Access traffic. Qwest will provide Interconnection at any Technically Feasible point within its network.<br><br>7.1.1.1 Establishment of SPOI: Qwest agrees to provide CLEC a Single Point of Interconnection (SPOI) in each Local Access Transport Area (LATA) for the exchange of all telecommunications traffic. The SPOI may be established at any mutually agreeable location within the LATA, or, at Level 3's sole option, at any technically feasible point on Qwest's network. Technically feasible points include but are not limited to Qwest's end offices, access tandem, and local tandem offices.<br><br>7.1.1.2 Cost Responsibility. Each Party is responsible for constructing, maintaining and operating all facilities on its side of the SPOI, subject only to the payment or intercarrier compensation in accordance with Applicable Law. In accordance with FCC Rule 51.703(b), neither Party may assess any charges on the other Party for the origination of any | 7.1.1This section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS/Local traffic), Intra LATA Toll carrier solely by local exchange carriers and not by an IXC (IntraLATA LEC Toll), ISP-Bound traffic, and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Qwest will provide Interconnection at any Technically Feasible point within its network. Interconnection, which Qwest currently names "Local Interconnection Service" (LIS), is provided for the purpose of connecting End Office Switches to End Office Switches or End Office Switches to local or Access Tandem Switches for the exchange of Exchange Service (EAS/Local traffic); of End Office Switches to Access Tandem Switches for thee exchange of IntraLATA LEC Toll or Jointly Provided Switched Access traffic. Qwest Tandem Switch to CLEC Tandem Switch connections will be provided where Technically Feasible. New or continued Qwest local Tandem Switch and Qwest Access Tandem Switch to Qwest access Tandem Switch can demonstrate that such connections present a risk or Switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any Affiliate's End User Customers. |

telecommunications delivered to the other Party at the SPOI, except for Telephone Toll Service traffic outbound from one Party to the other when the other Party is acting in the capacity of a provider of Telephone Toll Service, to which originating access charges properly apply.

7.1.1.3 Facilities included/transmission rates. Each SPOI to be established under the terms of this Attachment shall be deemed to include any and all facilities necessary for the exchange of traffic between Qwest's and Level 3's respective networks within a LATA. Each Party may use an Entrance Facility (EF), Expanded Interconnect Channel Termination (EICT), or mid Span Meet Point of Interconnection (POI) and/or Direct Trunked Transport (DTT) or DS1, DS3, OC3 or higher transmission rates as, in that Party's reasonable judgment, is appropriate in light of the actual and anticipated volume of traffic to be exchanged. If one Party seeks to establish a higher transmission rate facility than the other Party would establish, the other Party shall nonetheless reasonably accommodate the Party's decision to use higher transmission rate facilities.

7.1.1.4 Each Party Shall Charge Reciprocal Compensation for the Termination of Traffic to be carried. All telecommunications of all types shall be exchanged between the Parties by means of from the physical facilities established at Single Pint of Interconnection Per LATA onto its Network Consistent With Section 51.703 of the FCC's Rules:

7.1.1.4.1 Level 3 may interconnect with Qwest at any technically feasible point on Qwest's network for the exchange of telecommunications traffic. Such technically feasible points include butt are not limited to Qwest access tandems or Qwest local tandems. When CLEC is interconnected at the SPOI, separate trunk groups for separate types of traffic may be established in accordance with the terms hereof. No separate physical interconnection facilities, as opposed to separate trunk groups within SPOI facilities shall be established except upon express mutual agreement of the Parties.

7.1.1.1 CLEC agrees to allow Qwest to conduct operational verification audits of those network elements controlled by CLEC and to work cooperatively with Qwest to conduct an operational verification audit of any other provider that CLEC used to originate, route and transport VoIP traffic that is delivered to Qwest, as well as to make available any supporting documentation and records in order to ensure CLEC's compliance with the obligations set forth in the VoIP definition and elsewhere in this Agreement. Qwest shall have the right to redefine this traffic as Switched Access in the event of an "operational certification audit failure: An "operational certification audit failure" is defined as (a) Qwest's inability to conduct a post-provisioning operational verification audit due to insufficient cooperation by CLEC or CLEC's other providers, or (b) a determination by Qwest in a post-provisioning operational verification audit that the CLEC or CLEC's end users are not originating in a manner consistent with the obligations set forth in the VoIP definition and elsewhere in this Agreement,

7.1.1.2 Prior to using Local Interconnection Service trunks to terminate VoIP traffic, CLEC certifies that the (a) types of equipment VoIP end users will use are consistent with the origination of VoIP as defined in this Agreement; and (b) types of configurations that VoIP end users will use to originate calls using IP technology are consistent with the VoIP configuration as defined in this Agreement.

| | |
|---|---|
| | |

Matrix Issue 1B:

This section sets forth the types of interconnection

| Level 3's Proposed Language: | Qwest's Proposed Language: |
|---|---|
| 7.1.2 CLEC may establish a POI through: (1) a collocation site established by CLEC at a Qwest wire center, (2) a collocation site established by a third party at Qwest wire center, or (3) transport (and entrance facilities where applicable).<br><br>CLEC shall establish one POI at any technically feasible point on Qwest's network within each LATA in which CLEC desires to exchange traffic directly with Qwest by any of the following methods:<br><br>1. a collocation site established by CLEC at a Qwest Wire Center;<br>2. a collocation site established by a third party at Qwest Wire Center;<br>3. transport (and entrance facilities where applicable) ordered and purchased by CLEC from Qwest; or<br>4. Fiber meet points.<br>CLEC shall establish one POI on Qwest's network in each LATA POIs may be established by CLEC through:<br>1. a collocation site established by CLEC at a Qwest Wire Center;<br>2. a collocation site established by a third party at Qwest Wire Center;<br>3. transport (and entrance facilities where applicable) ordered and purchased by CLEC from Qwest at the applicable Qwest intrastate access rates and charges; or<br>4. Fiber meet points. | 7.1.2 The Parties will negotiate the facilities arrangement used to interconnect their respective networks. CLEC shall establish at least one (1) physical Point of Interconnection in Qwest territory in each LATA CLEC has local Customers. The Parties shall establish, through negotiations, at least one (1) of the following Interconnection arrangements, at any Technically Feasible Point: (1) of the following Interconnection arrangements, at any Technically Feasible Point: (1) a DS1 or DS3 Qwest provided facility; (2) Collocation; (3) negotiated Mid-Span Meet POI facilities; or (4) other Technically Feasible methods of Interconnection such as an Ocn Qwest provided facility, via the Bona Fide Request (BFR) process unless a particular arrangement has been previously provided to a third party, or is offered by Qwest as a product. Ocn Qwest provided facilities may be ordered through F C Tariff No. 1. |

Matrix Issue 1 C:

Agreed terms are set forth in normal text, and Level 3's proposed language is set forth in bold underline.

7.2.2.1.1 Exchange Service (EAS/Local) traffic will be terminated as Local Interconnection Service (LIS). **Notwithstanding reference to LIS and to trunking and facilities used or provisioned in association with LIS, nothing in this Agreement shall be construed to require CLEC to Qwest for any services or facilities on Qwest's side of the POI in**

**connection with the origination of traffic from Qwest to CLEC; and nothing herein shall be construed to require CLEC to pay for any services or facilities on Qwest's side of the POI in connection with the termination of traffic from CLEC by Qwest, other than reciprocal compensation payments as provided in Section hereof.**

Matrix Issue 1D:

Agreed terms are set forth in normal text, Level 3's proposed language is set forth in bold underline, and Qwest's proposed language is in bold italics.

7.2.2.1.2.2 CLEC may **order** ***purchase*** transport services from Qwest of from a third party, including a third party that has leased the private line transport service facility from Qwest **for purpose of network management and routing of traffic to/from the POI.** Such transport provides a transmission path for the LIS trunk to deliver the originating Party's Exchange Service EAS/Local traffic to the terminating Party's End Office Switch or Tandem Switch for call termination. ***Transport may be purchased from Qwest as Tandem Switch routed (i.e. tandem switching, tandem transmission and direct trunked transport) or direct routed (i.e., direct trunked transport),*** This Section is not intended to alter either Party's obligation under Section 251(a) of the Act **or under Section 51.703 or 51.709 of the FCC's Rules.**

Matrix Issue 1E:

Agreed terms are set forth in normal text, Qwest's proposed language is in bold italics as follows:

7.2.2.1.2.3 LIS ordered to a Tandem Switch will be provided as direct trunked transport between the Serving Wire Center of CLECs POI and the Tandem Switch. ***Tandem transmission rates, as specified in Exhibit A of this Agreement, will apply to the transport provided from the tandem Switch to Qwest's End Office Switch***

Matrix Issue 1F:

Agreed terms are set forth in normal text, Level 3's proposed language is set forth in bold underline, and Qwest's proposed language is in bold italics.

7.2.2.9.6 ***The Parties shall terminate Exchange Service (EAS/Local) traffic on Tandem Switches or End Office Switches. CLEC may interconnect at either the Qwest local tandem or the Qwest access tandem for the delivery of local exchange traffic.*** When CLEC is interconnected at the access tandem and when there is a DS1 level of traffic (512 BHCCS) over three (3) consecutive months between CLEC's Switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End office Switch **for purposes of network management and routing of traffic to or from the POI. Notwithstanding references to Qwest's ability to request that CLECs**

**order direct trunk groups to the Qwest end office, nothing in this agreement shall be construed to require CLEC to pay Qwest for any services or facilities on Qwest's side of the POI in connection with the origination of traffic form Qwest to CLEC and nothing herein shall b construed to require CLEC to pay for any services or facilities on Qwest's side of the POI in connection with the termination of traffic from CLEC by Qwest, other than reciprocal compensation payments as provided in this Agreement.** ***CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide Interconnection facilities to the local Tandem Switches or End Office Switches served by the Access Tandem Switch at the same cost to CLEC as Interconnection at the Access Tandem Switch. If CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal, Qwest may require it only: (a) upon demonstrating that a failure to do so will have a material adverse affect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact on the operation of CLEC, as compared with /Interconnection at such Access Tandem Switch.***

Matrix Issue 1I:

The parties propose the following language:

| Level 3's Proposed Language: | Qwest's Proposed Language: |
|---|---|
| 7.3.3.1 Neither Party may charge (and neither Party shall have an obligation to pay) any installation nonrecurring charges or the like, for any LIS trunk ordered for purposes of exchanging ISP-Bound Traffic, 251(b)(5) Traffic, and VoIP Traffic that either Party delivers at a POI, other than the intercarrier compensation rates. | 7.3.3.1 Installation nonrecurring charges may be assessed by the provider for each LIS trunk ordered. Qwest rates are specified in Exhibit A. |

