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October 10, 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 Post-Hearing Opening Brief, 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

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 OPENING BRIEF**

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INTRODUCTION

The overriding issue in this arbitration is responsibility for costs and the related issues of intercarrier compensation. Today, virtually all of the traffic exchanged between Qwest and Level 3 is interexchange ISP traffic. (Greene, 8/29/06 Transcript ("Tr."), 79-80.) Level 3 and its ISP customers have made the business decision to centralize their operations to minimize costs. (Brotherson, 8/30/06 Tr. 82.) As a result, the calls placed by dial-up customers are delivered to ISPs located outside of Oregon. (Greene, 8/29/06 Tr. 80.) The service that Level 3 offers to its ISP customers is the functional equivalent of a 1-800 toll free service. (Wilson, 8/29/06 Tr. 153-154.) Level 3 provides "local" telephone numbers to its ISP customers who, in turn, provide those numbers to their dial-up customers. Level 3 creates this toll free arrangement because it is necessary if their ISP customers are to have a viable product. (*Id*.)

To provide its toll-free interexchange service, Level 3 undertakes to gather traffic from dial-up callers and to deliver that traffic to the ISPs it serves. (Qwest/30, Fitzsimmons/4-12.) Since the dial-up customers are located on Qwest's network, Level 3 causes Qwest to incur costs to originate and transport these calls to Level 3. Under the established intercarrier compensation regime for interexchange traffic, Level 3 should compensate Qwest for the origination and transport that Qwest provides. Qwest should not be required to compensate Level 3 for costs incurred to provide service to Level 3's ISP customers.

In this case, Level 3 seeks to completely reverse the established intercarrier compensation rules so that Qwest would bear virtually all of the costs of carrying dial-up traffic, while Level 3 collects the revenues from the ISP customers its serves. There is no basis in law or policy to support Level 3's position. As explained below, the Commission should adopt Qwest's proposed contract language because it is supported both by applicable law and by sound economic policy.

ARGUMENT

I. THE COMMISSION SHOULD ADOPT QWEST'S PROPOSED LANGUAGE REGARDING THE SCOPE OF INTERCONNECTION AND RESPONSIBILITY FOR COSTS OF INTERCONNECTION (ISSUES 1A, 1B, 1D, 1F, 1G, 1H, AND 1J)

Level 3 initially described Issue 1 as whether Level 3 was entitled to a single point of interconnection ("POI") in a LATA. In fact, the dispute concerned interconnection agreement ("ICA") language related primarily to responsibility for costs of interconnection. In its new contract language, Level 3 proposed language for Issue 1 that raises new issues. For example, Level 3's proposed Section 7.1.1.3 (Issue 1A) relates to the call rating issues discussed in Issue 3. Qwest will limit its discussion of the subparts of Issue 1 to interconnection and cost responsibility and will flag other language that will be discussed elsewhere.

A. The Scope of Interconnection Under 47 U.S.C. § 251(c) Is Limited to Interconnection Used By a CLEC to Provide "Telephone Exchange Service" or "Exchange Access" (Issue 1A) (Sections 7.1.1, 7.1.1.3, and 7.1.1.4)

[Qwest summary (Issue 1A): Level 3's proposed changes to Section 7.1.1 are an unlawful attempt to expand its right to interconnection to encompass interexchange traffic. Each of Level 3's changes attempts to do so in a different manner, and each is unlawful. Level 3's language ignores the fact that Section 251(g), and not Section 251(c), governs interexchange traffic, a principle that is well-established in the law. Adoption of Level 3's proposed language would allow Level 3 to unlawfully receive discriminatorily advantageous treatment.]

Issue 1A primarily involves Section 7.1.1. Level 3's three proposed changes to this section attempt to expand Level 3's interconnection rights under Section 251(c) to encompass interexchange traffic delivered by Level 3 to Qwest. Level 3's first change purports to include "IntraLATA Toll and InterLATA Traffic carried by an IXC for termination to a customer of Qwest" among the types of traffic for which interconnection is governed by the ICA. Its second change attempts to extend the requirements of 47 C.F.R. § 51.321, the FCC rule implementing Section 251(c), to interexchange traffic. Then, in its third proposed change, Level 3 seeks to expand interconnection under the ICA to include interexchange VoIP and ISP traffic.

Level 3's unlawful effort to expand Qwest's interconnection obligations under Section 251(c) should be rejected. The FCC and several state commissions have held that a CLEC is *not* entitled to interconnection under Section 251(c) for the purpose of originating or terminating interexchange traffic. The FCC first addressed this issue in the *Local Competition Order*[1]:

> [A]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (*i.e.*, non-interexchange calls).
>
> We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2). *Local Competition Order*, ¶¶ 190-191.

The FCC reasoned that a carrier that requests interconnection to terminate a long distance call is not "offering" access services, but rather, is "receiving" access services. *Id.*, ¶ 186. Since the interconnection is not for the purpose of providing "telephone exchange service" or "exchange access," the ILEC is not required to provide the interconnection under Section 251(c)(2).

The Colorado Commission reached this precise conclusion in an arbitration between Level 3 and CenturyTel. The Colorado Commission ruled that Level 3 was not seeking "interconnection" within the meaning of Section 251(c) because Level 3 was seeking to serve ISP customers located in LCAs not served by CenturyTel; thus, the Commission determined that "calls by CenturyTel's customers to Level 3's ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls."[2]

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[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (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). This order is often referred to as the *First Report and Order*.

[2] Decision Denying Exception, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration . . . with CenturyTel of Eagle, Inc. Regarding Rate, Terms, and Condition for Interconnection*, Docket No. 02B-4087, Decision No. CO3-0117, ¶ 36 (CO PUC, Jan. 17, 2003). A copy of this decision is attached as Exhibit A.

Section 251(g) and Qwest's tariffs govern interconnection related to long distance calls. Section 251(g) states:

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

In this docket, Level 3 is attempting to extend its Section 251(c)(2) interconnection rights to encompass interconnection for the exchange of long distance traffic governed by Section 251(g) and Qwest's tariffs. However, the rules applicable to local interconnection under Section 251(c) do not apply to interconnection for interexchange calls. Qwest is required by Section 251(g) to provide interconnection to IXCs on a nondiscriminatory basis. Thus, Section 251(g) requires Qwest to charge Level 3 the same tariffed recurring and nonrecurring rates for interconnection for interexchange calls that Qwest charges other IXCs. Otherwise, Level 3 would be receiving discriminatorily advantageous treatment in violation of the Act.

Level 3 included Sections 7.1.1.1 through 7.1.1.4 under Issue 1. Sections 7.1.1.1 and 7.1.1.2 concern verification of VoIP traffic and are discussed in Section V. Sections 7.1.1.3 and 7.1.1.4 concern call rating and cost responsibility and are discussed in Sections IE and III.

B. OC Level Interconnection Should Be Implemented Using the ICA's BFR Process (Issue 1B) (Section 7.1.2)

[Qwest summary (1B): Interconnection at OC-3 and higher levels should be governed by the Bona Fide Request Process ("BFR") in the ICA because interconnection at OC-3 and higher levels has not been requested and Qwest does not currently have such an offering.]

Issue 1B is a dispute concerning changes proposed by Level 3 to Section 7.1.2. The only substantive change proposed by Level 3 is the one that purports to obligate Qwest to provide interconnection using "OC-3 and/or higher speed optical connections." This change should be

rejected because the use of OC-3 and higher speed optical connections is already addressed through the ICA's Bona Fide Request ("BFR") process. Qwest does not currently offer an optical facility interconnection offering because no carrier is currently using OC level interconnection. (Qwest/23, Easton/18.) Thus, a request for such interconnection would have to go through the BFR process, whose purpose is to address unique requests. (*Id*.)

C. Level 3's Proposed Modifications to Section 7.2.2.1.2.2 Should Be Rejected Because Level 3 Does Not Have an Unlimited Right to Purchase Transport at TELRIC Rates (Issue 1D)

[Qwest summary (Issue 1D): Qwest does not have an unlimited obligation to provide TELRIC-priced transport. Level 3's TELRIC language in Section 7.2.2.1.2.2 appears to be an effort to obtain such a right. Level 3's language violates federal law and should be rejected.]

Issue 1D concerns Section 7.2.2.1.2.2. Level 3 proposes language in Section 7.2.2.1.2.2 that gives Level 3 the right to purchase any transport it requests from Qwest "at TELRIC Rates." The Commission should reject this addition because it could be interpreted to give Level 3 an unlimited right to purchase unbundled transport at TELRIC rates. Qwest's obligations under federal law to provide unbundled transport at TELRIC rates are limited to the obligations set forth in the FCC's *Triennial Review Remand Order*.[3]

D. The Commission Should Reject Level 3's Proposed Changes to Section 7.2.2.9.6 (Issue 1F)

[Qwest summary (1F): The purpose of Section 7.2.2.9.6 is to prevent the exhaust of Qwest access tandems, in particular the requirement that when a CLEC's traffic reaches a certain level, it must establish direct end office trunking. Level 3's unexplained new language inappropriately purports to limit that requirement and should be rejected.]

Issue 1F concerns Section 7.2.2.9.6, a section that is necessary to prevent switch exhaust at Qwest's access tandems. Section 7.2.2.9.6 requires Level 3 to establish direct trunking to end offices when traffic volumes to those end offices reaches certain levels. Direct end office

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

trunking carries traffic past the access tandem so that ports are available on the tandem for other CLECs, IXCs, and Qwest. (Qwest/32, Linse/11-12, 15-17.) Level 3 proposes a modification to Section 7.2.2.9.6 that purports to limit Qwest's ability to request direct trunking to circumstances in which the request is "for purposes of network management and routing of traffic to or from the POI." Level 3 has never explained this proposed change and it makes no sense in the context of Section 7.2.2.9.6. (*Id*., pp. 13-14.) The Commission should reject the proposed modification to Section 7.2.2.9.6.

E. The Commission Should Adopt Qwest's Proposed Contract Language for the Relative Use Factor (Issues 1A, 1G and 1H) (Sections 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)

[Summary (1A, 1G, and 1F): Issues 1G and 1H address the relative use factor ("RUF") issue. Qwest's proposed language for Issues 1G and 1H requires that Level 3 bear the financial responsibility for the transport of Internet traffic on Qwest-provided Direct Trunked Transport and Entrance Facilities on Qwest's side of the point of interconnection ("POI"). In three prior decisions, the Commission ruled that the CLEC is financially responsible for the transport of Internet traffic on Qwest's side of the POI. Level 3's primary argument, that FCC Rules 703(b) and 709(b) prohibit making a CLEC responsible for such transport, has been rejected many times by this Commission and by the courts. Rules 703(b) and 709(b) apply only to "telecommunications traffic." Prior decisions of the Commission hold unequivocally that, under FCC Rules 701(a) and 701(b), ISP traffic is not "telecommunications traffic." A recent Ninth Circuit decision confirms and strengthens that conclusion, holding that VNXX Internet traffic is "exchange access," and not telecommunications traffic, and ISP traffic is "information access," and not telecommunications traffic. Making Level 3 financially responsible for the transport of Internet traffic is consistent with the principles of cost causation articulated in the policies underlying the FCC's *ISP Remand Order*. Level 3's proposed Section 7.1.4 (Issue 1A) merely articulates the false legal conclusion that Level 3 bears no responsibility for any costs on Qwest's side of the POI. It too must be rejected because it is inconsistent with prior Commission decisions, FCC orders and rules, and governing federal case authority.]