Matrix Issue 1J:

The parties propose the following language:

| Level 3's Proposed Language: | Qwest's Proposed Language: |
|---|---|
| 7.3.3.2 Neither Party may charge (and neither Party shall have an obligation to pay) any nonrecurring charges for rearrangement assessed for any LIS trunk rearrangement ordered for purposes of exchanging ISP-Bound Traffic, 251(b)(5) Traffic, and VoIP Traffic that either Party delivers at a POI, other than the intercarrier compensation rates. | 7.3.3.1 Nonrecurring charges for rearrangement may be assessed by the provider for each LIS trunk rearrangement ordered at one-half (1/2) the rates specified in Exhibit A. |

**Level 3's Position:**

Level 3 claims that Qwest's proposed language does not make clear that Level 3 is entitled to one Point of Interconnection ("POI") per LATA. Level 3 proposed its Section 7.1.1.1 to clarify it is

entitled to a single POI ("SPOI") in each LATA. Level 3 asserts its language is completely consistent with FCC rules and regulations. Level 3 cites § 251(c)(2) of the Act which requires an incumbent local exchange carrier to provide facilities "at any technically feasible point within the carrier's network." Level 3 asserts the evidence is undisputed that its proposal to interconnect with Qwest by means of a single POI on Qwest's network in each LATA will work efficiently. Level 3 asserts that its interconnection proposal is working efficiently today.

Level 3 states that Qwest's proposed language dose not contain a simple or direct statement that Level 3 may in fact use a single POI per LATA. Level 3 argues the implication of Qwest's proposed language is that Level 3 may be required to establish multiple POIs within a LATA, and/or to pay Qwest more for the privilege of interconnecting. For example, Level 3 claims that Qwest argues that where it has more than one tandem switch per LATA, Level 3 should establish separate physical facilities to each tandem. In addition, Level 3 cites Qwest's argument that Level 3 must have a physical location in each LCA to avoid toll calls between local calling areas. Level 3 claims that Qwest's position requires it to mimic Qwest's retail marketing plans and network architecture, and wholly negates the point of the SPOI requirement which was intended to allow new entrants to employ their own, more efficient network architectures.

Level 3 argues that when Qwest asserts that Rule 51.703(b) (reciprocal compensation) does not apply to ISP-bound and/or VoIP traffic, Qwest is seeking to charge Level 3 for the privilege of receiving such traffic from Qwest. Rule 51.701(b) applies to "telecommunications traffic" which is all telecommunications other than exchange access and information access. Rule 51.703(b) says that a LEC may not charge for "telecommunications traffic" that originates on another LEC's network, thus, Level 3 charges Qwest is asserting Rule 51.703(b) does not apply to information access and Qwest can charge Level 3 for this traffic. Level 3 asserts this argument has been rejected by at least two courts. The Fourth Circuit in *MCI Metro ACCESS Transmission Serv. v. BellSouth Telecommunications, Inc.* 353 F.3d 872 (4th Cir. 2003), held that FCC Rule 51.703(b) "unequivocal[ly] prohibits[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions." In addition, Level 3 cites *Qwest Corp. v Universal Telecom, Inc.*, 2004 U.S. Dist. LEXIS 28340 at *14-15, which it says addresses the same issue raised in this case. Citing the federal rules,

the *Universal* court held:

> In the instant case, 100% of the traffic exchanged between the parties originated on Qwest's network and terminated on Universal's. Under § 51.703(b) and §51.709(b), Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network and terminated on Universal's network. For these reasons, Qwest's claims as to the charges for LIS circuits, DTT, EF and MUX interconnection facilities fails.

Level 3 states that the *Universal* court had full knowledge that the traffic Qwest was originating to the CLEC was essentially entirely ISP-bound, and thus, this decision confirms that ISP-bound traffic is not an exception to Rule 51.703(b)'s ban on charging for traffic origination.

Qwest states that it requires its unregulated affiliate QCC, which provides service similar to Level 3 to buy a PRI in every LCA where it provides services. (Level 3 says a PRI is the equivalent service that Level 3 offers to its customers who provide VoIP, ISP dial-up and related services.) Level 3 argues that to require Level 3 to purchase the equivalent service in each LCA ensures that Level 3's costs exceed those of QCC because Qwest's actual cost of terminating Qwest-originated traffic to Level 3 at the single POI is *de minimis* and because of Qwest's proposal that Level 3 must either purchase transport or pay a higher intercarrier compensation.

Level 3 argues that it is discriminatory to force Level 3 to "mirror" Qwest's network by establishing multiple POIs. Level 3 likens the requirement as a tax on Level 3 for being different from Qwest. Level 3 asserts the key purpose of the 1996 Act is to enable facilities-based competitors like Level 3 to flourish, and it is anti-competitive to establish rules that penalize Level 3 for not interconnecting in a way that conforms to Qwest's wishes.

Level 3 states that by insisting on a SPOI, it is not asking Qwest to reconfigure its network in any way, nor is it asking Qwest to build new facilities. Level 3 states that Qwest already has connection within its network between its end office switches and the tandems they subtend, as well as between and among its tandem switches. According to Level 3, it is technically a simple matter to isolate Level 3-bound traffic (identified by telephone number) on separate trunk groups to allow that traffic to be efficiently carried to the SPOI. (Tr 506-07) Level 3 also argues the cost to Qwest of transporting traffic from within a LATA to a single POI within the same LATA is *de minimis*. (Ex RRD-22, TR 26-27). Level 3 asserts that the entire basis for Qwest's position is an illegitimate desire

to impose unreasonably discriminatory costs and operational inefficiencies on Level 3.

Level 3 proposed Section 7.1.1.2 to establish a single "meet point" interconnection arrangement per LATA, and under such arrangement each party is responsible for the operation of, and costs associated with, the facilities and equipment on its side of the meet point POI. Level 3 states under its proposal, each party pays the other for terminating traffic, but neither can export its traffic origination costs to the other, and each party's end users are responsible for paying the cost of the traffic they originate.

Level 3 states its language indicates that it will pay intercarrier compensation in accordance with applicable law, which includes both reciprocal compensation and, where applicable, access charges. It states that its proposed language is also clear that other than originating access charges for toll calls where Level 3 is the IXC (that is, the provider of "telephone toll service") Level 3 will not pay Qwest when Level 3 carriers calls originated by Qwest's customers.

Level 3 states that its proposal makes perfect sense in the real world. According to Level 3, an end user who makes a "1+" call expects to pay a toll for that service. Level 3 states, however, that it does not sell traditional retail long distance service; it does not provide 1+ service. (Tr at 85.) First, Level 3's network is entirely IP. Second, the end user making use of Level 3's network does not have to pre-subscribe to a third party toll carrier, instead the end user buys a voice-enabled data service that lets him make or receive calls form any point on the globe where they have a broadband connection to the Internet. Third, Level 3 states, regardless of whether the call will terminate to a VoIP customer in Bangkok or next door, Level 3 carries the call to the POI at no additional charge to Qwest. Level 3 pays Qwest to terminate the call to Qwest's end user.

Level 3 argues its position is consistent with federal and state authority under the 1996 Act. According to Level 3, a "meet point" is 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. Level 3 states the FCC has specifically held that "technically feasible methods of obtaining interconnection . . . include, but are not limited to: (2) meet point interconnection arrangements." 47 C.F.R. § 51.321(b). Level 3 argues this means that an ILEC must establish a meet point arrangement if a CLEC so requests.

Level 3 states that the "meet point" is a bridge connecting the networks. Trunks are the software that route traffic, and trunks talk to facilities through trunk ports. Level 3 states that it has trunk ports to talk to Qwest and Qwest has trunk ports to talk to Level 3. Level states that Qwest wants Level 3 to purchase the trunks and trunk ports that Qwest must use to route traffic from Qwest to Level 3. Level 3 asserts this makes no sense as in the *Local Competition Order*, the FCC made clear that in a meet point interconnection, neither carrier has financial or operational responsibility for the physical arrangements on the other carrier's side of the meet point. (See *Local Competition Order* at ¶ 553) Level 3 asserts that its proposed arrangement, under which each party bears its own costs for the facilities needed to reach the POI, is operationally simpler and eliminates the need for any jointly used "internetwork" facilities whose costs must be allocated.

**Qwest's Position:**

Qwest argues that the real issue is compensation for the use of its network. Qwest states that pursuant to Section 251(c)(2)(D) of the 1996 Act, Qwest has a duty to provide interconnection with its local exchange network "on rates terms and conditions that are just, reasonable, and nondiscriminatory" and in accordance with the requirements of Section 252 of the 1996 Act. Section 252 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," "nondiscriminatory," and "may include a reasonable profit." Qwest states the FCC recognized in the *Local Competition Order* ¶¶ 200, 209, that these provisions make clear that CLECs must compensate incumbent LECs for the costs incumbent LECs incur to provide interconnection. Qwest asserts this is true even when the costs are incurred on Qwest's side of the point of interconnection.

Qwest explains that it offers Level 3 a number of options for interconnection, and allows Level 3 to elect the option that best meets its needs. One option is for the CLEC to build facilities to a Qwest central office for collocation, which allows a CLEC to put equipment in one of Qwest's serving wire centers and interconnect at that point. This option requires the CLEC to incur the costs of establishing the collocation, but does not require the use of entrance facilities. A second option is for the CLEC to purchase entrance facilities from a Qwest central office to the CLEC's nearest premises. Qwest states this option is appropriate for those CLECs who do not want to incur capital expense by either laying

fiber for a mid-span meet POI or setting up a collocation. An entrance facility creates transport between a CLEC building and the nearest Qwest serving wire center. Qwest states the two-way entrance facilities between Qwest and the CLEC are shared based on their relative use by each party. (See Matrix issues 1g and 1h, below.) A third option is for the parties to build to a meet point approximately midway between the CLEC's POI and a Qwest tandem or end office switch. This option requires a capital outlay, but the relative use calculations that apply to an entrance facility purchased from Qwest do not apply. Qwest states that each of these interconnection options has its own compensation rules that are set forth in Qwest's SGAT. Qwest states that its proposed language follows the applicable rules and is consistent with the SGAT language, while Level 3's proposal does not and would result in Level 3 receiving special treatment.