Issues 1G and 1H concern responsibility for the costs of interconnection. Under the Act, Qwest has a duty to provide interconnection with its local exchange network "on rates, terms and conditions that are just, reasonable, and nondiscriminatory" and in accordance with the requirements of Section 252 of the Act. 47 U.S.C. § 251(c)(2)(D). Section 252 in turn provides that determinations by a state commission of the just and reasonable rate for interconnection shall be "based on the cost…of providing interconnection," "nondiscriminatory," and "may

include a reasonable profit." 47 U.S.C. § 252(d)(1). As the FCC recognized in its *Local Competition Order*, these provisions requires that CLECs compensate ILECs for the costs ILECs incur to provide interconnection. *Local Competition Order*, ¶¶ 199-200. (Qwest/23, Easton/15.)

In its *Local Competition Order*, the FCC specifically stated that "[t]he amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility." *Local Competition Order*, ¶ 1062. Accordingly, Qwest has proposed language setting forth the terms of a relative use factor ("RUF"). The RUF for entrance facilities (Issue 1G) is contained in Qwest's proposed Sections 7.3.1.1.3 and 7.3.1.1.3.1. The RUF for direct trunk transport (Issue 1H) is set forth in Qwest proposed Sections 7.3.2.2 and 7.3.2.2.1.

In this case, virtually all of the traffic exchanged between Qwest and Level 3 is one-way ISP traffic from Qwest's network to ISPs on Level 3's network that can be properly categorized as "VNXX" traffic. (Greene, 8/29/06 Tr. 79-80.) Qwest's proposed language for the RUF provides that "the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic." This is consistent with the Commission's prior arbitration decisions. In the 2001 Level 3/Qwest arbitration, docket ARB 332, the Commission ruled that Internet traffic should not be attributed to the originating carrier when calculating the RUF:

> The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier. Order No. 01-809, ARB 332 (September 13, 2001), p. 14.

The Commission followed this decision in the AT&T/Qwest arbitration order. Order No. 04-262, docket ARB 527 (April 19, 2004), Appendix A, p. 13. The Commission then reaffirmed it this year in the Qwest/Universal arbitration order. Order No. 06-190, docket ARB 671 (April 19, 2006), pp. 7-9, Appendix A, pp. 6-11.

Attributing ISP traffic to the terminating carrier rather than the originating carrier is economically correct. When a dial-up customer places a call to an ISP, he or she is acting as a customer of the ISP. (Qwest/30, Fitzsimmons/4.) Level 3, the terminating carrier, has undertaken to gather the ISP traffic on behalf of the ISP, and uses Qwest's network to do so. (*Id*., pp. 10-12.) So that ISPs will bear the full cost of providing Internet service (and pass those costs onto their dial-up customers), the flow of compensation must follow the chain of causation. Level 3 should pay for originating ISP traffic on Qwest's network. Level 3 should pass this cost and its own transport and termination cost to its ISP customers. The ISPs should pass these costs and their own additional costs to their customers, who are the ultimate cost-causers. (*Id*.)

Level 3 has not proposed a RUF. Instead, Level 3 has proposed Sections 7.1.1.4 (Issue 1A), 7.3.1.1.3 (Issue 1G), and 7.3.2.2 (Issue 1H), which together would make Qwest responsible for all costs on its side of the POI. The latter two provisions appear to carve out "transport assumed IP" from this arrangement. However, Level 3 has proposed no contract language that would require it to assume any IP transport costs, and thus, this carve-out is ambiguous at best. (Qwest/23, Easton/29-30; Wilson, 8/29/06 Tr. 152-53.)

In other arbitrations, Level 3 has attempted to rely on two FCC rules, 47 C.F.R. §§ 51.703(b) and 51.709(b), to argue that Qwest is responsible for all costs on its side of the POI. Both of these rules are contained in the FCC's reciprocal compensation rules that address the transport and termination of "telecommunications traffic." *See* 47 C.F.R. § 51.701(a). Accordingly, these rules apply only if and to the extent that "telecommunications traffic" is involved. *Level 3 Communications v. Colorado PUC*, 300 F.Supp.2d 1069, 1075-81 (D. Colo. 2003). "Telecommunications traffic" is specifically defined to *exclude* "interstate or intrastate exchange access" and "information access." 47 C.F.R. § 51.701(b). Thus, as a matter of federal law, VNXX traffic is excluded from Rules 703(b) and 709(b) because it is interexchange traffic.

Verizon California v. Peevey, 2006 WL 2563879, p. *12 (9th Cir. 2006). ISP traffic is excluded from the scope of Rules 703(b) and 709(b) because it is "information access." *Id.*

Excluding ISP traffic (especially VNXX ISP traffic) from Rules 703(b) and 709(b) makes sense from a policy perspective because it requires that the cost of Internet traffic to be borne by the customers who cause ISP calls. As the Colorado Commission has recognized in a Level 3 arbitration, when a caller dials its ISP, it is acting primarily as a customer of the ISP:

> We find Qwest's ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.[4]

Qwest's proposed RUF language properly makes the terminating carrier responsible for ISP traffic so that the cost of providing service to ISPs is borne by the ISPs, and through them by the ultimate cost-causers, their dial up customers. In contrast, Level 3's proposed language would either (1) leave Qwest holding the bag for the costs of originating and transporting ISP and VNXX traffic or (2) result in these costs being borne by ratepayers generally. Neither of these outcomes sends the proper economic signals. As the FCC recognized in the *ISP Remand Order*, "[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."[5]

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[4] Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, p. 18, ¶ 20 (CO PUC 2001).

[5] 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, ¶ 87 (2001) (*"ISP Remand Order").*

F. Level 3 Should Be Required to Compensate Qwest for Nonrecurring Costs That Qwest Incurs (Issue 1J) (Section 7.3.3.2)

[Qwest summary (1J): Level 3 should be responsible for non-recurring charges for Local Interconnection Service ("LIS") trunks, a position consistent with the law, and Level 3's acceptance of other similar language in the ICA. Level 3's language, which would relieve it of this obligation, should be rejected.]

Issue 1J also concerns responsibility for the costs of interconnection. Qwest's Section 7.3.3.2 requires Level 3 to compensate Qwest for the nonrecurring costs that Qwest incurs to rearrange Local Interconnection Service ("LIS") trunks for Level 3. Level 3's language seeks to bar Qwest from recovering such costs, a position inconsistent with the FCC's ruling that, "to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers." *Local Competition Order,* ¶ 200. A prior Commission decision supports Qwest's position on this issue.[6] Level 3 agreed to compensate Qwest for the nonrecurring costs incurred to install LIS trunks by accepting Qwest's proposed language for Issue 1I. The same result should follow.

II. IF SWITCHED ACCESS TRAFFIC AND LOCAL TRAFFIC ARE TO BE COMBINED ON THE SAME INTERCONNECTION TRUNKS, IT SHOULD BE DONE ON FEATURE GROUP D 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)

[Qwest summary (2A and 2B): Issue 2 concerns combining all traffic, including switched access traffic, on LIS trunks. Qwest does not oppose combining all traffic on a single trunk group. For many years, Qwest has combined all traffic on Feature Group D ("FGD") interconnection trunks. Qwest has incurred the cost of configuring FGD interconnection trunks so they are capable of properly recording and billing switched access for Qwest and for the other carriers that rely on Qwest for such information. Qwest's position should be adopted because (1) it allows Qwest to continue to use an existing system for recording and billing switched access traffic, thus allowing actual data to serve as the basis for billing, (2) Level 3's proposal would disable Qwest's ability to bill switched access for the CLECs who are currently using QPP™ (there are over 100,000 such lines in Oregon), and (3) Level 3's proposal would not allow Qwest to provide industry-standard jointly-provided switched access ("JPSA") records in circumstances in which Qwest and a CLEC or an Independent Telephone Company provide JPSA to Level 3. Level 3's proposed solution (the so-called "transit limitation") does not solve the underlying problems. Level 3 proposes that Qwest be required, at great expense, to alter one billing system to create

[6] Order No. 05-874, dockets IC 8/IC 9 (Wantel/Pac-West), pp. 16-24 (July 26, 2006).

capabilities that already exist in another system, a system that has successfully served other carriers for many years.]

Issue 2 concerns Level 3's request to combine interexchange traffic ("switched access traffic") with local traffic on the interconnection trunks established pursuant to the ICA. Level 3 argues that combining all traffic types on the same interconnection trunks is more efficient. Qwest does not object to combining all traffic types on the same interconnection trunks so long as they are FGD interconnection trunks. FGD interconnection trunks are necessary so that Qwest and carriers who depend upon Qwest for records can properly record and bill switched access charges applicable to interexchange traffic. (Qwest/23, Easton/37.) Level 3 has refused Qwest's offer and insists on delivering switched access traffic to Qwest over LIS trunks.[7]

Qwest's proposal is superior for three reasons. First, Qwest's proposal allows Qwest to continue to use its mechanized systems for recording and billing switched access traffic. Allowing Level 3 to combine switched access traffic on LIS trunks would effectively disable the systems that Qwest and carriers who depend upon records from Qwest use to bill switched access. (Qwest/23, Easton/39-40; 8/30/06 Tr. 104.) Furthermore, Qwest would incur significant additional costs to implement Level 3's factors system. (Easton, 8/30/06 Tr. 101-02.) The existing mechanized systems use actual traffic data and are clearly superior to a manual system that relies upon past data to estimate current volumes of switched access traffic. Indeed, given Level 3's expressed intention to increase the volume of interexchange traffic (Greene, 8/29/06 Tr. 102), Level 3's factors proposal will consistently underestimate the amount of interexchange traffic because it will be based on data from prior periods when volumes were smaller.

[7] Level 3's proposed Section 7.2.2.9.3.2 (Issue 2B) would allow Level 3 to combine all traffic types on LIS interconnection trunks. Level 3's proposed Section 7.2.2.9.3.1 (Issue 2A) purports to ratchet the rates for the LIS interconnection trunks so that Level 3 would pay LIS rates to the extent the interconnection trunks carry local traffic and tariffed rates to the extent the trunks carry intraLATA and/or interLATA traffic. (Jt. Ex. 1, pp. 21- 24.)

To downplay Qwest's concerns, Level 3 contends that other ILECs have agreed to use a factors system. However, this argument fails to mention that Level 3 made concessions, such as reducing the rate charged for ISP-bound traffic and capping compensation for ISP-bound traffic, in order to obtain concessions on the factors proposal. (Qwest/23, Easton/42-44.) Furthermore, Level 3 entered these agreements at a time when Level 3 claimed it would not be carrying significant amounts of interexchange traffic. (Level 3/500, Greene 16.) However, Level 3 recently acquired WilTel, and announced that it would significantly increase the amount of interexchange traffic that it carries. (Greene, 8/29/06 Tr. 102; Wilson, 8/29/06 Tr. 158.)

Second, Level 3's factors proposal would not allow Qwest to prepare records for wholesale customers who purchase Qwest's Platform Plus (QPP™) product. (Qwest/23, Easton/41.) As part of the QPP™ offering, Qwest provides switched access billing records to allow CLECs to bill for switched access related to their QPP™ lines. If Level 3 is allowed to send switched access traffic over LIS trunks, Qwest will be unable to provide these records, and CLECs using the service would therefore be unable to bill for switched access. There are approximately 103,000 such lines in Oregon. (Easton, 8/30/06 Tr. 117.)

Third, Level 3's proposal would not allow Qwest to provide industry-standard jointly-provided switched access records in circumstances in which Qwest and a CLEC or an Independent Telephone Company jointly provide switched access to Level 3. (Qwest/23, Easton/39-40.) Today, these records are produced mechanically, using the information recorded on FGD interconnection trunks. If Qwest does not record this traffic as FGD, neither Qwest nor the collaborating CLEC or LEC can bill the IXC that originated the call. (*Id*., p. 40.)

To get around this problem, Level 3 has proposed a transit limitation as Section 7.2.2.3.5. (Jt. Ex. 1, p. 64.) Under Level 3's proposal, Level 3 purports to agree only to send "IntraLATA Toll Traffic, InterLATA Traffic and VoIP traffic that would route to NPA-NXX codes homed to Qwest switches." As Mr. Linse testified, this is not an adequate solution. (Qwest/32, Linse/29-

32.) To start with, the proposed transit limitation would be difficult for Qwest to enforce without FGD recording capabilities. However, even if Level 3 complied with its proposed Section 7.2.2.3.5 to the letter, it is still not a solution. Other carriers who depend upon records from Qwest have switches homed to Qwest's tandems. Furthermore, traffic destined for customers who have ported their numbers from Qwest to another carrier would be sent to Qwest's switches. Thus, even under Level 3's proposed language, Level 3 would be permitted to send switched access traffic through Qwest, destined for customers of other carriers for which switched access records could not then be produced. (Qwest/38, Linse/7.)

If traffic is to be combined, it should only be done on FGD. Level 3 objects to the use of FGD trunks because it does not want to pay tariffed rates for those trunks. This is not a legitimate objection. Qwest is required to charge the same tariffed rates to all carriers. Today, all other carriers either segregate their switched access traffic onto separate trunks or combine traffic on FGD interconnection trunks. (Qwest/23, Easton/42.) Level 3 is not entitled to the special treatment it seeks.

III. ISSUE 3: COMPENSATION ISSUES RELATED TO ISP VNXX TRAFFIC

The Oregon Commission has developed the most comprehensive body of decisions on VNXX issues in Qwest's fourteen-state territory. These decisions, along with other compelling authorities, demonstrate that from both policy and legal perspectives, Qwest's proposed language on VNXX issues should be adopted.

A. Definition of "VNXX" Traffic (Issue 3B). Qwest's Definition Is Consistent With Prior Commission Decisions, Oregon Statutes and Rules, and Federal Law. Level 3's Proposed Definition Is Inconsistent With Its Operating Certificate, and Its POI Theory Would Violate Oregon and Federal Law

[Qwest summary (Issue 3B): This issue concerns the definition of VNXX traffic. Qwest's language is consistent with the Commission's definitions of VNXX in several orders, and is virtually identical to language adopted in Order No. 06-190 in docket ARB 671, the Universal arbitration order. Qwest defines VNXX as traffic originated by a Qwest end user that is not

terminated to a CLEC end user located within the same Commission-approved local calling area ("LCA") as the originating caller. Level 3's definition of VNXX does not even define VNXX, but is a confusing effort to define what is not VNXX. The essence of Level 3's definition is that, so long as Level 3 has a POI in an LCA or pays for TELRIC-priced transport to that LCA, no traffic originating in that LCA is VNXX. Level 3's language is completely inconsistent with Oregon law, including Oregon statutes and Commission rules, and Qwest's Commission-approved tariffs, and represents a direct violation of Level 3's operating certificate of authority. Level 3's POI theory is not supported by either Oregon or federal law, has no historical basis, and represents a position directly contrary to Oregon call rating rules as they apply to other carriers, including IXCs and Independent LECs. Level 3's position is also inconsistent with a recent Ninth Circuit decision, the GTE/ELI arbitration order, and the *Universal* decision. Level 3's POI theory is simply an unsupported effort to end run the rulings of the Commission that the *ISP Remand Order* applies only to local ISP traffic.]

Qwest defines VNXX as traffic originated by a Qwest end user that is not terminated to a CLEC end user located within the same Commission-approved local calling area ("LCA") as the originating caller. (Jt. Ex. 1, p. 29.) However, Level 3, instead of defining what *is* VNXX traffic, proposes language that purports to define three categories of calls that "are not" VNXX traffic. (*Id.*, pp. 28-29.) Instead of rating calls based on customer location, Level 3's language states that if Level 3 has a POI in the same LCA as the calling party, the traffic is not VNXX. (*Id.*, p. 28.)

Qwest's language is consistent with the Commission's definitions of VNXX. In docket UM 1058, the Commission defined VNXX as the situation when "a CLEC assigns a 'local' rate center code to a *customer physically located in a 'foreign' rate* center." Order No. 04-504, p. 2. (Emphasis added.) The Commission, in other decisions, has consistently defined VNXX in terms of the location of parties to the call. In the Level 3 case, the ALJ decision stated:

> "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.)[8]

Qwest's VNXX definition language is not new to the Commission. In the Universal arbitration decision, the Commission adopted language that defines VNXX traffic in words essentially identical to Qwest's proposed definition. Arbitrator's Decision, docket ARB 671 (February 2, 2006), p. 11, *aff'd with modifications*, Order No. 06-190 (April 19, 2006).[9] In the AT&T arbitration, the Commission adopted language that states that local exchange traffic is "traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission." Order No. 04-262, docket ARB 527 (May 17, 2004), Appendix A, pp. 5-7. Level 3's language would change the test for VNXX from the physical location of the parties to whether Level 3 maintains a POI in an LCA and pays TELRIC-rated transport from that LCA. The same Commission decisions cited above are conclusive authority that the Level 3 POI theory is contrary to Oregon law.[10] Oregon statutes and Commission rules likewise demonstrate that Level 3's language is inconsistent with Oregon law. For example, ORS 759.005(2)(c) defines "Local exchange telecommunications service" as "telecommunications service provided *within the boundaries of exchange maps filed with and approved by the commission*." (Emphasis added.) The Commission's rules likewise define local exchange traffic to traffic *within* exchange

[8] 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."). Qwest's language is consistent with *Universal's* VNXX definition.

[9] Section 7.3.4.5, the relevant section of the Universal ICA, states: "The Parties will not pay reciprocal compensation on traffic, including ISP-bound traffic**,** when the traffic does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the calling and called NPA-NXXs and, specifically, regardless whether an End User Customer is assigned an NPA-NXX associated with a rate center that is different from the rate center where the End User Customer is physically located (also known as "VNXX traffic")." Arbitrator's Decision, docket ARB 671, p. 11.

[10] Further, although the "secondary POI" concept is not mentioned in Level 3's language (even though it was Level 3's theory of the week in the technical conference), there is no basis in the ICA, Oregon law, or federal law for the use of such a concept in rating calls.

areas. In OAR 860-032-0001(5), for example, the Commission defines "local exchange service" as local exchange telecommunications service as defined in ORS 759.005(2)(c).

Consistent with Oregon statutes and rules (and consistent with Qwest's approved tariffs),[11] Qwest's VNXX definition treats traffic as local only if it originates and terminates within the same LCA.

Level 3's certificate of authority places numerous conditions on Level 3. Two of those conditions are:

> 7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange boundaries and Extended Service Area (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.
>
> 8. When applicant is assigned one or more NXX codes, Applicant shall limit each of its NXX codes to a single local exchange or rate center, whichever is larger, and shall establish a toll rate center in each exchange or rate center that is proximate to the toll rate center established by the telecommunications utility or cooperative corporation serving the exchange." See Order No. 02-371, docket CP 1036, p. 6 (June 5, 2002).

Thus, Level 3 has a legal obligation in Oregon to comply with fundamental industry standards relating to LCAs, as well as industry standards related to telephone number assignment. Level 3 cannot simply pretend that LCAs do not exist, which is precisely what happens when a CLEC implements VNXX arrangements. A carrier that uses VNXX is blatantly ignoring these express conditions. In Order No. 04-504 in docket UM 1058, the Commission, after quoting these conditions, stated: "A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA. . . would clearly be in violation of its certificate." Order No. 04-504, p. 5. The conduct the OTA was describing was VNXX. In the Arbitrator's

[11] Qwest's tariffs, which are approved by the Commission, are also consistent with Qwest's proposed language. For example, the term "Local Service" is defined as "[t]elephone service furnished *between customer's premises* located within the same local service area." Oregon PUC No. 33, Exchange and Network Services, Section 21, at sheet 10. (Emphasis added.) The tariff defines a "Local Service Area" as "[t]he area within which telephone service is provided under a specific schedule of rates. This area may include one or more exchanges without the application of toll charges." *Id.* The term "Premises" is defined as a "tract of land. This tract of land may have one or more building structures or individual space or units on its grounds. There may also be individual space or units also within this building structure." *Id.*, at sheet 13. (Emphasis added.)

Decision in the Universal arbitration, the Arbitrator quoted the same conditions and concluded that "Universal, in using VNXX arrangements to provide dial-up access to the Internet to its ISPs' customers . . . is in violation of Conditions 7 and 8 of its operating certificate." Arbitrator's Decision, docket ARB 671, p. 10 (February 2, 2006), *aff'd with modifications,* Order No. 06-190, pp. 6-7 (April 19, 2006) (the Commission noted that "the Arbitrator was correct to address the conditions set forth in Universal's certificate. . . . Universal cannot assert that it can use its telephone numbers for any purpose notwithstanding the conditions of its certificate"). Nor can Level 3.

Level 3's POI theory is inconsistent with federal law. It is merely a clever attempt to broaden the scope of the *ISP Remand Order* to all ISP traffic, a position contrary not only to Commission rulings, but also to recent rulings of the four federal circuit courts, including the Ninth Circuit, that have addressed the issue. The Commission decisions are clear. In docket IC 12, the Commission soundly rejected Level 3's argument that the *ISP Remand Order* applies to all ISP traffic. Basing its decision on a detailed analysis of the history and language of the *ISP Remand Order*, the ALJ concluded that "ISP-bound traffic, as defined in the *ISP Remand Order, does not include VNXX-routed ISP-bound traffic*." ALJ Decision, docket IC 12, pp. 9-12 (August 16, 2005). The Commission affirmed that decision, relying explicitly on the *Universal* decision for the proposition that "the *ISP Remand Order* does not contemplate that ISP-bound traffic will be provisioned through VNXX arrangements, *but rather that an ISP's modems must be located in the same local calling area as the customers originating the Internet-bound call* in order for the traffic to be compensable." Order No. 06-037, p. 4. (Emphasis added.) Thus, the

Commission has consistently ruled that the *ISP Remand Order's* scope is limited to local ISP traffic (as defined by customer location).[12]

Since that decision, four federal circuit court decisions, including a recent Ninth Circuit decision, have agreed with the Commission. In the most definitive of these decisions, *Global NAPs v. Verizon New England,* 444 F.3d 59 (1st Cir. 2006) ("*Global NAPs I*"), the First Circuit, relying on a detailed preemption analysis (*id.*, pp. 71-75), held that "the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*." *Id*., p. 62. (Emphasis added.) Three months later, in *Global NAPs v. Verizon New England,* 454 F.3d 91 (2nd Cir. 2006) ("*Global NAPs II*"), the Second Circuit upheld a Vermont decision banning VNXX, holding that the Vermont Board's decision was a valid exercise of state authority. The court noted 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.*, p. 99. (Emphasis in original.) In *In re Core Communications,* 455 F.3d 267 (D.C. Cir. 2006) ("*Core*"), the D.C. Circuit reaffirmed the original *WorldCom* decision that defined the *ISP Remand Order* as applying only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area*." *WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002). (Emphasis added.) In *Core*, the court 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.'" 455 F.3d at 271. (Emphasis added.) Finally, last month, the Ninth Circuit, in *Verizon California v. Peevey*, 2006 WL 2563879 (9th Cir. 2006) ("*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*

[12] In Order No. 06-190, the Commission likewise followed the *Universal* decision, stating that "the decision in *Qwest v. Universal* unequivocally states that VNXX traffic is not compensable under the terms of the FCC's *ISP Remand Order*." Order No. 06-190, docket ARB 671, p. 4.

interexchange ISP-bound traffic." *Id.*, p. *13. (Emphasis added.) Thus, this Commission's rulings that the scope of the *ISP Remand Order* applies only to local ISP traffic have been confirmed by four federal circuits. Level 3's POI theory, which cannot be squared with Oregon's call rating rules, is merely a transparent attempt to do an end run around these definitive decisions.