Qwest asserts that establishing a meet point does not relieve Level 3 of the requirement that it compensate Qwest for interconnection costs Qwest incurs. Qwest cites the *Local Competition Order* in which the FCC addressed the nature of meet point arrangements. With respect to configuration of meet point arrangements the FCC stated:

> Meet point arrangements (or mid-span meets). . . are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network" (e.g. main distribution frame, trunk side of the switch), and the limited build out of facilities from that point may then constitute an accommodation for interconnection. In a meet point arrangement each party pays its portion of the costs to build the facilities to the meet point. *Local Competition Order* ¶553.

The FCC continued, addressing cost sharing:

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

Qwest argues that Level 3 does not seek interconnection for the purpose of exchanging traffic,

but rather for the purpose of serving its ISP customers whose end users generate a large amount of one-way calls flowing from Qwest's network to Level 3. If, as the FCC has stated, where there is an exchange of traffic and each carrier benefits, "it is reasonable to require each party to bear a reasonable portion" of the cost, then Qwest argues the inverse is also true, that where there is no exchange, and only one party benefits (here, Level 3) it is not reasonable for the other party to bear the costs.

Qwest asserts that the FCC's decision in its *Verizon Virginia Order*[34], undermines Level 3's position that Qwest must bear all the cost of its network used for interconnection. In that case the FCC held:

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

Qwest asserts the *Verizon Virginia Order* contradicts Level 3's insistence that Qwest must bear all cost of its network used for interconnection. Furthermore, Qwest asserts, commissions and courts who have looked at such arrangements have concluded that the costs incurred in transporting one-way traffic to the CLEC's ISPs are not costs that should be borne by the ILEC.

Qwest argues that court decisions support its position. For example, Qwest cites *US WEST Communications, Inc. v Jennings*, 304 F.3d 950,961 (9th Cir. 2002), in which the Ninth Circuit noted that "to the extent that AT&T's desired interconnection points prove more expensive to US WEST, we agree that the [Arizona Corporation Commission] should consider shifting cots to AT&T." Qwest notes that in *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, the Third Circuit found that while WorldCom was entitled to choose interconnection at a single point per LATA, "to the extent . . .that WorldCom's decision on interconnection points may prove more expensive to Verizon,

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

the PUC should consider shifting costs to WorldCom." 271 F.3d 491, 518 (3rd Cir. 2003).

Qwest argues that Level 3's reliance on the FCC's Rule 51.703(b) is misplaced, as this rule applies to telecommunications traffic, and the FCC has defined "telecommunications traffic" to exclude "information access traffic." 47 C.F.R. §51.701(b)(1). Qwest states that in the *ISP Remand Order*, the FCC determined that ISP-bound traffic (defined as traffic destined for the Internet where the ISP server is located in the same local calling area as the originating caller) is information access traffic. *ISP Remand Order* ¶ 39.

Qwest objects to Level 3's proposed language that Qwest characterizes as attempts to interject disclaimers that it is not responsible to pay for interconnection costs incurred at its request. Qwest argues that these disclaimers are not appropriate in sections of the agreement that address the manner of interconnection, as the financial obligations of the parties are addressed in other sections of the interconnection agreement.

Furthermore, with respect to issues 1B and 1F, Qwest claims that Level 3 incorrectly describes facets of interconnection. In issue 1B, Qwest asserts that Level 3 confuses what is required to create a point of interconnection with what is required to interconnect two networks. In addition, Qwest complains that Level 3 inappropriately removes the reference to tandem switches and end office switches as places where traffic may be exchanged. (Matrix Issue 1F) Qwest states that Level 3's language is inappropriate because there are no other places within Qwest's network where traffic may be exchanged. Qwest also objects to Level 3 eliminating any requirement to establish trunking to subtending network switches when traffic volumes require it.

Qwest refutes Level 3's argument that by requiring Level 3 to establish a local presence in the LCA in which it purports to provide local service or to pay access charges for interexchange calls "negates the point of the SPOI requirement." (Level 3 Brief at 17.) Qwest states this argument was rejected by the FCC in the *Local Competition Order* in which the FCC states that "because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, access charges are not affected by our rules implementing section 251(c)(2)." [35] Qwest states

[35] *Local Competition Order* ¶ 176.

that in deciding where to interconnect, Level 3 has to consider the extent to which it will have to pay access charges if it chooses only a single point of interconnection. But Qwest argues, there is no basis for Level 3's contention that single point of interconnection somehow excuses it from paying access charges.

Qwest also claims it is disingenuous for Level 3 to argue that because end users do not have to dial "1+" before making an interexchange call to Level 3's customers because of its use of VNXX, it is appropriate that Qwest carry the traffic from any point in the LATA to the Level 3 POI without charge. (Level 3 Brief at 21.) Qwest states that by using VNXX Level 3 is sending a false economic signal to end users by disguising an interexchange call as local, and thereby is encouraging heavier use. Qwest asserts that Level 3 generates more revenue, and Qwest is left the burden of uncompensated traffic.

**Resolution**:

Level 3's fear that Qwest's proposed language deprives Level 3 of the right to a single POI per LATA is misplaced. There is nothing in Qwest's proposed terms that would deprive Level 3 of this long recognized right. Different types of interconnection require different capital outlays and recurring costs, which Level 3 must consider in determining where and how to interconnect. Level 3's proposal for issue 1A confuses methods of interconnection with compensation and appears either overbroad in its statements concerning intercarrier compensation or conflicts with our determination herein regarding the use of VNXX.

The FCC and courts have recognized that it is inequitable for ILECs to have to bear the entire cost of interconnection, including recurring costs and costs of embedded plant. See e.g. *Verizon VirginiaOrder* at ¶ 133. Qwest's language accurately defines the obligations of interconnection under the Act. Qwest's proposed language requiring the establishment of trunking to subtending switches when the volume of traffic requires additional facilities is consistent with our prior decisions and approval of SGAT language.

Thus, with respect to Matrix Issue 1A, we adopt Qwest's proposed Section 7.1.1. For reasons set forth in connection with the next issue, we decline to adopt Qwest's proposed sections 7.1.1.1 and 7.1.1.2.

With respect to Matrix Issues 1B, 1C, 1D, IE, 1F, 1I and 1J we adopt Qwest's proposed language.

**Issue: Should the ICA contain language that would allow operational audits and certification related to VoIP providers? (Matrix issue 1A)**

**Level 3's Position:**

Level 3 did not address this issue in either of its briefs, nor did it submit testimony. In the Issue Matrix Level 3 states that Level 3 has no control, nor should it have control over the equipment and configurations used by third party end-users. Level 3 objects to Qwest's proposed language as it seeks to make Level 3 the virtual guarantor of third party activities.

**Qwest's Position:**

Qwest proposes language (see above) that would allow operational audits related to VoIP traffic (Section 7.1.1.1) and language requiring Level 3 to certify that traffic it characterizes as VoIP traffic meets the approved definition (Section 7.1.1.2).

Qwest argues that audits are necessary to certify the jurisdiction of a call by ensuring that a VoIP call is properly classified for billing purposes according to the location of the originating and terminating points of the PSTN portions of the call, and to ensure that the calls are properly classified as VoIP in compliance with the FCC's definition.

**Resolution:**

We believe that it would be operationally difficult for Level 3 to provide the certification of its end users as required by Qwest's proposed Section 7.1.1.2, and thus, we do not approve this provision. We find further that Qwest's proposed language for Section 7.1.1.1 is not reasonable as it places an unnecessary burden on Level 3 and its customers in contravention of the FCC's goal of limiting burdens on VoIP providers.

**Issue: What is the appropriate language concerning the Relative Use Formula? (Matrix issue 1G and 1H)**

This issue addresses how the cost of jointly used facilities will be allocated. Issue 1G relates to the question of entrance facilities and issue 1H concerns two way direct transport facilities. The issue is the same as it relates to both types of facilities. The Parties' proposed language as follows:

Matrix Issue 1G:

| Level 3's Proposed Language | Qwest's Proposed Language |
|---|---|
| 7.3.1.1.3 Each party is solely responsible for any and all costs arising from or related to establishing and maintaining the interconnection trunks and facilities it uses to connect to the POI. Thus, neither party shall require the other to bear any additional costs for the establishment and operation of interconnection facilities that connect to its side of the POI.<br>7.3.1.1.3.1 Intercarrier compensation, Intercarrier compensation for traffic exchanged at the SPOI shall be in accordance with FCC Rule 51.703 and associated FCC rulings. For avoidance of doubt, any traffic that constitutes "telecommunications" and that is not subject to switched access charges, including without imitation so-called "information access" traffic, shall be subject to compensation from the originating carrier to the terminating carrier at the FCC-mandated capped (as of the effective date hereof) of $0.0007 per minute. Any dispute about the appropriate intercarrier compensation applicable to any particular traffic shall be resolved by reference to the FCC's rule and associated orders. | 7.3.1.1.3 If the Parties elect to establish LIS two-way trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the LIS two-way facilities shall be shared among the Parties by reducing the LIS two-way entrance facility (EF) rate element charges as follows:<br>7.3.1.1.3.1 Entrance Facilities – The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor (RUF) of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor based on actual minutes of use data for non-ISP-bound traffic and all traffic that is VNXX Traffic to substantiate a change in that factor. If a CLEC's End User Customers are assigned NPA-NXXs associated with a rate center where the Customer is physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling NPA-NXXs, involving those Customers is referred to as "VNXX traffic". For purposes of determining the RUF, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with non-ISP-bound traffic data that actual minutes of use during the first quarter justify a new relative use factor, that Party will send a notice to the other Party. Once the Parties finalize a new factor, the bill reductions and payments will apply going forward from the date the original notice was sent. ISP-bound traffic or traffic delivered to Enhanced Service providers is interstate in nature. Qwest has never agreed to exchange VNXX Traffic with CLEC. |

Matrix Issue 1H

| Level 3's Proposed Language | Qwest's Proposed Language |
|---|---|
| 7.3.2.2 Each Party is solely responsible for any and all costs arising from or related to establishing and maintaining the interconnection trunks and facilities it uses to connect to the POI. Thus, neither party shall require the other to bear any additional costs for the establishment and operation of interconnection facilities that connect its network to its side of the POI. | 7.3.2.2 If the Parties elect to establish LIS two-way DTT trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic the cost of the LIS two-way DTT facilities shall be shared among the Parties by reducing the LIS two-way DTT rate element charges as follows:<br><br>7.3.2.2.1 Direct Trunked Transport – The provider of the LIS two-way DTT facility will initially share the cost of the LIS two-way DTT facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the DTT facility, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor based on actual minutes of use data for non-ISP-bound traffic and all traffic that is VNXX Traffic to substantiate a change in that factor. If a CLEC's End User Customers are assigned NPA-NXXs associated with a rate center where the Customer is physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling NPA-NXXs, involving those Customers is referred to as "VNXX traffic". For purposes of determining the RUF, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with non-ISP-bound traffic data that actual minutes of use during the first quarter justify a new relative use factor, that Party will send a notice to the other Party. Once the Parties finalize a new factor, the bill reductions and payments will apply going forward from the date the original notice was sent. ISP-bound traffic or traffic delivered to Enhanced Service providers is interstate in nature. Qwest has never agreed to exchange VNXX Traffic with CLEC. |

**Level 3's Position:**

Level 3 asserts that Qwest's proposed "RUF" formula impermissibly undermines the use of a

SPOI as a financial demarcation point between the two networks. Level 3 claims that the effect of Qwest's RUF shifts to Level 3 some or all of the costs that Qwest incurs in getting Qwest-originated traffic to the hand-off point. Level 3 argues Qwest's position is contrary to general federal policy banning origination charges between LECs and contrary to the specific FCC rule governing charges for internetwork facilities.

In support of its position, Level 3 cites FCC Rule 51.703(b), which states "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." In addition to violating Rule 703(b), Level 3 asserts that Qwest's proposed language violates Rule 51.709(b)'s specific provisions relating to relative use factors. According to Level 3, Qwest's proposed language says that Level 3 must pay for the entire capacity of facilities that Qwest provides for this purpose, reduced by any outbound-to-Level 3 usage that Qwest might generate. However, according to Level 3 Rule 51.709(b) provides that the interconnecting carrier can only be charged for such a facility based on the proportion of its capacity that it actually uses. FCC Rule 51.709(b) provides:

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

Thus, Level 3 argues, if Qwest establishes a DS3 between the two networks, the only charge that can be assessed on Level 3 is the proportion of the DS3 that Level 3 actually uses to send traffic to Qwest. According to Level 3, neither the amount nor type of traffic that Qwest might send to Level 3 has any possible relevance under the FCC's rule. Level 3 charges that Qwest's proposed formula is designed to shift costs to Level 3. According to Level 3, it starts out responsible for all the capacity between the networks—if Qwest sends no traffic to Level 3, the factor that determines how much Level 3 pays is 100 percent. As the amount of Qwest to Level 3 traffic grows, then the amount that Level 3 pays declines. Level 3 states that while Qwest's rule may sound fair, it is divorced from the FCC rule that speaks only in terms of traffic from Level 3 to Qwest.

Level 3 complains that every minute of Qwest-originated traffic that gets excluded from

Qwest's RUF formula is that much more that Qwest can charge Level 3 for Qwest-originated traffic. Thus, Level 3 states it is not surprising that Qwest asserts that ISP-bound traffic should not be counted for purposes of determining the RUF. Level 3 argues the rule is the opposite, and requires that where facilities exist but no traffic has yet been sent in either direction, Level 3 pays nothing for the simple reason that Level 3 is not sending Qwest any traffic.

Level 3 argues that its position conforms to the regulatory policy that costs should be recovered from the cost causer. Level 3 argues that when a Qwest end user makes a call, that end user causes the costs involved in getting the call to its destination, and cost responsibility does not shift from that caller if the called party is on another network. Level 3 claims it makes no sense to charge another network for the privilege of receiving calls, and that to the contrary, the originating LEC should recover the costs involved in getting the call to the terminating LEC from the cost causer –its own end user. Level 3 asserts that its position is further supported by the economics of originating, transporting and terminating traffic. When a calling party calls another entity on the Qwest network, Qwest is responsible for the costs of originating the call, transporting the call and terminating the call. If the called party is on a different network, Qwest still incurs the costs of originating and transporting the call to the caller's end office switch, but does not have to transport it to the terminating switch or to perform the terminating switching. Instead it only transports the call to the meet point-POI.

Level 3 also argues there is no basis in federal law to exclude ISP-bound traffic from the relative use calculation. Level 3 cites to Rule 51.709(b), which governs charges for internetwork trunking, the FCC did not use the defined term "telecommunications traffic," but instead used the broader term "traffic." Level 3 argues that, thus, we can conclude that the FCC did not care whether the traffic being exchanged was or was not, subject to reciprocal compensation.

Level 3 asserts that the circumstances surrounding its interconnection with Qwest can be distinguished from AT&T's circumstances as discussed in Commission Decision No. 66888 (April 6, 2004)("*AT&T Arbitration Order*). Level 3 states that in that case, AT&T was interconnecting with Qwest not by means of a meet point, but by means of special access connections. AT&T wanted to shift the cost of those special access facilities back to Qwest in reliance on FCC Rule 51.709(b). Level 3 states that the problem with AT&T's position could be viewed as not with the RUF, but with

AT&T's attempt to avoid the requirement that interconnection occur "on" or "within" Qwest's network. Level 3 submits that the proper means for preventing unfair cost shifting is to enforce the requirement that interconnection occur "on" Qwest's network, not by misapplying Rule 51.709(b).

**Qwest's Position:**

Qwest argues that its proposed language concerning RUF is consistent with federal law as interpreted by the courts and this Commission and is substantially similar to that contained in Qwest's Arizona SGAT as well as numerous Commission-approved interconnection agreements.

Qwest states that the baseline rule is that the CLEC that requests interconnection must compensate the ILEC for the costs the ILEC incurs. *Local Compensation Order* ¶¶ 199-200, 209. Qwest asserts that Level 3 skirts this rule by misapplying Rules 51.703(b) and 51.709(b). Rule 51.703(b) provides:

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

Qwest notes that on its face, Rule 51.703(b) applies only to "telecommunications traffic." "Telecommunications traffic" is defined in Rule 51. 701(b)(1):

> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> > (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access, information access,* or exchange services for such access[.] (emphasis added.)

Qwest states that based on these rules, Level 3 would only be correct that Qwest cannot charge for the facilities it uses to transport calls to Level 3 if those calls qualify as "telecommunications traffic." Qwest asserts that the FCC has determined that calls to ISP providers do not qualify as "telecommunications traffic." In its *ISP Remand Order*, the FCC found that "ISP-bound traffic falls under the rubric of 'information access.'" *ISP Remand Order* ¶ 39. Thus, Qwest argues, Rule 703(b) does not apply to limit recovery by Qwest of the cost of providing Direct Trunk Transport to Level 3

so that Level 3 can serve its ISP customers.[36]

Rule 709(b) provides:

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

Qwest notes that Level 3 relies on this Rule for the proposition that it can only be charged for that portion of any shared facility that it "actually uses to send traffic to Qwest." (Level 3 Brief at 27-28.) Qwest claims that like Rule 703(b), this Rule does not apply to "information access." Thus, Qwest argues, Rule 703(b) does not prohibit Qwest from recovering interconnection costs incurred so that ISP traffic can be delivered to Level 3's ISP customers. Qwest states that its interpretation was upheld by the Colorado Federal District court in *Level 3 v. CPUC*, which found:

> I conclude that [Rule 51,709(b)] must refer to "telecommunications traffic." The first part of the relevant regulations, 47 C.F.R. § 701(a), provides that "[t]he provisions of this subpart [which include 47 C.F.R. § 51.709(b)] apply to reciprocal compensation for transport and termination of tele*communications traffic* between LECs and other telecommunications carriers." 47 C.F.R. §51.701(a) (emphasis added). In light of the fact that 47 C.F.R. § 51.709(b), therefore, can only apply to "telecommunications traffic," under 47 C.F.R. § 51.701(a), 47 C.F.R. § 51.709(b)'s reference to "traffic" must be read to mean "telecommunications traffic."[37]

Qwest notes that this Commission relied on the *Level 3 Decision* in deciding whether ISP traffic should be included in determining relative use in the *AT&T Arbitration Order*. In Decision No. 66888 (April 6, 2004) the Commission stated:

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

Qwest notes that this Commission Decision in the *AT&T Arbitration Order* is consistent with a number of other state regulatory commissions who have likewise excluded ISP traffic from traffic

[36] Qwest notes that Level 3 acknowledged that ISP-bound traffic is "information access" when it stated that "VoIP traffic is a form of "information access" traffic just like ISP-bound traffic." Level 3 Brief at 72.

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

attributed to Qwest in the calculation of the RUF.

Here, Qwest states, the only traffic on the facilities in question is ISP traffic transported by Qwest to Level 3. Consequently, Qwest argues, while Rule 709(b) does not apply to prohibit Qwest from assessing charges for Level 3's use of Qwest's network, the concept of relative use is not helpful in analyzing how the costs of the facilities dedicated to Level 3's ISP traffic should be allocated. Rule 51.100(c) provides :

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

Qwest states that given Level 3's intense focus on serving ISP customers who generate only one-way traffic, Level 3 is not in a position to complain that it is entitled to use Qwest's facilities without charge.

Qwest argues that the *Level 3 Decision* supports its position that Level 3 should bear the cost of providing service to ISP customers. In that case, the court held:

> When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport. 300 F.Supp.2d at 1079.

With respect to Level 3's attempt to distinguish the *AT&T Arbitration Order* from the current situation, Qwest responds that Level 3's distinction between interconnection "on" the network and "within" the network is beside the point. Qwest argues that as it did in the AT&T Arbitration the Commission should reject an attempt to shift the costs of ISP traffic on Qwest. Qwest asserts that it could legitimately have proposed language that required Level 3 to bear 100 percent of the costs of entrance facilities and direct trunk transport since virtually all of the traffic is ISP traffic for which Level 3 should be responsible. However, Qwest states that the language it proposed in Section 7.3.1.1.3.1 for Entrance Facilities and Section 7.3.2.2.1 for Direct Trunk Transport starts with the assumption that the flow of traffic in each direction will be equal and then allows adjustments to the

fifty-fifty split based on actual use.

Level 3 states that prior to the interconnection requirement, Qwest incurred three kinds of costs (origination, transport and termination), but now only incurs a portion of those costs. (Level 3 Initial Brief at 31.) Qwest responds that Level 3 overlooks that under Level 3's proposal to use VNXX, Qwest would be deprived entirely of the compensation that previously covered the costs of those calls, and must also pay Level 3 compensation at the rate of $0.0007 per minute of use. Qwest argues the outcome is entirely inequitable, as Qwest still incurs some of the costs it would previously have incurred, but receives no revenue and must pay Level 3.