Level 3's POI theory suffers from other fatal weaknesses. Call rating has never been based on a POI location. Both parties agree that a POI is the point at which two carriers networks meet to exchange traffic. Mr. Brotherson of Qwest testified that a POI is "the physical point where the trunks connecting a Qwest switch and a CLEC switch are connected so that traffic from each parties' network will flow to the network of the other carrier." (Qwest/28, Brotherson/15.) Level 3 witness Mr. Wilson stated that a POI "is the location where two carriers connect their networks for the purpose of exchanging traffic." (Level 3/800, Wilson/4.) He also agreed that a POI is not a customer location. (Wilson, 8/29/06 Tr. 148.)

POIs have existed for decades, ever since telephone companies began connecting to each other. (Qwest/28, Brotherson/15.) Yet, in his 30 years in the industry, Mr. Brotherson has never seen a situation where "the demarcation point between telephone company trunks has ever been used as the relevant point to rate a call between customers of the two companies." (*Id.*, p. 18.) Mr. Brotherson testified that IXCs often place a POI within a particular ICA so that the IXC can transport calls to distant LCAs. However, "[t]he fact that the POI where the IXC picked up the call was within a particular LCA has never been relevant for call rating purposes." (*Id.*, pp. 15-16.) Rather, call rating with IXCs "has always been based on where the called and calling parties are located." (*Id.*, p. 16.) Precisely the same situation has existed for decades with independent local exchange carriers; as in the IXC situation, customer location, and not the location of the POI, has always been the test for call rating purposes. (*Id.*, pp. 17-18.) Thus, Level 3's proposal represents "a major unprecedented exception to call rating in Oregon" that, if

allowed, would call into question "the entire call rating system in Oregon." (*Id.*, p. 18.) Level 3 never rebutted this testimony.[13]

Level 3's POI theory is inconsistent with the Ninth Circuit's *Peevey* decision, the GTE/ELI decision in Oregon, and the *Universal* federal court decision. In *Peevey*, the Ninth Circuit clearly ruled the relevant end point for ISP traffic is not a POI location. In that case, the CLEC claimed an inability to determine an end point for ISP traffic. The court, however, concluded 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*. 2006 WL 2563879, p. *14. (Emphasis added.)

Thus, as a matter of federal law, the end point for rating an ISP call is where the traffic is handed off by the CLEC to its ISP customer. 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. (Greene, 8/29/06 Tr. 59-60.)

Earlier Oregon decisions applied a somewhat different test. In the 1999 GTE/ELI decision in Oregon, this Commission ruled that the relevant terminating location for ISP traffic is the ISP's modem: "To the extent that calls to ISP providers are not directed to *an ISP modem within the local calling area*, they are not local calls and should not be eligible for reciprocal

[13] In its proposed language, Level 3 never mentioned the "secondary POI" concept that was its primary theme in Level 3's Supplemental Technical Testimony (Exhibits Level 3/701, 710, 711 and Level 3/800, Wilson/5-9) and in the technical conference. Thus, it is unclear whether Level 3 has now discarded this concept in favor of the POI theory. However, to the extent that Level 3 continues to consider this a viable theory, Mr. Easton rebutted the concept in detail. He noted, among other things, that the concept of a "secondary POI" is completely new and finds no support in the Telecommunications Act, the ICA, or FCC rules. Mr. Easton provides a comprehensive rebuttal of the secondary POI concept in Qwest/23, Easton/10-14, in connection with his discussion of Issue 1A.

compensation." Order No. 99-218, docket ARB 91 (March 17, 1999), p. 9. The same issue was addressed in *Qwest Corp. v. Universal Telecom,* 2004 WL 2958421 (D. Or. 2004):

> VNXX traffic is generated when an end user, who is not located in the same LCA as *Universal's network facilities,* calls the local dial-up number they have been provided. The number they call is the local number held by Universal but which Universal allows the ISPs to provide to their customers. The call is transported by Qwest, who has a physical presence in the LCA, to the POI, located in a different LCA, where it is handed off to Universal. Universal then terminates *the call by converting it to internet protocol for delivery to the internet. Id.* at *9.

When the parties could not agree on the relevant terminating location for compensation purposes, the court, relying on Order No. 99-218 (the GTE/ELI Order) and the *ISP Remand Order,* ruled that "*the 'termination point' is the location of the Universal modems that handle the call on behalf of the ISP*. This interpretation is supported by both the *GTE/ELI Decision* and the *ISP Remand Order*."[14] Mr. Greene acknowledged that none of the Level 3 ISP customers maintain modems in any Oregon LCA. (Greene, 8-29-06 Tr. 79-80.)

Thus, neither the *Peevey* test nor the modem test supports Level 3's POI theory. Under either approach, the Oregon Level 3 traffic is all VNXX traffic. There was no evidence that any ISP traffic is handed off by Level 3 to an ISP in Oregon, and Level 3's Media Gateway in Seattle performs the modem functionality for ISP calls originated for end users served by Level 3's ISP customers.

A recommended decision in Minnesota also rejects Level 3's POI theory. The issue there was the appropriate language to implement the *Core Forbearance Order*. Level 3 and the Minnesota Staff proposed language that would have made ISP traffic subject to terminating compensation if the traffic "is delivered to a *point of interconnection* with CLEC within the same

[14] Order, *Qwest Corp. v. Universal Telecom,* Civil No. 04-6047-AA (D. Or. September 22, 2005), at 2 (slip opinion attached hereto as Exhibit B). (Emphasis added; citations omitted.)

Qwest local calling area (as approved by the state Commission), as the originating caller."[15] Qwest's language required compensation only where the calling party and the ISP server are in the same LCA.[16] The ALJ recommended Qwest's language, stating that it "is consistent with the *ISP Remand Order*."[17] The irrelevance of a POI for call rating purposes is also supported by the Ohio Commission's recent *Telcove* decision, 2006 Ohio PUC LEXIS 54 (Ohio PUC, January 25, 2006).[18] The Ohio Commission rejected TelCove's argument that NXXs should be the means of rating calls, ruling instead that the ILEC's language, "which considers the physical location of the originating and terminating end users of a call, [is] consistent with our Guidelines." *Id.* at *2. The CLEC had argued that "rather than focus on the geographic end points of the call, . . . the Commission [should] focus on the *call's point of entry into and use of the PSTN . . . .*" *Id.* at *27. (Emphasis added.) The CLEC thus argued that the POI (or something very akin to a POI), instead of the customer location, should be treated as the relevant endpoint for intercarrier compensation purposes. The Commission rejected that argument, concluding that "for all types of [VoIP] traffic . . . , *the physical location of the calling and called party,* to the extent known, is the deciding factor in the jurisdiction of the call for traffic routing and intercarrier compensation purposes." *Id*. at *42. (Emphasis added.)

Level 3's new proposed Sections 7.1.1.3 and 7.1.1.4 were presented as part of Issue 1A. An examination of them demonstrates that these sections are merely reiterations of the POI theory already addressed above.

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[15] Findings of Fact, Conclusions and Recommendations on Remand, *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Docket Nos. 3-2500-16646-2 & P-421/C-05-721, pp. 8, 9 (Judge Sheehy, September 15, 2006). (Emphasis added).

[16] *Id*., p. 11.

[17] The ALJ recommended a minor change to other Qwest-proposed language that is not relevant here.

[18] Arbitration Award, *In the Matter of TelCove Operations, Inc's Petition for Arbitration Pursuant to Section 252(b) . . . For Rates, Terms, and Conditions of Interconnection with Ohio Bell Telephone Company d/b/a SBC Ohio*, Case No. 04-1822-TP-ARB, 2006 Ohio PUC LEXIS 54 (Ohio PUC, January 25, 2006).

In short, Qwest's VNXX definition is consistent with: language recently adopted by the Commission in the Universal arbitration; Oregon statutes and rules; the *Peevey* case; prior Commission orders; the *Universal* decision; the *ISP Remand Order* and other governing federal authorities, and decisions of other state commissions. Level 3's definition, on the other hand, has no basis in law and violates its own Oregon operating certificate.

B. Compensation for VNXX Traffic (Issue 3A) (Section 7.3.6.3). Qwest's Language Is Consistent With FCC Policies and the Principles of Cost Causation Upon Which Those Policies Are Based; Consistent With Its Order in the Universal Arbitration, the Commission Should Ban VNXX

[Qwest summary (Issue 3A): Issue 3A concerns Section 7.3.6.3, and the subissues are an extension of the same arguments addressed in Issue 3A. Qwest's language simply states that Qwest has no obligation to pay terminating compensation on VNXX traffic. Level 3's complicated language is a reiteration of its POI theory, and thus suffers from all of the legal problems with that theory that Qwest discusses above. In addition, Qwest's position is consistent with the cost causation principles that underlie the *ISP Remand Order* and the *Core Forbearance Order*. Level 3's approach turns cost causation on its head. Even though Level 3 and its ISP customers create and benefit from ISP traffic, Level 3 argues that Qwest, which is not the cost-causer, should bear all origination costs, transport costs, and, for good measure, should pay Level 3 to terminate the traffic. Yet, when Level 3 delivers a VNXX call placed by a caller to an ISP located outside of the caller's LCA, Qwest receives no compensation from the caller to cover the cost of originating and delivering that call (because Qwest's local rates are not set to cover the cost of originating and terminating long distance calls, and never have). The adoption of Level 3's proposal would directly violate the FCC's statement that "[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." Dr. Fitzsimmons' unrebutted testimony demonstrated that in providing VNXX, Level 3 operates as an IXC (in effect offering a 1-800 type service). If Level 3 charges Qwest for terminating a long distance call, Qwest incurs two costs: the termination charge and the origination cost. Qwest does not have the provider/customer relationship with the dial-up customer for Internet access that the ISP does, and thus cannot seek compensation from the person who places the call to the ISP. Further, Level 3's use of VNXX (because it disguises long distance calls as local calls) prevents passing these costs on directly to the dial-up callers in the form of toll charges. Thus, the only way that Qwest could recover its origination costs and the termination cost that it pays to Level 3 would be to raise rates generally. It would certainly be improper to raise local exchange rates for all customers of Qwest, even if that were possible, when only a small subset of them are making calls to ISPs served by Level 3. That is the very outcome the FCC sought to avoid in the *ISP Remand Order*. Finally, based on *Global NAPs II* and Order No. 06-190, the Commission has the authority to ban VNXX in Oregon, and should do so.]

This issue relates to Section 7.3.6.3. Qwest's language simply states that Qwest will not pay terminating compensation on VNXX traffic. (Jt. Ex. 1, p. 27.) The essence of Level 3's

complicated language is that Qwest should be required to pay terminating compensation on all traffic originated in LCAs in which Level 3 maintains a POI. (*Id.*, pp. 25-27.)[19] The underlying premise of Level 3's proposal is the same POI theory that Qwest addressed above. Thus, for purposes of Issue 3A, Qwest incorporates its earlier arguments by reference. However, in addition to the legal issues, the compensation question raises policy and cost causation issues. Specifically, the adoption of Level 3's language would violate the principle of cost causation, which is the basis for the policies articulated in the *ISP Remand Order* and other FCC decisions.

When an ISP customer places a dial-up call, three types of costs are incurred—origination, transport costs, and termination costs. (Qwest/37, Brotherson /7; Qwest/30, Fitzsimmons/4, 11-12.) The question here is who should bear those costs—the ISPs and their dial-up ISP customers or ratepayers generally. The FCC has emphatically answered that question. In the *ISP Remand Order*, the FCC stated that "[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."[20] *ISP Remand Order,* ¶ 42. In the *Core Forbearance Order*, the FCC stated that "the rate caps and mirroring rule were implemented to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service, and to avoid discrimination between services." *Core Forbearance Order,* ¶ 25.

In the *ISP Remand Order*, the FCC was addressing whether reciprocal compensation (an intercarrier compensation arrangement in which an originating LEC compensates the terminating LEC for terminating a local call) should be paid on calls placed to an ISP located in the same LCA. The theory behind this arrangement is that the terminating carrier has performed a service (delivering, or terminating, the call *to the called party*) for which the originating carrier has

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[19] Level 3's language also addresses VoIP traffic (which Qwest will address in Section IV and V, *infra*).

[20] The FCC did not go directly to a bill and keep regime in order to avoid a "disruptive" flash cut. *ISP Remand Order*, ¶ 77.

received compensation (specifically, compensation through the flat monthly rate paid by the originating carrier's customer that allows the customer to place an unlimited number of *local calls*). (Fitzsimmons, 8/29/06 Tr. 175-77.)

The theory justifying payment by the originating LEC to the terminating LEC does not apply to long distance calls, however, because the flat monthly rate paid by a customer to place an unlimited number of local calls does not include calls placed outside of the customer's LCA. (Fitzsimmons, 8/29/06 Tr. 175-77.) Long distance, or interexchange calls, are governed by a different intercarrier compensation scheme. Under the long distance intercarrier compensation model, the long distance carrier charges the customer placing the long distance call and pays originating access charges to the originating LEC and terminating access charges to the terminating LEC. (Qwest/30, Fitzsimmons /4.) Thus, when a Qwest customer originates a long distance call, Qwest receives rather than pays compensation.

In offering VNXX service, Level 3 functions as a long distance carrier. (Qwest/30, Fitzsimmons/4.) It offers its ISP customers a service that allows dial-up callers to place long distance calls for free. Level 3 does this by assigning telephone numbers to its ISP customers so that long distance calls appear to be "local" calls. As the Vermont and South Carolina commissions have recognized, when a CLEC deploys VNXX, it offers the equivalent of an incoming 1-800 service, without having to pay any of the costs of that service.[21]

There is no dispute in this case that all of the ISP traffic at issue is delivered to ISPs located outside of the LCA of the calling party. (Greene, 8/29/06 Tr. 79-80.) Thus, under the *ISP Remand Order*, as interpreted by other Commission orders, none of the traffic would be

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[21] *Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, pp. *41-*42 (Vt. PSB 2002) ("In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service . . . ."); Order Ruling on Arbitration, *In re Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006 S.C. PUC LEXIS 2, p. *35 (S.C. PUC, January 11, 2006) ("Virtual NXX calls . . . are no different from standard dialed long distance toll or 1-800 calls").

compensable. However, under the Level 3 language, by Level 3's own admission, virtually all of the ISP traffic would become compensable. (Level 3/714, Greene.) Level 3 suggests that its new language is a compromise. It is nothing of the sort, however. Rather, it would completely reverse a substantial body of Oregon Commission decisions.

The Level 3 proposal is also completely at odds with the FCC's policy decisions. If Level 3 were to charge Qwest for terminating a long distance call to an ISP, Qwest would incur two costs: the termination charge and the origination cost. Qwest, however, does not have the provider/customer relationship with the dial-up customer for Internet access that the ISP does, and thus cannot seek compensation from the person who places the call to the ISP.[22] Further, Level 3's use of VNXX (because it disguises long distance calls as local calls) prevents the passing of these costs on directly to the dial-up callers in the form of toll charges. Thus, the only way that Qwest can recover the origination cost that it incurs and the termination cost that it pays to Level 3 is by raising rates generally. It would certainly be improper to raise local exchange rates for all customers of Qwest, even if that were possible, when only a small subset of them are making calls to ISPs served by Level 3. In fact, that is the very outcome the FCC seeks to avoid. The FCC's policy is worth repeating: "[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*, ¶ 42.

Moreover, the economic theory for having the originating carrier (Qwest) pay the terminating carrier (Level 3) does not apply to long distance calls. When Level 3 delivers a VNXX call placed by a caller to an ISP located outside of the caller's LCA, Qwest receives no compensation from the caller to cover the cost of originating and delivering that call because

[22] Qwest has the local exchange service relationship with the end user, but cannot raise charges for telephone service simply because the customer uses its service to access the Internet. The latter relationship is between the end user and its ISP.

Qwest's local rates are not set to cover the cost of originating and terminating long distance calls, and never have been. (Fitzsimmons, 8/29/06 Tr. 175-78.) The economic principle of cost causation requires the cost-causer—the dial-up customer—to bear the cost of providing dial-up service. The long distance model, which applies here, would have Level 3 (the provider offering the 1-800 service) pay compensation to Qwest for the origination costs that Qwest incurs and then seek compensation from the ISP in an amount sufficient to cover what Level 3 pays Qwest, plus the costs that Level 3 incurs to transport and deliver the call to the ISP. Applying proper cost causation principles, the ISP could then pass its costs on to the dial-up customer so that the dial-up customer bears the costs that Qwest, Level 3, and the ISP incur to make dial-up service possible.

Level 3's proposal reverses the compensation flow that should apply to long distance ISP traffic.[23] In a recent Qwest/Level 3 arbitration, the Iowa Utilities Board rejected Level 3's claim that ISP traffic should be treated as local traffic if the parties to the calls have the same NXXs:

> [T]he Board finds that Level 3's proposed solutions do not address the Board's compensation concerns in any meaningful manner. The Board's 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*. Instead, Level 3 claims that Qwest should make a payment to Level 3 or, at best, that the Board's bill-and-keep policy should apply, such that neither party would pay the other. Neither of these proposals addresses the problem

[23] See *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005), where, in the context of transit traffic, the court described the differences between the local and interexchange intercarrier compensation mechanisms: "[T]he difference between the compensation schemes is more than semantic. Under these reciprocal compensation agreement, the originating carrier bears the cost of transporting telecommunications traffic across [the ILEC's] network to the point of interconnection with the terminating network. The originating network is then required to compensate the terminating network for terminating the call . . . In contrast, under the access charge regime, both the originating and terminating carriers would be compensated by the IXC. Under this scenario, neither carrier bears the cost of transporting traffic on the IXC network." *Id.*, 400 F.3d at 1260-61. The court also ruled that reciprocal compensation applies only to local traffic (traffic that originates and terminates in the same local calling area). *Id*., p 1263. Here, Level 3 wishes to receive the benefit of millions of minutes of interexchange ISP traffic that is delivered to ISPs in Seattle or other parts of the country but, contrary to the compensation plan that applies to interexchange traffic, Level 3 denies any obligation to pay Qwest to originate the traffic. At the same time, Level 3 demands that Qwest pay it to terminate interexchange traffic, when Level 3 is in reality an IXC providing a 1-800 service to its ISP customers. Thus, to place this in its proper context, Level 3 (in the role of an IXC) demands that the originating carrier not only be denied the cost of origination, but also that Qwest (instead of the IXC) pay to terminate the traffic. This approach stands the existing compensation schemes on their head.

identified by the Board.[24]

Virtually all of the traffic at issue in this case is one-way traffic from ISP dial-up customers to ISPs who have purchased service from Level 3. (Greene, 8/29/06 Tr. 79-80.) ISPs hire Level 3 to provide the network facilities to make dial-up service possible, and Level 3 undertakes to do so. (Qwest/30, Fitzsimmons/10-11.) Level 3, in turn, seeks to use Qwest's network. Level 3 could compensate Qwest and then recover that cost from its ISP customers. Instead, Level 3 asks the Commission to require Qwest to provide use of its network for free and then charge Qwest, rather than the ISP, for the cost that Level 3 incurs to deliver traffic to the ISP. As Dr. Fitzsimmons testified, this proposal is an economically irrational and inefficient proposal. (*Id.*, pp. 11-12.) No Level 3 witness challenged Dr. Fitzsimmons' testimony.

Qwest is not seeking to collect access charges in this proceeding. Qwest asks only that the Commission not reverse the compensation flow that should apply so as to require Qwest to pay rather than receive compensation. Under Level 3's language, Qwest is left with two possible outcomes, both very negative: (1) to bear the origination and termination costs without compensation or (2) to pass on costs shifted to Qwest or to customers generally. Dr. Fitzsimmons testified the first outcome violates cost causation principles. The FCC rejected the second outcome in the *ISP Remand Order* and the *Core Forbearance Order*, where it articulated the policy that customers generally should not be compelled to pay for the cost incurred to provide dial-up service to the smaller group of customers who use such dial-up service.

Nor can Level 3's proposal be reconciled with *Global NAPs II*, where the court discussed the FCC's concern that competitors may not enter the market to "expand competition," but instead, "to take advantage of the relatively rigid control of the incumbents." 454 F.3d at 95. Because of this concern, "the FCC has warned time and again that it will not permit competitors

[24] *In re Level 3 Communications, LLC v. Qwest Corporation*, Docket No. ARB-05-4, Order on Reconsideration, p. 40 (Iowa Util. Bd., July 19, 2006) (emphasis added), attached as Exhibit C.

to engage in regulatory arbitrage—that is, to build their businesses to benefit almost exclusively from existing intercarrier compensation schemes *at the expense of both incumbents and consumers*." *Id.* (Emphasis added.) The court neatly summarized its underlying policy concerns with VNXX:

> Global's desired use of virtual NXX simply *disguises traffic* subject to access charges as something else and would force Verizon to subsidize Global's services. *This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage*. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILECs in a purported quest to compete." *Id.,* 454 F.3d at 103. (Emphasis added.)

Level 3's proposal would disguise traffic and result in regulatory arbitrage.

Mr. Brotherson testified that the Commission should ban the use of VNXX in Oregon (Qwest/28, Brotherson/25), a result that would be consistent with Order No. 06-190 in the Qwest/Universal arbitration (docket ARB 671). There, the Commission ordered that the following language be inserted into the ICA: "Qwest and CLEC shall not exchange VNXX traffic." Order No. 06-190, Appendix A, pp. 10, 16. In its rehearing request, Universal complained that the Arbitrator improperly relied on the conditions in Universal's certificate of authority (which are substantially identical to those in Level 3's certificate) as a basis to ban VNXX. The Commission rejected that argument, noting that the Arbitrator was correct to rely on the conditions, because Universal was able to obtain numbers because of the Universal's representations in its certificate, and that Universal "cannot assert that it may use its telephone numbers for any purpose notwithstanding the conditions of its certificate." *Id.*, p. 7. Thus, the "Arbitrator was correct to conclude that VNXX arrangements are prohibited in Oregon. Given that VNXX arrangements violate state laws and regulations that have not been preempted by the federal government, Universal's arguments regarding this type of traffic pursuant to those illegal arrangements are moot." *Id.*

The Commission's decision in docket ARB 671 is supported by *Global NAPs II*, where the Second Circuit upheld a decision of the Vermont Board banning VNXX in that state. In reaching that conclusion, the Second Circuit found, citing the *Local Competition Order*, that the FCC "had early indicated that it intended to leave authority over defining local calling areas where it always had been—squarely within the jurisdiction of state commissions." 454 F.3d at 97. Nothing on that issue had changed, and thus the court stated that: "state boards have authority to define local calling areas with respect to intercarrier compensation." *Id*., 454 F.3d at 99. Turning to VNXX, the court concluded that the Board violated no federal rules in prohibiting the use of VNXX. *Id.*, 454 F.3d at 101. Consistent with these decisions, the Commission should ban the use of VNXX by Level 3.