**Resolution:**

We find that Level 3's proposed language is overbroad and misstates the law concerning the allocation of costs of interconnection. When a Qwest end user dials his ISP, he is both a customer of Qwest and the ISP. It is only fair and reasonable that the costs of interconnection facilities be shared by Qwest and Level 3 which serves that ISP. A calculation of relative use under Rule 51.709(b) takes account only of "telecommunications traffic" which does not include "information access." See *Level 3 Decision*, 300 F. Supp.2d 1069. Recent Commission decisions have found that ISP-bound traffic should be excluded from the traffic used to allocate cost. *AT&T Arbitration Order*. Level 3 has not provided authority that contradicts this finding. Because most of the traffic from Qwest to Level 3 is to ISPs, and ISPs rarely call their customers, the percentage of non-ISP traffic should be close to zero for both parties. Consequently, under the proposed formula, the parties would share the cost of the facilities 50-50. Qwest's proposed language contains references to VNXX traffic that do not appear relevant give our finding that VNXX arrangements are not appropriate as proposed by Level 3. Thus, with respect to Issues 1G and 1H, we find that Qwest's proposed language for sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2 and 7.3.2.2.1 should be modified to reflect our findings concerning VNXX.

**Issue: Should the Agreement contain a definition of LIS? (Matrix Issue 13)**

The parties propose the following definitions:

| Level 3's Proposed Language: | Qwest's Proposed Language: |
|---|---|
| LIS refers to the physical linking of the Parties' networks for the exchange of Telecommunications Traffic. | "Local Interconnection Service or "LIS" Entrance Facility" is a DS1 or DS3 facility that extends from CLECs Switch location or Point of |

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| | Interconnection (POI) to the Qwest Serving Wire Center. An Entrance Facility may not extend beyond the area served by the Qwest Serving Wire Center. |

Level 3's Position:

Level 3 opposed the Qwest language because it claims the term is used by Qwest to shift the costs of Qwest's network to Level 3.

**Qwest's Position**:

Qwest asserts the definition merely describes an Entrance Facility used for interconnection and does not contain any language that determines who bears the cost of the facility.

**Resolution**:

We do not understand Level 3's objection, as Qwest's proposed definition does not contain language concerning who bears the cost for the facility. Level 3's definition is too vague. We will adopt Qwest's proposed language.

**Issue: Is it appropriate for Qwest to require the use of Separate Feature Group D (FGD) Trunks?(Issue 2, Issue 18)**

This issue involves Qwest's desire to use FGD trunks rather than LIS trunks for certain types of traffic. Level 3 asserts that it should be allowed to commingle local and toll traffic over LIS trunks, while Qwest asserts that it will only allow co-mingled traffic over FGD trunks.

Matrix Issue 2A:

| Level 3's Proposed Language | Qwest's Proposed Language: |
|---|---|
| 7.2.2.9.1 Where CLEC exchanges Telephone Exchange Access Service, Telephone Toll Service, and Information Services traffic with Qwest over a single interconnection network, CLEC agrees to pay Qwest, on Qwest's side of the POI, state or federally tariffed rates applicable to the facilities charges for InterLATA and/or Inter LATER traffic in proportion to the total amount of traffic ex hanged over such interconnection facility Otherwise each party remains 100% responsible for the cots of its interconnection facilities on its side of the POI. Thus, by way of illustration only, where 20%of such traffic is interLATA (intrastate and interstate) and the remaining 80% is Section 251(b)(5) Traffic, CLEC would pay Qwest an amount equal to 20% of the applicable | 7.2.2.9.3.1 Exchange Service (EAS/Local), ISP-Bound Traffic, IntraLATA LEC Toll, VoIP traffic and Jointly Provided Switched Access (InterLATA and IntraLATA Toll involving a third party IXC) nay be combined in a single LIS trunk group or transmitted on separate LES trunk groups.<br><br>7.2.2.9.3.1.1 If CLEC utilizes trunking arrangements as described in Section 7.2.2.9.3.1, Exchange Service (EAS/Local) traffic shall not be combined with Switched Access, not including Jointly Provided Switched access, on the same trunk group, i.e. Exchange Service (EAS/Local) traffic may not be combined with Switched Access Tandem Switch and/or End Office Switch. |

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| tariffed transport rate that would apply to a tariffed facilities used solely for the exchange of such access traffic for such traffic exchanged on Qwest's side of the POI over a single interconnection trunk.<br><br>Except as expressly provided in Section 7.3.1.1.3 Each party shall bear all costs of interconnection on its side of the network in accordance with 47 C.F.R. § 51.703. Accordingly, unless otherwise expressly authorized according to Section 7.3.1.1.3, neither Party may charge the other (and neither Party shall have an obligation to pay) any recurring and/or nonrecurring fees, charges or the like (including, without limitation, any transport charges), associated with the exchange of any telecommunications traffic including but not limited to Section 251(b)(5) Traffic on its side of the POI.<br><br>Each party is solely responsible for any and all costs arising from or related to establishing and maintaining the interconnection trunks and facilities it sues to connect to the POI. Thus, neither Party shall require the other to bear any additional costs for the establishment and operation of interconnection facilities that connect its network to is side of the POI. IF traffic is combined, Section 7.3.9 of this Agreement applies. | |

Matrix Issue 2B:

Level 3 believes that Qwest's language forces it to build out separate trunks for local and toll traffic in contravention of the requirements of the Act.

| Level 3's Proposed Language: | Qwest's Proposed Language |
|---|---|
| 7.2.2.9.3.2 CLEC may combine Exchange Service (EAS/Local) traffic, ISP-Bound Traffic, Exchange Access (IntraLATA Toll carried solely by Local Exchange Carriers), VoIP Traffic and Switched Access Feature Group D traffic including Jointly Provided Switched Access traffic, on the same Feature group D trunk group or over the same interconnection trunk groups as provided in Section 7.3.9. | 7.2.2.9.3.2 CLEC may combine originating Exchange Service EAS/Local) traffic, ISP-Bound Traffic, IntraLATA KLEC Toll, VoIP Traffic and Switched Access Feature Group D traffic including Jointly Provided Switched Access traffic, on the same Feature Group D trunk group.<br><br>7.2.2.9.3.2.1 CLEC shall provide to Qwest, each quarter, Percent Local Use (PLU) factors(s) that can be verified with individual call detail records or the Parties may use call records or mechanized jurisdictionalization using Calling Party Number (CPN) information in lieu of PLU, if CPN is available, Where CLEC utilizes an |

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|---|---|
| | affiliate's Interexchange Carrier (ISC) Feature Group D trunks to deliver Exchange Service (EAS/Local) traffic to Qwest, Qwest shall establish trunk group(s) to deliver Exchange service (EAS/Local), Transit, and IntraLATA LEC Toll, to CLEC. Qwest will use or establish a POI for such trunk group in accordance with Section 7.1. |

Matrix Issue 18:

Level 3 claims that Qwest's language on the use of factors to determine categorization of traffic is vague, and that its proposed language contains detailed instructions on how the parties will measure and report the allocation of traffic. Agreed upon language is in normal text font, with Level 3's proposed language in bold underline and Qwest's proposed language in bold italics.

7.3.9 To the extent a Party combines ***Section 251(b)(5) Traffic Exchange Service (EAS/Local), IntraLATA LEC Toll***, and Jointly Provided Switched Access (InterLATA and NtraLATA calls exchanged wit a third party ISC) traffic on a single ***LIS*** trunk group, the originating Party, at the terminating Party's request sill declare **monthly *quarterly*** PLU(s) **PIU(s), and PIPU(s), collectively "Jurisdictional Factors."** Such **Jurisdictional Factors *PLUs*** will be verifiable with either call summary records utilizing **Call Record *Calling Party*** Number information for jurisdictionalization of call detail samples. The terminating Party should apportion per minutes of use (MOU) charges appropriately.

**7.3.9.1 The Jurisdictional Factors – PLU, PIO and PIPU- are defined as follows:**

**7.2.9.1.1 PIPU – Percent IP Usage: This factor represents the traffic that is IP Enabled as a percentage of ALL traffic. CLEC has introduced this factor to identify IP-Enabled Services traffic for billing purposes to Qwest on an interim basis until an industry standard is implemented, IP-Enabled traffic includes all IP-TDM and TDM to IP traffic that is exchanged directly between the parties.**

**7.3.9.1.2 PIU- Percent Interstate Usage: This factor represents the end-to-end circuit switched traffic (ie TDM-IP-TDM) that is interstate for services that are billed at tariffed rates on a per Minute of Use (MOU) basis as a percentage of all end-to end circuit switched traffic, i.e. all interstate traffic after IP-Enabled traffic has been exclude. This factor does not include IP-Enabled Services Traffic.**

**7.3.9.1.3 PLU-Percent 251(b)(5) Usage: this factor represents the end-to-end circuit switched traffic 251(b)(5) traffic as a percentage of all end-to end circuit switched traffic, This factor distinguishes traffic that is rated as "local" (ie "Section 251(b)(5) traffic") from Intrastate toll traffic. This factor does not include IP-Enabled Services traffic.**

7.3.9.2 Unless other agreed to by the parties: (1) factors will be calculated and exchanged on a monthly basis. Percentages will be calculated to two decimal places (for example 22.34%); (2) each party will calculate factors for all traffic that they originate and exchanged directly with the other Party; and (3) the party responsible for collecting data will collect all traffic data, including but not limited to Call Detail Records (this includes CPN), from each trunk group in the state over which the parties exchange traffic during each study period. The parties will calculate the factors defined in section 7.9.1, above , as follows:

7.3.9.2.1 PIPU: The PIPU is calculated by dividing the total IP-Enabled Services MOU by the total MOU. The PIPU is calculated on a statewide basis.

7.3.9.2.1.1 Upon ILEC request, CLEC will provide a PIPU factor for all minutes of usage exchanged directly between the Parties over the Interconnection Trunk Groups in each state. CLEC will provide separate PIPU factors for CLEC Terminating IP-enabled Traffic and CLEC Originating IP-enabled Traffic, which terms are defined in sections 7.8.4.3.1.1 and 7.8.4.3.1.2, respectively, below, Accordingly, the PIPU factor is based upon CLEC's actual and verifiable Call detail Records or IP-originated traffic.