C. Compensation for VNXX Traffic (Issue 3C) (Section 7.3.6.1). Qwest's Language Is Consistent With Oregon Law and FCC Policies

[Qwest summary (Issue 3C): This issue is merely a variation of issues 3A and 3B. Qwest's language is consistent with Oregon and federal law, while Level 3's language is not.]

The Issue 3C dispute (Section 7.3.6.1) is merely an extension of the disputes in Issues 3A and 3B. Qwest's language, which states that terminating compensation will be paid on ISP traffic that originates and terminates in the same LCA, is consistent with Oregon call rating rules and federal law. Level 3's language attempts to mandate terminating compensation on all ISP and VoIP traffic. For the reasons discussed above, Qwest's language should be adopted.

IV. VOIP ISSUES (DEFINITION OF VOIP (ISSUE 16), NEW ISSUE RELATED TO "PSTN-IP-PSTN TRAFFIC" DEFINITION) AND QWEST ISSUE 1A (SECTIONS 7.2.2.12. AND 7.2.2.12.1)

[Qwest Summary (Issue 16 and "PSTN-IP-PSTN traffic" definition): With regard to the definition of VoIP (Voice over Internet Protocol), there is only one type of traffic at issue: traffic that originates in TDM (Time Division Multiplexing) on the PSTN (Public Switched Telephone Network) and terminates to a VoIP end user on a broadband connection. Qwest's language is consistent with current FCC orders and is based on the rational position that a call should be classified by the format in which it is originated: thus, calls that originate in TDM, but are delivered to a VoIP end user, should be classified as PSTN traffic. At the same time, traffic that originates on IP-compatible equipment in IP (Internet Protocol) on a broadband connection should be classified as VoIP. Until the FCC's provides more direction, this is a reasonable approach.

Qwest's proposed definition of "VoIP traffic" originally contained a second paragraph that, because the terms of that language more appropriately relates to terms and conditions, should not have been in the "VoIP traffic" definition. Qwest, therefore, moved the language from the definitions section to Sections 7.2.2.12 and 7.2.2.12.1. Originally, Level 3 opposed the language in total. Now, however, it proposes to replace the term "VoIP Provider POP" with "Level 3 POI." Level 3's use of language related to a "POI" (Point of Interconnection) is merely another example of its effort to improperly rate calls based on POI location, a position inconsistent with governing law. The effect of this language would be to allow Level 3 to inappropriately use a form of VNXX for VoIP calls, thus violating call rating rules and the ESP Exemption. Qwest's language, which was adopted in Iowa and Arizona, properly applies the ESP Exemption, using the ESP POP (VoIP Provider POP) as the relevant point for call rating.]

Level 3 proposes an extremely broad definition of VoIP traffic, then takes the position that all such traffic is exempt from access charges no matter where the calls are terminated, so long as the calls are originated in Internet Protocol ("IP") and delivered by Level 3 to Qwest. (Greene, 8-29-06 Tr. 46-48.) Thus, Level 3 believes that it, or its third-party VoIP providers, can place VoIP calls on the PSTN and never pay the access charges that would apply to any other carrier under the same circumstances. Level 3 maintains this position even though many of the calls it terminates are neither local in nature nor qualify for the ESP Exemption. In fact, although Level 3's advocacy is vague at best, an analysis of its proposals demonstrates that Level 3 is merely proposing another variation of VNXX for VoIP traffic. Level 3's proposals should be rejected for the same reasons the Commission should reject its ISP VNXX proposals.

Time Division Multiplexing ("TDM") is the language of the PSTN, while IP is the language of the Internet that is used to transmit VoIP. (Qwest/17, Brotherson/33-34.) In order for voice traffic to be exchanged between a TDM network and an IP network equipment, it must convert the traffic from one protocol (*i.e.*, TDM to IP, or IP to TDM) to the other. Modems (or other devices like Level 3's Media Gateway) perform that function. For VoIP traffic exchanged between Qwest and Level 3, this function occurs at Level 3's Media Gateway in Seattle. (Greene, 8-29-06 Tr. 35-36; Exs. Level 3/701 and Level 3/704.)

The parties addressed the four general types of calls that could arguably fall within the definition of VoIP traffic. However, the only issues in this docket relate to calls that originating in TDM over a regular PSTN line, but terminating in IP (*i.e.*, on IP-compatible equipment over a broadband connection). These calls are known as TDM-IP calls. Qwest's language excludes such call from the definition of VoIP because they do not originate in IP on a broadband connection over the proper type of equipment. (Qwest /28, Brotherson/37.)[25] Level 3 proposes language that would include TDM-IP calls in the definition of VoIP. (Level 3/901, Greene/11-12; see also Jt. Ex. 1, p. 46.)

There are three significant differences in the competing definitions of "VoIP traffic" that are relevant to this issue. In addition, Qwest has proposed other language (Sections 7.2.2.12 and 7.2.2.12.1) related to VoIP that should be included in the agreement (discussed below).

[25] The other categories are not at issue. The first category is IP-IP calls, or calls that both originate and terminate on IP-compatible customer premises equipment ("CPE") over broadband connections. No one disputes that these are VoIP calls, but both parties agree they are irrelevant to this docket because they are originated, transmitted, and terminated entirely over the Internet, and thus never touch the PSTN. (Qwest/28, Brotherson/34-35.) The second category of calls originates in IP (*i.e.*, on IP-compatible equipment over a broadband connection), but terminate to a traditional TDM line on the PSTN (*i.e.*, IP-TDM calls). Both parties agree that this category meets the proper definition of VoIP. The third category is known at TDM-IP-TDM, or "IP in the middle" calls. Both parties acknowledge that the FCC has ruled that this traffic is not VoIP, not subject to the ESP Exemption, and should be treated like any other TDM call. (Ex. Qwest/17, at 11). The FCC ruled in the *AT&T Declaratory Ruling* that this type of call is not a VoIP call, even if at some point during the call it was converted to IP, because, before delivery, it was reconverted to TDM and delivered over the PSTN. 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 (April 21, 2004).

Level 3 inappropriately removes two phrases from the VoIP definition ("at the premises of the party making the call" and "end user premises"), both of which were included by Qwest to underline the fact that VoIP calls must originate in IP on IP-compatible end user equipment. If such IP-compatible equipment is not at the premises where the call originates, then it must necessarily originate in TDM and be converted to IP elsewhere; thus, it would not meet the proper test for a VoIP call. Level 3 removed both references to the premises of the end user, but did not explain why, other than to say that its language is a "reflection that VoIP traffic may originate and terminate in IP." (Level 3/901, Greene/11.) Other than this unsupported, conclusory statement, Level 3 provided no testimony on the subject.

The second difference is that Qwest's language requires that a VoIP call be "transmitted over a broadband connection to the VoIP provider," while Level 3 adds the words "or from" after the word "to." It is through this language that Level 3 attempts to categorize calls that originate in TDM, but which terminate in IP, as VoIP calls. Thus, ultimate issue is whether TDM-IP calls should be categorized as VoIP. The FCC has not yet ruled on a definitive definition of VoIP, but all indications thus far are that the only traffic that will meet the VoIP definition is traffic that originates in IP. It only makes sense that the technology in which a call originates should define the category into which it falls. Just as Qwest believes that a call originating in IP on IP-compatible equipment over a broadband connection is VoIP, it also believes in a consistent manner that traffic that originates in TDM on the PSTN should *not* be categorized as VoIP, regardless that it terminates in IP. Level 3's argument, however, is essentially that the IP aspect of a call should always trump the TDM aspect. There is no basis for such inconsistent treatment. Thus, in order to assure internal consistency and conformity with the FCC, Qwest strongly urges the Commission to adopt Qwest's language, and thus exclude TDM-IP traffic from the VoIP definition.

The third difference in the definition of VoIP is that Level 3 adds language that states that "PSTN-IP-PSTN Traffic as defined herein shall not constitute VoIP traffic." Level 3 then proposes a complicated definition of "PSTN-IP-PSTN Traffic." While this language is completely unnecessary, especially given the fact that the FCC has already issued a definitive order on the issue, Qwest does not object to including this language.

Qwest's proposed definition of "VoIP traffic" originally contained a second paragraph that, because the terms of that language more appropriately relate to terms and conditions, and thus should not be in the "VoIP traffic" definition, Qwest proposed to move the language from the definitions section to section 7.2 of the agreement (specifically Sections 7.2.2.12 and 7.2.2.12.1). (Qwest/28, Brotherson/43-45.) In its new language, Level 3 no longer proposes to eliminate this section, instead now attempting to remove the phrase "VoIP Provider Point of Presence ("POP")," and replacing it with "Level 3 POI" in both sections, as illustrated in the following language:

> 7.2.2.12 VoIP Traffic. VoIP traffic as defined in this agreement shall be treated as an Information Service, and is subject to interconnection and compensation rules and treatment accordingly under this Agreement based on treating the ***VoIP Provider Point of Presence ("POP")*** **Level 3 POI** as an end user premise for purposes of determining the end points for a specific call.
>
> > 7.2.2.2.12.1 CLEC is permitted to utilize LIS trunks to terminate VoIP traffic under this Agreement only pursuant to the same rules that apply to traffic from all other end users, including the requirement that the ***VoIP Provider POP*** **Level 3 POI** must be in the same Local Calling Area as the called party. (Jt. Ex. 1, pp. 46-47.)

In other cases, Level 3 proposed to eliminate both sections. Now, despite retaining both sections, but proposing to make the changes noted above, Level 3 provides only the most sketchy of justifications. With regard to Section 7.2.2.12, Mr. Greene states: "Qwest's view that the undefined VoIP POP is the end point of a VoIP call" and "Level 3's proposal that the POI better represents the financial end point of the call." (Level 3/901, Greene/11.) With regard to Section 7.2.2.12.1, Mr. Greene states: "Qwest's attempt at restricting LIS trunk use to only those calls

that meet the undefined VoIP POP criteria" and "Level 3's view that LIS trunks may be utilized when Level 3 has POI in the local calling area." (*Id.*, pp. 11-12.) There are three principal reasons Level 3's language should be rejected.

First, an ESP POP (the same concept as a VoIP Provider POP) is a well-understood concept in telecommunications and is critical to the proper application of the ESP Exemption (discussed in more detail below). Mr. Brotherson responded directly to Mr. Greene on this point:

> The concept of a "VoIP provider POP" is simply another way that Qwest uses to describe the concept the FCC established as part of the ESP Exemption. The FCC ruled that an ESP, such as a VoIP provider, can purchase service as an end user out of the local exchange tariffs. When a VoIP provider purchases local service from Qwest, Qwest knows where it provisions the service to its end user customer. If there is a service problem, Qwest knows where the service is delivered so that it can go to that location and make repairs. If Level 3 is representing to Qwest and to the Commission that the VoIP ESP (e.g., Vonage) is a Level 3 local customer entitled to the ESP Exemption, it is surely not too much to ask Level 3 where the customer is located (and that location is the location of the "VoIP provider POP"). It is interesting that Mr. Greene does not say that Level 3 does not know where its customers are located; instead, he just says that the POI between the companies is all that is relevant and that using the POI will bring more certainty than knowing where the Level 3 customer is located. Certainty is not a substitute for complying with the law as it relates to rating calls as local or interexchange in nature. (Qwest/37, Brotherson/10.)

Both the Iowa and Arizona commissions accepted Qwest's language on this issue.[26] Level 3 apparently finds it inconvenient that the VoIP Provider POP is the relevant point for rating enhances service traffic—but that is the law and thus should be a part of the ICA.

Second, the entire premise of Level 3's language is the unsupported idea that the location of its POI is relevant for call rating. The Ohio Commission, in the *Telcove* decision discussed above, affirmatively rejected this argument in the context of VoIP traffic.

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[26] Order on Reconsideration, *In Re Level 3 Communications, LLC, vs. Qwest Corporation*, Docket ARB-05-4, pp. 57-59, 63-64 (Iowa Util Bd. July 19, 2006) (adopting Qwest's language on all Tier II issues); Decision No. 68817, *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 Nos. T-03654A-05-0350 & T-01051B-05-0350, p. 37 (Arizona Corp. Comm'n, June 29, 2006) ("We agree that the VoIP Provider's POP is the appropriate point to determine the end point of the call"; "we adopt Qwest's proposed [VoIP] definition as well as Section 7.2.2.12 and 7.2.2.12.1").

Finally, Mr. Greene's claim that Level 3 is entitled to use LIS (Local Interconnection Service) for VoIP calls in any LCA in which it has a POI has no legal basis. LIS is properly available for the exchange of local traffic, which, in the case of VoIP, is determined by the location of the VoIP Provider's POP. Qwest's language is consistent with this principle and with the principle that an ESP, such as a VoIP provider, has no greater rights than a business end-user customer. Level 3 inappropriately attempts to use this provision as the means to gain the right to use LIS services in situations where such services need not be provided.

V. 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)

[Qwest summary (Issue 4 and VoIP Aspects of Issues 3A, 3B, and 3C): Sections 7.3.4.1 and 7.3.4.2 are directly related to Issues 3A, 3B and 3C. Level 3's language would exempt Level 3 from ever incurring access charges on VoIP traffic based on the same unsupported POI theory addressed in other sections. Level 3's proposals are unlawful and inconsistent with the ESP Exemption, which allows an ESP to be treated like a typical business end user in the LCA in which it purchases local exchange service. However, Level 3's claim that the ESP Exemption grants an ESP a complete exemption from access charges in all circumstances is not supported by any authority and is inconsistent with the language of the exemption. Qwest's proposed audit and certification language for VoIP traffic is reasonable and should be approved.]

Earlier, Qwest discussed Issue 3 in the context of ISP traffic. Those same sections also have VoIP implications. For example, in Issue 3B (the VNXX definition), Level 3's definition states that VoIP traffic from Level 3 VoIP customers to Qwest customers is not VNXX traffic in any LCA in which Level 3 has a POI, or where Level 3 delivers that traffic to the LCA over a TELRIC-priced service to that LCA. (Jt. Ex. 1, pp. 28-29.) Level 3 proposes similar language in Section 7.3.6.3 (Issue 3A) (*id.*, pp. 25-27). In Section 7.3.6.1 (Issue 3C), Level 3's language would require Qwest to pay terminating compensation on all VoIP traffic at $.0007 per minute of use (MOU) without limitation.

Issue 4 (Sections 7.3.4.1 and 7.3.4.2) are related sections. Subject to Level 3's election under the *ISP Remand Order's* "mirroring rule," Qwest's language in these sections states that

local voice and VoIP traffic will be exchanged at the state voice rate,[27] and that no terminating compensation will be paid on VNXX traffic. Level 3's language, however, requires terminating compensation on all traffic that is not VNXX (which, as Level 3 defines VNXX, is virtually all traffic). (Jt. Ex. 1, pp. 32-33.) Level 3's proposed VoIP language on these issues is inconsistent with Oregon and federal law.

Reciprocal compensation is limited to those cases where the physical end points of a call are within the same LCA. As in the case of ISP traffic, Level 3's language abandons proper call rating and, in effect, would require that terminating compensation be paid on all VoIP traffic, local and interexchange alike. But that is not all. Level 3 also contends that it may avoid the existing carrier compensation system which governs compensation for interexchange calls. For reasons that Level 3 has not explained, it proposes a scheme for VoIP traffic that amounts to a complete end run around normal compensation rules for the exchange of traffic between carriers.

Level 3's effort to abandon the historical distinction between local traffic (for which reciprocal compensation is appropriate) and non-local traffic (whose compensation is governed by an alternative compensation system) for VoIP traffic should be rejected. Level 3 takes the position that access charges should never apply to a VoIP call originated on its IP network, no matter where it enters the PSTN, and without regard to where Qwest must transport the call for termination. (Greene, 8-29-06 Tr. 46-48.) Thus, if a VoIP call from a Level 3 VoIP customer to a Salem Qwest end user on the PSTN is delivered to Qwest anywhere in the LATA, and is transported to the Salem LCA over LIS that Level 3 pays for, Level 3's language would require Qwest to deliver that traffic to its Salem end user and, instead of receiving access charges, Qwest

[27] In other states, Level 3 has claimed that under the *ISP Remand Order's* "mirroring rule," Qwest must pay the voice rate on all traffic, including ISP traffic. Under the mirroring rule, a CLEC may elect to exchange all local traffic at the ISP rate of $.0007 per MOU, or may exchange voice traffic at the higher rate. *ISP Remand Order,* ¶ 8. A CLEC, however, is not entitled to exchange all traffic at the higher rate. To the extent there is any lack of clarity on this issue, Qwest has and hereby reaffirms its offer to exchange all properly compensable local traffic at $.0007 per MOU.

would perform the transport and termination functions for $.0007 per MOU. Mr. Greene testified that the only time that Level 3 would ever hand off a VoIP call to an IXC would be in an "unusual" overflow situation, but that in normal circumstances, it does not hand off any VoIP traffic to an IXC. (*Id.*, pp. 51-52). Level 3's position is that access charges can never be assessed on a VoIP-originated call that is terminated by Qwest in TDM, no matter how far Qwest must transport the call in order to terminate it.

Although it is far from clear how it reaches this conclusion, Level 3 apparently believes the historical ESP Exemption gives it, or its third-party VoIP provider customers, a blanket exemption from access charges under all circumstances. (Greene, 8/29/06 Tr. 46-48.) This argument is not supported by the law, however, and would be grossly unfair to Qwest. The ESP Exemption only exempts an ESP VoIP provider from terminating access charges for delivering calls to PSTN customers in the same LCA in which the VoIP provider is purchasing local exchange service. For all other calls, including calls that terminate to a different LCA than the LCA where the VoIP provider purchases local exchange service, Qwest is entitled to charge applicable access charges.

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

The most critical aspect of the exemption is that the ESP is treated like an end user; thus, the physical location of the ESP's POP is the relevant location for call rating purposes. This principle is clearly articulated in the FCC's 1988 *ESP Exemption Order*:[28]

> Under our present rules, *enhanced service providers are treated as end users for purposes of applying access charges*. . . . Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. *ESP Exemption Order*, ¶ 2, n. 8. (Emphasis added.)
>
> Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users." *Id.*, ¶ 20, n. 53.

Level 3's language, however, is a direct attempt to avoid the FCC's ruling. Instead of standing in the place of an end user (whose local service gives it the right to originate and terminate calls within the LCA in which it is located without incurring additional charges), Level 3 believes it is entitled to terminate VoIP traffic throughout the same LATA without incurring access charges. Level 3 cited no authority for this expansive reading of the ESP Exemption, however. It defies common sense that an ESP, which stands in the place of an end-user customer, should receive privileges far beyond those granted to end-user customers themselves. It likewise defies common sense for Level 3 to suggest that, at the same time a typical end-user customer's physical location is critical to whether calls are local or long distance, the location of the VoIP provider's POP should not likewise be the relevant measuring point for VoIP calls. A non-ESP end-user customer located in Portland that calls Salem would incur toll charges. Yet, Level 3 seems to think that it should be given greater rights than such end users (*i.e.*, that a VoIP

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

provider whose POP is in Portland should be able to terminate calls to Salem without incurring access charges, when an IXC in the same circumstance must pay access charges).

Under Oregon law, a voice call between separate LCAs is a toll call and thus must be treated as such. This rule applies equally to VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the VoIP provider POP is located, but the call is being sent for termination to another LCA, the VoIP provider is not exempt from the call rating rules that have applied for decades in Oregon, under the ESP Exemption or on any other basis. Nor is the VoIP provider allowed to connect to the terminating LCA as an end user under the ESP Exemption if it does not have a POP in that LCA. Calls of this sort are properly classified as long distance traffic and must be handed off to an IXC, which must connect to Qwest via a Feature Group connection. Another clear FCC policy statement is directly relevant: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on and IP network, or on a cable network. *We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways*."[29]

Nevertheless, Level 3 tries to do precisely what the FCC says it should not be allowed to do. That is, Level 3 attempts to improperly use the ESP Exemption to effect a VNXX scheme for VoIP calls. Level 3's proposed language would magically transform every interexchange VoIP voice call into the equivalent of a local call. For all of the reasons set forth in Qwest's earlier sections dealing with ISP VNXX traffic, the Commission should likewise reject Level 3's attempt to apply VNXX to VoIP traffic. Level 3 cited no authority in its testimony to suggest that such a result is legally permissible, nor does it provide meaningful reasons why this traffic (which consists of voice calls that are no different to the end user than a voice call using the

[29] Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, WC Docket 04-36, ¶ 61 (March 10, 2004). (Emphasis added.)

PSTN) should receive special regulatory treatment. Qwest's language, which determines the proper compensation regime for VoIP calls based on the two relevant physical locations (*i.e.*, the VoIP Provider POP and the TDM end user), is completely consistent with both the ESP Exemption and Oregon law and thus should be adopted.

In Section 7.1.1.1, Qwest proposes language that would allow operational audits related to VoIP traffic. (Jt. Ex. 1, pp. 2-3; Qwest/28, Brotherson/46-47.) Level 3 proposed two language changes, one of which is related to the use of dispute resolution in the ICA. As to the dispute resolution language, it is unnecessary and would, on its face, require Qwest to invoke the dispute resolution process whenever it challenges the identification of traffic as VoIP. (Qwest/37, Brotherson/11.) Nevertheless, Qwest proposed a change to the language that would resolve that issue. (*Id*., pp. 11-12.) Mr. Greene states that the second change (the addition of the words "a determination by Qwest in a post-provisioning" to the definition of an audit failure) is necessary to assure that Qwest cannot unilaterally make a conclusive determination that a failure has occurred. (Level 3/901, Greene/13.) However, given that an audit failure determination is subject to dispute resolution, there is no basis for a concern that Qwest can conclusively determine that an audit failure has taken place. Level 3 would have the right to dispute such a finding. Thus, this language is unnecessary and should be rejected.

In Section 7.1.1.2, Qwest offers language requiring Level 3 to certify that traffic it characterizes as VoIP traffic meets the Commission-approved VoIP definition. (Jt. Ex. 1, pp. 3-4; Qwest/28, Brotherson/49.) Level 3 proposes to change the word "certifies" to "represents," based on a claim that otherwise, Level 3 becomes the "guarantor" that traffic it claims to be VoIP really is VoIP traffic. (Level 3/901, Greene/13.) Level 3's argument is disingenuous, however, and simply points out why Qwest's language is necessary. It is Level 3, not Qwest, that has the business relationship with VoIP providers. Thus, to the extent that Level 3 is able to obtain intercarrier compensation from Qwest for VoIP traffic, it should also bear the obligation to

"certify" that it really is VoIP traffic. In other words, Level 3's claim that it has a right to compensation for VoIP traffic should be accompanied by a duty to certify that the traffic is indeed what it says it is. In essence, Level 3 wants the right, but not the duty. Qwest's language should be adopted.