7.3.9.3 Exchange of Data:

7.3.9.3.1 The party responsible for billing will provide the PIPU, PLU and PIU factors to the non-collecting party on or before the 15th of each month, via email (or other method as mutually agreed between the parties), to designated points of contact within each company.

7.3.9.4 Maintenance of Records

7.3.9.4.1 Each company will maintain traffic data on a readily available basis for a minimum period of one year (or however long as required by state and federal regulations) after the end of the month for which such data was collected for audit purposes.

7.3.9.5 Audits

7.3.9.5.1 Each company will have the ability to audit the other company's traffic factors up to a maximum of twice per year. A party seeking audit must provide notice of their intent to audit and include specific dates, amounts and other detail necessary for the party receiving the request to process the audit. Notice must be provided in writing and post marked as mailed to the audited party within one year after the end of each month (s) for which they seek audit.

7.3.9.5.2 The audited party must provide in mutually agreeable electronic format traffic data for the months requested according to Section 7.3.9.5.1 above.

7.3.9.6 True up

**In addition to rights of audit, the Parties agree that where a factor is found to be in error by more than 2 %, they will automatically true up the factors and pay or remit the resulting amounts to correct such errors.**

**Level 3's Position:**

Level 3 complains that there is no reason for Qwest's willingness to receive all "types" of traffic over Feature Group D ("FGD") trunks, but its unwillingness to permit "switched access" traffic to terminate on "LIS" trunks. Level 3 argues that from a network engineering perspective, there is no basis for distinguishing different "types" of traffic and placing them on different trunk groups. Level 3 states its proposed language allows all traffic types to be exchanged over a single trunking network. It asserts that its position is technically feasible, more efficient than Qwest's and fully adequate for proper billing. Level 3 asserts that dividing traffic headed for a particular switch into different categories on different trunks requires the establishment of more trunks than would otherwise be needed. (Ex L-1 at 31-32.)

Level 3 asserts that Qwest's suggestion that its LIS trunks are not properly configured to handle exchange access traffic is odd as Level 3 claims Qwest invented LIS trunks to meet its responsibilities under Section 251 of the 1996 Act which requires Qwest to provide interconnection "for the transmission and routing of telephone exchange service and exchange access." Level argues the language of Section 251(c)(2)(A) is clear that Qwest should be exchanging access traffic over CLEC interconnection trunks, and that if Qwest has not properly configured its LIS trunks to handle access traffic, it has ignored its statutory duty. Level 3 claims that Qwest's position is even more odd in light of Qwest's acknowledgement that it is appropriate for a CLEC to send switched access traffic bound for a third-party interexchange carrier over LIS trunks.

FGD trunks are generally used to give a toll carrier access to the ILEC network and provide additional call recording functionalities. Level 3 asserts that because the arrangement under review is for interconnection it should use LIS trunks. Level 3 asserts that the majority of traffic that it exchanges with Qwest is locally dialed traffic, not subject to toll billing. Since Level 3 does not provide retail toll services and will not receive any 1+ (FGD) calls from end users, Level 3 argues it makes no sense for Level 3 to order separate FGD trunks.

In addition, Level 3 states, Qwest has admitted that FGD trunks have some of the same

limitations as the LIS trunk. Level 3 states it is quite likely that Level 3 will send Qwest more VoIP traffic than 1+ toll traffic. Level 3 states there is no billing standard for VoIP traffic and there is no evidence to suggest that VoIP calls would be measured more effectively on FGD trunks than on LIS trunks. Level 3 states that although Qwest argues that FGD trunks are preferable to LIS trunks because LIS trunks require the use of factors, Qwest admits that it uses factors for certain FGD traffic. (Tr at 426-27.) Level 3 asserts there is nothing unusual about using factors and it is commonplace throughout the industry.

Level 3 states that its proposed language requires that the traffic be verifiable and that it be reviewed every 30 days. (See Level 3 proposed Section 7.3.9.) Level 3 argues its proposed factors are not a wild guess, as its softswitches record call information in automatic message accounting ("AMA") format. Level 3 states Qwest acknowledges AMA format measures actual traffic. Even on LIS trunks, Level 3 argues, Qwest will, or should, have call detail records associated with each incoming and outgoing call, so that traffic can be sorted and rated after the fact. (Tr. 415-16.) Thus, Level 3 argues, Qwest will be able to get the access charges to which it is entitled.

Level 3 argues that Qwest misreads Section 251(g) as requiring Qwest to "provide interconnection for the exchange of switched access in the same manner that it provided interconnection for such traffic" before the 1996 Act. According to Level 3, Section 251(g) requires "the same equal access and nondiscriminatory interconnection restrictions and obligations" that applied before the Act continue to apply, or in other words, that Qwest cannot stop providing equal access, or start discriminating among carriers. Level 3 asserts that Qwest complies with this requirement by having its nondiscriminatory FGD tariff offerings on file and available to all carriers.

Level 3 asserts that nothing in Section 251(g) says that "local" interconnection under Section 251(c)(2) cannot carry exchange access traffic. Level 3 argues that since Section 251(c)(2) expressly requires the establishment of new interconnections for the "transmission and routing of . . . exchange access", it is incorrect to claim, as Qwest does, that trunks set up for interconnection under Section 251(c)(2) cannot be used for the exchange and routing of exchange access.

**Qwest's Position**:

Qwest requires that switched access traffic be carried over Feature Group D ("FGD")

interconnection trunks. Qwest states that it has offered Level 3 the option of combining all traffic types on FGD trunks, and Qwest has agreed to allow all traffic except for switched traffic to be carried over LIS trunks. Qwest claims that Level 3's purported basis for seeking to combine all traffic types on the same trunks is trunk efficiency, and Qwest argues that combining all traffic on FGD trunks provides that efficiency. Qwest says that Level 3 offers no explanation why it rejects FGD trunks for its combined traffic needs. Instead, Qwest states, Level 3 wants Qwest to modify its operations to do something for Level 3 that it does not do for any other carrier.

Qwest has three reasons why switched access traffic should be carried over FGD trunks. First, according to Qwest, switched access traffic must be exchanged over FGD trunks to allow Qwest to provide industry standard terminating records to Independent Telephone Companies ("ICOs"), CLECs, and wireless service providers ("WSPs"). Qwest states that without these records, the ICOs, CLECs and WSPs will not be able to bill Level 3 for interexchange traffic that Level 3 originates. Qwest claims that Level 3's proposal to use an entirely new system of billing factors does not address the problem as every ICO, CLEC and WSP receiving traffic from Level 3 would have to completely rework its billing systems.

Second, since Qwest has the ability to receive all types of traffic over FGD trunks, by routing all traffic over these trunks, Level 3 will achieve the same trunk efficiencies as over LIS trunks, but without the disadvantage of disabling Qwest's billing systems. Qwest states that since it has developed the billing systems that allow it to both prepare billing records for ICOs, CLECs and WSPs and to permit commingling of various traffic types over FGD trunks, if there is to be commingling, it should be over FGD trunks.

Finally, Qwest asserts switched access traffic should be exchanged over FGD trunks in order to comply with Section 251(g) of the 1996 Act. Qwest claims that under Section 251(g) it 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 the passage of the Act. Furthermore, Qwest states that the cost of enabling LIS trunks to handle switched access traffic would be substantial (Ex Q-3 at 31.)

**Resolution:**

The record indicates that LIS trunks are not configured to properly bill for switched access. In

its testimony on this issue, Level 3 does not refute Qwest's claim that allowing switched access on LIS trunks would require a substantial outlay of resources. Without more to justify the expense, we cannot find that Level 3's proposal is reasonable. Consequently, we adopt Qwest's proposed language for Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1.

**Issue: What is the appropriate definition of call record? (Issue 8)**

The parties propose the following:

| Level 3 Proposed Language: | Qwest Proposed Language: |
|---|---|
| "Call Record" may include identification of the following: charge number, Calling Party Number ("CPN"), Other Carrier Number ("OCN"), or Automatic Number Identifier ("ANI"), Originating Line Indicator ("OLI"), as well as originating telephone number, terminating telephone number, billing telephone number (if different from originating or terminating number), time and date of call, duration of call, long distance carrier (if applicable), and other data necessary to properly rate and bill the call. In addition as facilities-based intermodal carriers offer new services including VoIP, the Parties agree to explore means of identifying VoIP traffic for billing purposes. Such identification includes insertion of digits into the OLI field, as has been operationalized by Level 3 with ILECs nationwide. | "Call Record" means a record that provides key data about individual telephone calls. It includes originating telephone number, billing telephone number (if different from originating or terminating number) time and date of call, duration of call, long distance carrier (if applicable), and other data necessary to properly rate and bill the call. |

**Level 3's Position:**

Level 3 claims that in the guise of fighting over a definition, Qwest is attempting to interfere with Level 3's ability to offer IP-based services. Level 3 believes that Qwest's proposed definition of "call record" would require the provision of information that may not always be available in connection with VoIP-originated calls, and would at best impose substantial administrative costs on Level 3 in an effort to conform to an unreasonable definition. At worst, Level 3 asserts, it could set the stage for a claim that Level 3 is "call laundering" VoIP traffic.

Level 3 asserts that this issue is less important if the Commission approves the intercarrier compensation obligation of $0.0007 per minute with respect to all VoIP traffic, as under such regime, the specific details associated with individual calls are less important than under Qwest's proposal. In

any case, Level 3 requests the approval of its definition that it claims is more flexible to accommodate the growth of VoIP traffic and to minimize disputes.

**Qwest's Position:**

Qwest objects to Level 3's definition as it requires information not required by the industry, such as "Charge number" and "Originating Line Indictor," and which are often not contained in the signaling stream used to create a call record. Qwest urges the Commission reject Level 3's definition as it would require Qwest to provide information that often does not exist. Qwest also objects to Level 3's substitution of the word "may" for "shall", as it effectively eliminates any requirement on Level 3 to provide any particular information in call record.

**Resolution:**

We believe that given the rapid technological changes in the telecommunications industry, that the more information that can be recorded about a call, the easier it will be to identify that call. Some of the identifiers proposed by Level 3 may not always be available, but where they are, we believe that they should be included in the call record, and that the parties should cooperate to identify VoIP traffic. Consequently, we adopt the following definition of call record:

> "Call Record" means a record that provides key data about individual telephone calls. It includes originating telephone number, billing telephone number (if different from originating or terminating number) time and date of call, duration of call, long distance carrier (if applicable), and other data necessary to properly rate and bill the call, which may include when available, Other Carrier Number and Originating Line Indicator. In addition, as intermodal carriers offer new services including VoIP, the Parties agree to explore means of identifying VoIP traffic, which may include inserting digits into the OLI field.

**Issue: What is the appropriate language relating to trunk forecasting (Matrix issue 17)**

Qwest proposes that the interconnection agreement contain forecasting provisions.

| Level 3's Proposed Language | Qwest's Proposed Language |
|---|---|
| 7.2.2.8.4 The forecast will identify trunking requirements for a two (2) year period, From the semi-annual close date as outlined in the forecast cycle, the receiving Party will have one (1) month to determine network needs and place vendor orders which may require a six (6) | 7.2.2.8.4 The Parties agree that trunk forecasts are non-binding and are based on the information available to each respective Party at the time the forecasts are prepared. Unforecasted trunk demands, if any, by one Party will be accommodated by the other Party |

| | |
|---|---|
| month interval to complete the network build. See also Section 7.2.2.8.6 | as soon as practicable based on facility availability. Switch capacity growth requiring the addition of new switching modules may require six (6) months to order and install.<br><br>7.2.2.8.5 In the event of a dispute regarding forecast quantities, where in each of the preceding eighteen (18) months, trunks required is less than fifty percent (50%) of forecast, Qwest will make capacity available in accordance with the lower forecast. |

**Level 3's Position:**

Level 3 does not specifically address section 7.2.2.8.4 in its Briefs, but has stated these provisions force Level 3 to play a role in managing the trunks and facilities on Qwest's side of the network. Level 3 argues that Qwest is responsible for terminating all traffic to Level 3 at the POI, and Level 3 is not required to pay any costs incurred on Qwest's side of the POI.

**Qwest's Position:**

Qwest asserts that forecasts from CLECs are necessary so that Qwest can plan for future demands for its network. Qwest is concerned that Level 3 may have an incentive to overstate its need for capacity to induce Qwest to build capacity to handle Level 3's most optimistic needs. Originally, Qwest states that it proposed that Level 3 back up its forecasts with a deposit, but after Level 3 objected, Qwest modified its proposal to allow it to adjust forecasts downward based on the relationship between trunks actually ordered by Level 3 and Level 3's forecasted trunk forecast in previous months.

**Resolution:**

We do not accept Level 3's claims that Qwest's language improperly forces it to pay for network facilities on Qwest's side of the POI. We find that Qwest's proposed language is reasonable and not burdensome on Level 3.

**Issue: What is the proper language concerning the ordering of Interconnection Trunks and Compensation for Special Construction? (Matrix Issues 21 and 22)**

| Level 3's Proposed Language | Qwest's Proposed Language |
|---|---|
| 7.4.1.1 Nothing in this Section 7.4 shall be construed to in any way affect the Parties' respective obligations to pay each other for any activities or functions under this agreement. All references in this section 7.4 to 'ordering' shall be construed to refer only to the administrative processes needed to establish interconnection and trunking arrangements and shall have no effect on either Party's financial obligations to the other.<br><br>19.1.1 Nothing in this section 19 shall be construed to in any way affect the Parties' respective obligations to pay each other for ay activities or functions under this Agreement. All references in this section 19 to construction charges shall be construed to refer only to those Level 3 requests for construction that are outside the scope of what is needed to establish interconnection and trunking arrangements and shall have no effect on either Party's financial obligations to the other. | |

**Level 3's Position:**

Level 3 claims that its proposed language would clarify that the mere ordering of trunks for administrative purposes would not affect which party is actually responsible for the costs of those trunks. Level 3 submits that the fact that the parties are at such loggerheads with respect to the substantive question of cost responsibility shows why Level 3's language is necessary.

**Qwest's Position:**

Qwest objects to Level 3's proposed language. Qwest believes the disclaimers are misplaced as sections 7.4 and 19.1 of the agreement have to with ordering and do not address allocation of the responsibility for the cost. Moreover, Qwest argues Level 3's proposed language underscores why its position on allocation of costs is wrong. Qwest states that the fact that Level 3 requests that facilities be constructed on Qwest's side of the point of interconnection demonstrates that the interconnection and/or construction is done for Level 3's benefit. Qwest argues that the proposed Sections 7.4.1.1 and 19.1.1 are completely unnecessary. Qwest states that the Commission will determine who pays the costs of interconnection in the sections of the agreement that are related to Issue 1.

**Resolution:**

We determined the cost allocation of interconnection costs in connection with Matrix Issue 1. Given our previous findings concerning cost allocation, we find that Level 3's proposed language is unnecessary and contradictory to those findings.

**Issue: What Signaling Information should the parties be required to provide each other? (Matrix Issue 20)**

The proposed language for Section 7.3.8 is as follows (with Level 3's proposed language identified with bold underline and Qwest's proposed language in bold italics):

> 7.3.8 Signaling Parameters: Qwest and CLEC are required to provide each other the proper signaling information (e.g. originating Calling **Record information** ***Party Number*** and destination called party number, etc.) ***per 47 CFR 64.1601*** to enable each Party to issue bills in a complete and timely fashion. All CGS signaling parameters will be provided including **Call Record Information ("CRI")** ***Calling Party Number ("CPN")***, Originating Line Information Parameter ("OLIP") on calls to 8XX telephone numbers, calling party category, Charge Number, etc, All privacy indicators will be honored. If either Party fails to provide **CRI** ***CPN*** (valid originating information), and cannot substitute technical restrictions (**e.g.** ***i.e.***, MF signaling, **IP origination**, etc.) such traffic will be billed as **interstate** Switched Access. **Transit** Traffic sent to the other Party without **CRI** ***CPN*** (Valid originating information) will be handled in the following manner. The transit provider will be responsible for only its portion of this traffic, which will not exceed more than five percent (5%) of the total Exchange Service (EAS/Local) and IntraLATA LEC Toll traffic delivered to the other Party. The Switch owner will provide to the other Party, upon request, information to demonstrate that Party's portion of no **CRI** ***CPN*** traffic does not exceed five percent (5%) of the total traffic delivered. The Parties will coordinate and exchange data as necessary to determine the cause of the **CRI** ***CPN*** failure and to assist its correction. All Exchange Service (EAS/Local) and IntraLATA LEC Toll calls exchanged without **CRI** ***CPN*** information will be billed as either Exchange Service (EAS/Local) Traffic or IntraLATA LEC Toll Traffic in direction proportion to the minutes of use (MOU) of calls exchanged with **CRI** ***CPN*** information for the preceding quarter, utilizing a PLU factor determined in accordance with Section 7.2.2.9.3.2 of this Agreement.

**Level 3's Position:**

Level 3 states this issue is related to the "call record" dispute, and claims that Qwest is seeking to impose a definition of an SS7 message that does not embrace the broader scope of information that the SS7 signal can contain, including specifically, information that could be used to distinguish VoIP from non-VoIP traffic. Level 3 claims its proposed language is more flexible and more appropriate as IP-enabled services become more prevalent.

**Qwest's Position:**

Qwest states that its language uses industry defined terms, while Level 3's language uses undefined terms such as "CRI" that do not have an accepted meaning in the telecommunications industry. Qwest states that CRI does not even exist in the SS7 protocol used in the industry. Qwest asserts that Level 3's proposed language would excuse it from providing the calling party number for IP originated calls even though the fact that a call is IP originated does not prevent the population of the calling party number signaling parameter. Qwest claims the calling party number is essential to properly rate and bill a call, and thus, Level 3's proposed language will lead to disputes as to the rating and billing for calls.

Qwest also objects to Level 3's language that would burden Qwest with populating the "originating line information" parameter to identify VoIP calls. Qwest states that the industry standard setting bodies have not determined to use the "OLI" parameter to identify VoIP calls.

**Resolution:**

Level 3's proposed language appears to improperly impose interstate switched access rates on traffic that is intrastate traffic. It is not clear, but Level 3's reference to "Call Record Information" may be intended to refer to its definition of "Call Record" discussed in Issue 8. If such is the case, it would incorporate the "Calling Party Number." As resolved in connection with Issue No. 8, we believe that the parties should cooperate in finding effective and cost efficient methods of identifying VoIP traffic. We do not believe that including reference to providing information concerning VoIP traffic is burdensome on Qwest, especially in light of our modification to the definition of "Call Record." We approve a modified version of the proposed section as follows:

> 7.3.8 Signaling Parameters: Qwest and CLEC are required to provide each other the proper signaling information (e.g. originating Calling Party Number and destination called party number, etc.) ***per 47 CFR 64.1601*** to enable each Party to issue bills in a complete and timely fashion. All CCS signaling parameters will be provided including Calling Party Number ("CPN"), Originating Line Information Parameter ("OLIP") on calls to 8XX telephone numbers, calling party category, Charge Number, etc, All privacy indicators will be honored. If either Party fails to provide CPN (valid originating information), and cannot substitute technical restrictions (*e.g. i.e.*, MF signaling, IP origination, etc.) such traffic will be billed as Switched Access. Traffic sent to the other Party without CPN (Valid originating information) will be handled in the following manner. The

transit provider will be responsible for only its portion of this traffic, which will not exceed more than five percent (5%) of the total Exchange Service (EAS/Local) and IntraLATA LEC Toll traffic delivered to the other Party. The switch owner will provide to the other Party, upon request, information to demonstrate that Party's portion of no CPN traffic does not exceed five percent (5%) of the total traffic delivered. The Parties will coordinate and exchange data as necessary to determine the cause of the CPN failure and to assist its correction. All Exchange Service (EAS/Local) and IntraLATA LEC Toll calls exchanged without CPN information will be billed as either Exchange Service (EAS/Local) Traffic or IntraLATA LEC Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information for the preceding quarter, utilizing a PLU factor determined in accordance with Section 7.2.2.9.3.2 of this Agreement.

**Issue: What is the proper method to identify ISP-bound traffic? (Matrix Issue 19)**

| Level 3's Proposed Language: | Qwest's proposed language |
|---|---|
| Identification of ISP-Bound Traffic – Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-Bound traffic. Either Party may rebut this presumption by demonstrating that factual ratio to the state Commission. Traffic exchanged that is not ISP-Bound traffic will be considered to be section 251(b)(5) traffic. | Identification of ISP-Bound Traffic – unless the Commission has previously ruled that Qwest's method for tracking ISP-bound Traffic is sufficient, Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-Bound traffic. Either Party may rebut this presumption by demonstrating that factual ratio to the state Commission. |

**Level 3's position:**

Level 3 advocates using the FCC's 3:1 ratio to determine what traffic is ISP-bound traffic. The FCC has established a rebuttable presumption that traffic which exceeds a 3:1 terminating to originating ratio is deemed to be ISP-bound traffic. Qwest objects to the underlined sentence. Level 3 states that it acknowledges that there will be some traffic it sends Qwest that is subject to switched access, but because Level 3 is not a "1+" toll carrier, it will never be in a position of paying originating access charges. Level 3 agrees, however that the underlined sentence is too broad. Level proposes to replace "Traffic exchanged . . ." with "Traffic sent from Qwest to Level 3 . . ." Level 3 states that this would make it clear that Level 3 is not attempting to avoid paying terminating access charges with respect to toll traffic it sends to Qwest, but would not result in Level 3 being assessed access charges on Qwest-originated traffic.

Level 3 argues that Qwest's proposal to include language concerning a prior commission ruling

is inappropriate given that Qwest has voluntarily opted into the FCC's ISP-bound compensation framework, a key aspect of which is the 3:1 ratio. Furthermore, Level 3 argues the ICA should not reference unspecified "prior" commission rulings, as Level 3 believes it is vague and ambiguous and will lead to further disputes.

**Qwest's position:**

Qwest states that there are two issues raised: (1) whether Qwest or Level 3 could challenge the 3:1 ratio by seeking approval by a state commission to approve a means of using actual data; and (2) whether Level 3's inclusion of the term "section 251(b)(5) traffic is over-broad.

Qwest agrees that including the sentence "[e]ither party may rebut this presumption by demonstrating the factual ratio to the state Commission "resolves the first issue in Arizona, as it is clear that this language allows a party to challenge the presumption before the Commission. Qwest argues that by including the last sentence, Level 3 is attempting to further confuse the issue and thereby effect a major policy shift in categorizing traffic and the compensation scheme. Qwest argues that it is incongruous to include the sentence on compensation in a section that references the 3:1 ratio. Further, Qwest argues, it is not true that all non-ISP traffic is subject to reciprocal compensation under section 251(b)(5). Qwest asserts Level 3's inclusion of that here is a veiled attempt to classify all traffic exchanged between the two companies as local traffic. With the removal of the last sentence, Qwest could agree to the proposed language.

**Resolution:**

Level 3's inclusion of the last sentence is overly broad and unnecessary. We will adopt Level 3's proposed language absent the last sentence.

**Issue: Incorporation of SGAT (Matrix Issue 5)**

Qwest believes this is no longer an issue. Level 3 does not appear to address it in any of its Briefs. We therefore conclude it is no longer an issue requiring our resolution.

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

## FINDINGS OF FACT

1. On May 13, 2005, Level 3 filed with the Commission a Petition for Arbitration of certain terms conditions and prices for interconnection and related arrangements with Qwest pursuant to 47 U.S.C. § 252(b) of the 1996 Act.

2. On June 7, 2005, Qwest filed a Response to the Petition.

3. By Procedural Order dated June 16, 2005, procedural guidelines were established and the arbitration was set to commence on September 8, 2005, at the Commission's office in Phoenix, Arizona.

4. The arbitration convened as scheduled on September 8, 2005. Following two days of Arbitration, the proceeding was continued on September 16, 2005, at the Commission's offices in Tucson, Arizona. The parties filed Opening Briefs and an Issues Matrix on November 18, 2005, and Reply Briefs on December 2, 2005.

5. On December 19, 2005, Qwest filed Supplemental Authority: *Iowa Arbitration Order*. On December 20, 2005, Qwest filed a Notice of Errata that contained a complete copy of the *Iowa Arbitration Order*.

6. On January 23, 2006, Qwest filed its Second Filing of Supplement Authority: State of Minnesota Office of Administrative Hearing for the Public Utilities Recommendation on Motions for Summary Disposition No. 3-2500-16646-2, P-421/C-05-721, *In the Matter of the Complain of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic* issued January 18, 2006.

7. On February 1, 2006, Qwest filed its Third filing of Supplement Authority: Order granting reconsideration of the *Iowa Arbitration Order*.

8. On February 1, 2006, Level 3 filed a Response to Qwest's Filing of Supplemental Authority, attaching Level 3's Application for Reconsideration of the *Iowa Arbitration Order* and the Iowa Board's Order Granting Reconsideration of that Order.

9. On February 2, 2006, Qwest filed its Fourth filing of Supplemental Authority: Recommendation on Motion for Summary Disposition entered on January 30, 2006, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, Docket No. IC 12, Order No. 06-037, Public Utility Commission of Oregon; and

Arbitrator's Decision entered on February 2, 2006, *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.* ARB 671, Public Utility Commission of Oregon.

10. On February 17, 2006, Level 3 filed Supplemental Authority: Order Accepting Interlocutory Review; Granting in Part, and Denying in Part, Level 3's Petition for Interlocutory Review, *In the Matter of Level 3 Communications, LLC v. Qwest Corporation, Level 3 Communications. LLC's Petition for Enforcement of Interconnection Agreement with Qwest Corporation*, Docket No. UT-053039, Order No. 05 Washington State Utilities and Transportation Commission.

11. On March 21, 2006, the parties filed a Stipulation extending the deadline for a final Commission Order until May 31, 2006.

12. Section 252(c) of the Act provides that in arbitrating interconnection agreement, the state commission is to: (1) assure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

13. The Commission has analyzed the issues presented by the parties and has resolved the issues as stated in the Discussion above in accordance with the Act.

14. The Commission hereby adopts the Discussion and incorporates the parties' positions and the Commission's resolution of the issues herein.

15. Pursuant to A.A.C. R14-2-1506(A), the parties will be ordered to prepare and sign an interconnection agreement incorporating the issues as resolved by the Commission, for review by the Commission pursuant to the Act, within thirty days from the date of this Decision.

## CONCLUSIONS OF LAW

1. Level 3 is a public service corporation within the meaning of Article XV of the Arizona Constitution.

2. Level 3 is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

3. Qwest is a public service corporation within the meaning of Article XV of the Arizona

Constitution.

4. Qwest is an ILEC within the meaning of 47 U.S.C. § 252.

5. The Commission has jurisdiction over Level 3 and Qwest and of the subject matter of the Petition.

6. The Commission's resolution of the issues pending herein is just and reasonable, meets the requirements of the Act and regulations prescribed by the FCC pursuant to the Act, is consistent with the best interests of the parties, and is in the public interest.

**ORDER**

IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its Order the resolution of the issues contained in the above Discussion.

IT IS FURTHER ORDERED that Qwest shall work with Level 3 to implement within thirty (30) days of the effective date of this Decision an interim replacement for VNXX which we shall refer to as FX-like traffic. Such ISP-bound and VoIP FX-like traffic shall be routed over a direct end office trunk between Level 3's network and the Qwest end office serving the local calling area of the originating Qwest end user. The direct end office trunk shall be established and paid for by Level 3 under the terms of this Agreement.

IT IS FURTHER ORDERED that intercarrier compensation for FX-like traffic exchanged between Level 3 and Qwest during the interim period shall be set at $0.0007 per MOU consistent with the rate for ISP-bound traffic established by the FCC.

IT IS FURTHER ORDERED that, within sixty (60) days of the effective date of this Decision, Level 3 shall cease using VNXX.

IT IS FURTHER ORDERED that the interim use of FX-like traffic shall be allowed to continue until such time as the Commission issues a Decision resolving the issues concerning the use of VNXX.

IT IS FURTHER ORDERED that Level 3 Communications LLC and Qwest Corporation shall prepare and sign an interconnection agreement incorporating the terms of the Commission's resolutions.

...

IT IS FURTHER ORDERED that the signed interconnection agreement shall be submitted to the Commission for its review within thirty days of the date of this Decision.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 29th day of June, 2006.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT

DISSENT

JR:mj

SERVICE LIST FOR: LEVEL 3 COMMUNICATIONS LLC/ QWEST CORPORATION

DOCKET NO.: T-03654A-05-0350
T-01051B-05-0350

Michael W. Patten
Roshka DeWulf & Patten, PLC
One Arizona Cetner
400 E. Van Buren Street
Suite 800
Phoenix, Arizona 85004

Richard E. Thayer
Erik Cecil
Level 3 Communications, LLC
1015 Eldorado Boulevard
Broomfield, CO 80021

Henry T. Kelly
Joseph E. Donovan
Scott A. Kassman
Kelley, Drye & Warren LLP
333 West Wacker Drive
Chicago, IL 60606

Christopher W. Savage
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., NW
Washington, DC 20006

Norman G. Curtright
QWEST CORPORATION
4041 N. Central Ave., 11th Floor
Phoenix, AZ 85012

Thomas M. Dethlefs
Senior Attorney
Qwest Legal Dept/CD&S
1801 California St., Suite 900
Denver, Colorado 80202

Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

## CERTIFICATE OF SERVICE VIA E-MAIL

I do hereby certify that a true and correct copy of the foregoing QWEST CORPORATION'S REPLY BRIEF was served on the 30th day of October, 2006 via e-mail electronic transmission upon the following individuals:

Richard E. Thayer, Esq.
*Erik Cecil
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield CO 80021
Rick.thayer@level3.com
Erik.cecil@level3.com

Christopher W. Savage
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., NW
Washington, DC 20006
Chris.savage@crblaw.com

*Lisa F. Rackner
Ater Wynne, LLP
222 SW Columbia St., Suite 1800
Portland, OR 97201
(lfr@aterwynne.com

Henry T. Kelly
Joseph E. Donovan
Scott A. Kassman
Kelley Drye & Warren LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 857-2350(voice)
(312) 857-7095 (facsimile)
hkelly@kelleydrye.com
jdonovan@kelleydrye.com
skassman@kelleydrye.com

*Thomas Dethlefs
Qwest Corporation
1801 California St., Suite 900
Denver, CO 80202
Thomas.dethlefs@qwest.com

Wendy Martin
Ater Wynne, LLP
222 SW Columbia St., Suite 1800
Portland, OR 97201
wlm@aterwynne.com

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**QWEST CORPORATION**

By: _____

Alex M. Duarte (OSB No. 02045)
421 SW Oak Street, Suite 810
Portland, OR 97204
503-242-5623
503-242-8589 (facsimile)
alex.duarte@qwest.com

Attorney for Qwest Corporation