VI. 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)

[Qwest summary (Issue 18): This issue is related to Issue 2, the issue whether Qwest is required to combine all traffic over LIS trunks. Because Qwest has no mechanized way to bill such traffic, Level 3 proposes a manual system of "factors" to bill switched access. Feature Group D (FGD) already provides the ability to combine all traffic on one trunk group, and also provides mechanized bills based on actual usage data. Abandoning a mechanized system for a manual system is a step backward. Furthermore, adoption of Level 3's position would give Level 3 sole control of the raw information necessary for billing, thus allowing Qwest to perform only manual audits. Other practical problems demonstrate that Level 3's proposal is completely impractical and should be rejected.]

Issue 18 concerns Level 3's proposal to use a manual system of "factors" to bill for switched access traffic that Level 3 proposes be combined over LIS trunks. A system of factors is not necessary if switched access traffic and other traffic types are combined on FGD trunks, as Qwest proposes. A system of factors becomes necessary only if switched access traffic is delivered to Qwest over LIS trunks (because Qwest's LIS trunks do not have the capability to properly record and bill switched access traffic).

As discussed above, if all traffic types are to be combined on the same trunks, it should be done on FGD trunks. Problems with Level 3's factor proposal only confirm this conclusion. First, the factors proposal is an entirely manual process from beginning to end. Switching to a factors system would require Qwest to discard its existing systems and thus replace them with new manual systems. (Easton, 8/30/06 Tr. 102-04.) Moreover, under Level 3's proposal, Qwest would no longer be able to use its existing mechanized systems to record traffic and thus supply Qwest with independent evidence of the volume of each traffic type delivered by Level 3.

Level 3 would have sole control of the raw information necessary for billing. Thus, Qwest's only mechanism to verify the correctness of billing information supplied by Level 3 would be to conduct manual audits. Given the enormous volumes of traffic exchanged between the parties, this would be an extremely complex and time-consuming endeavor. (*Id.*, pp. 112-13.)

Second, Level 3's proposed factors proposal does not correctly address the existing traffic types. For example, there is no factor for instrastate switched access. In addition, under Section 7.3.9.1.1 of Level 3's proposal, all VoIP traffic appears to be placed in a single category and treated as a single type of traffic. Such a categorization is not consistent with existing law. As discussed above, both parties agree that VoIP is an enhanced service. (Greene, 8/29/06 Tr. 52-55.) As a result, a VoIP provider is treated as an end user for purposes of applying access charges. If the VoIP provider is located in a different local calling area than the called party, the call is an interexchange call, and thus is subject to switched access charges, just like any other interexchange call. By lumping all VoIP traffic together in one category, however, Level 3's factor proposal would inextricably combine local VoIP traffic with VoIP traffic that is subject to switched access. The result would be a colossal mess that would have to be manually sorted out. Finally, Level 3's proposed Section 7.3.9.1.2 purports to create a PLU factor (presumably for "Percent Local Use"), but the description for the factor includes some VoIP traffic (which presumably is included in the PIPU factor) and undefined Section 251(b)(5) traffic (which Level 3 has argued in other proceedings includes VNXX interexchange traffic).

In short, even if one were to assume that a factors proposal could be used, it is clear that Level 3's proposal does not prescribe a legally correct system of factors. Thus, the Commission should reject Level 3's proposed language for Issue 18.

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

[Qwest summary (Issue 20): Level 3 proposes three changes to Section 7.3.8. Level 3 provides no testimony supporting or explaining its proposals, and Qwest's evidence demonstrates that each proposal has serious problems and should be rejected.]

The dispute concerning signaling parameters (Issue No. 20) concerns three changes that Level 3 proposes to make to the language for Section 7.3.8. First, Level 3 proposes a change that would characterize "IP Origination" as a technical limitation to excuse it from providing Calling Party Number ("CPN") or other valid origination information on IP-originated calls. Second, Level 3 proposes that where CPN is not provided, such traffic will be rated as "interstate" switched access traffic, even if some portion of the traffic is intrastate traffic. Third, Level 3 proposes a clause purporting to state that VoIP traffic specifically may be originated without CPN. Level 3 does not support or otherwise explain any of these modifications in its testimony.

All three of Level 3's proposed changes should be rejected. Mr. Linse provided the only testimony concerning the proposed changes, and his unrebutted testimony demonstrated that there is no basis for adopting any of them. "IP Origination" is not a technical limitation that prevents the population of valid origination information on IP-originated calls. Specifically, the Charge Number signaling parameter is valid origination information and can be populated by Level 3 in all instances on IP-originated calls. (Qwest/32, Linse/36-37.) It is inappropriate to presume that all traffic without CPN is interstate traffic merely because some of it will be intrastate. Treating all traffic without CPN as interstate switched access traffic simply gives Level 3 an incentive to fail to populate CPN on intrastate calls in order to obtain lower interstate switched access rates. Finally, there is no technical limitation that prevents Level 3 from populating CPN for VoIP traffic. (*Id.*, p. 35.) Indeed, it is inconsistent for Level 3 on the one hand to claim that calls are rated based solely on the NPA/NXXs of the calling and called parties, and at the same time, to claim that there is no requirement that it populate the NPA/NXX of the

calling party for VoIP calls. To be sure, Level 3's proposed changes to Section 7.3.8 are merely further examples of its repeated efforts to avoid payment of intercarrier compensation required by law.

VIII. 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)

[Qwest summary (Quad Links): This issue, which was not raised in Level 3's petition, would impose signaling obligations on Qwest that are unreasonable and that would exceed Qwest's legal obligations. Although ostensibly related to whether additional quad links are required, Level 3's language is actually broader, and would impose on Qwest a new concept called "meet point signaling," an issue that Level 3 does not even raise in its testimony. Level 3 has offered no lawful basis or policy rationale for expanding Qwest's obligation to provide signaling beyond what the law today requires and what the parties previously agreed to.]

In its testimony, Level 3 for the first time expressed its desire to use just a single set of quad links for signaling. This issue was not raised in either Level 3's petition or in Qwest's response.[30] In fact, the parties had agreed to the language for Section 7.2.2.6.1. (Compare, e.g., the interconnection agreements filed with Level 3's petition and Qwest's response.) Under Section 7.2.2.6.1, Qwest's sole obligation to provide signaling is contained in Qwest's tariffs. Under federal law, Qwest no longer has an obligation to provide unbundled signaling. (Qwest/32, Linse/39-40.)

In the new contract language that Level 3 submitted on June 26, 2006, Level 3 for the first time proposed three new sections (Sections 7.2.2.6.1.1, 7.2.2.6.1.2 and 7.2.2.6.1.3), ostensibly to address the use of a single set of quad links. These sections, however, are unnecessary if their sole purpose is to provide for the use of a single set of quad links (signaling links). Qwest's tariffs do not require more than a single set of quad links. (Qwest/32, Linse/41.) However, Level 3's new proposed language does not appear to be limited to the question of a

[30] Section 252(b)(4) of the Act requires the Commission to limit is consideration of issues in an arbitration to the issues raised in the petition and in the response. 47 U.S.C. § 252(b)(4).

single set of quad links. Instead, Level 3 appears to also be proposing a new concept called "meet point signaling," an issue that Level 3 does not even raise in its testimony.

Each of Level 3's proposed contract sections addressing quad links should be rejected. Level 3's proposed language for Section 7.2.2.6.1.1 should be rejected because it is duplicative of the agreed-to language in section 7.2.2.6.1. (Qwest/32, Linse/41.) Level 3's proposed language for Sections 7.2.2.6.1.2 and 7.2.2.6.1.3 should also be rejected because they are ambiguous, such that one could not determine what Qwest's obligations would be. Both provisions could be interpreted to obligate Qwest to provide signaling that is not required by FCC regulations or Qwest's tariffs. (*Id*., p. 42.) Level 3 has offered no lawful basis or policy rationale for expanding Qwest's obligation to provide signaling beyond what the law today requires and what the parties previously agreed to.

SUMMARY OF UNDISPUTED ISSUES

Based on Qwest's review of Level 3's new proposed language and testimony, the following issues appear to be resolved, either by Level 3's acceptance of Qwest's language or, where Qwest proposed no language, by eliminating Level 3's proposed language: Issue 1C (Section 7.2.2.1.1); Issue 1E (Section 7.2.2.1.4); Issue 1I (Section 7.3.3.1); Issue 5 (Adoption of specific SGAT terms); Issue 6 (Definition of "Automatic Message Accounting); Issue 7 (Definition of "Basic Exchange Service"); Issue 8 (Definition of "Call Record"); Issue 9 (Definition of "Exchange Access"); Issue 11 (Definition of "Interexchange Carrier"); Issue 12 (Definition of "IntraLATA Toll Traffic"); Issue 13 (Definition of "Local Interconnection Service or 'LIS' Entrance Facility"); Issue 14 (Definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic"); Issue 15 (Level 3's Definition of "Telephone Toll Service"); Issue 17 (Sections 7.2.2.8.1 through 7.2.2.8.16); Issue 19 (Section 7.3.6.2); (Issue 21 (Section 7.4.1.1); and Issue 22 (Section 19.1.1).

CONCLUSION

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

DATED: October 10, 2006.

Respectfully submitted,

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QWEST EXHIBIT A

Decision No. C03-0117

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02B-408T

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 WITH CENTURYTEL OF EAGLE, INC. REGARDING RATES, TERMS, AND CONDITIONS FOR INTERCONNECTION.

DECISION DENYING EXCEPTIONS

Mailed Date: January 30, 2003
Adopted Date: January 17, 2003

I. BY THE COMMISSION

A. Statement, Findings, and Conclusion

1. This matter comes before the Commission for consideration of Exceptions filed by Level 3 Communications, LLC. (Level 3) on November 21, 2002. The Exceptions were filed in response to Decision No. R02-1242 (Recommended Decision) which granted CenturyTel of Eagle, Inc.'s (CenturyTel) Motion to Dismiss Petition in this docket. Level 3, in its Petition for Arbitration pursuant to 47 U.S.C. § 252, requests interconnection with CenturyTel's network for the transport and termination of traffic to Internet Service Providers (ISPs) served by Level 3. In Decision No. R02-1242, the Administrative Law Judge (ALJ) determined that the Federal Communications Commission (FCC) has preempted state commission jurisdiction over all issues concerning ISP-bound traffic. As such, the ALJ concluded, this Petition for Arbitration by Level 3 must be dismissed.

2. CenturyTel filed its Response to the Exceptions. On January 3, 2003, we heard oral argument on the Exceptions and, in particular, the Commission's authority to arbitrate Level 3's request for interconnection with CenturyTel. Attorneys for Level 3 and CenturyTel presented

arguments and support for their positions in this matter. Now being duly advised, we grant the Exceptions, in part only. While we agree with Level 3 that the FCC has not preempted state commissions from arbitrating all matters concerning ISP traffic, we nevertheless agree with CenturyTel that, for reasons other than those cited by the ALJ, the Commission lacks jurisdiction over this Petition under 47 U.S.C. § 252.

B. Exceptions by Level 3

3. Level 3 argues that the ALJ erred in his conclusion that the Commission lacks jurisdiction to arbitrate the interconnection dispute between Level 3 and CenturyTel pursuant to §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act).[1] Level 3 states that the FCC has not preempted state commissions from exercising jurisdiction over ISP traffic, except on the discreet issue of setting intercarrier compensation rates under § 251(b)(5) of the Act.

4. According to Level 3, the Recommended Decision would inflate the costs for any ISP served by Level 3, because CenturyTel will charge originating access charges, thus forcing Level 3 to pay for dedicated facilities to carry traffic that CenturyTel should otherwise be obligated to carry at its own expense.[2] The FCC has stated that the ban on origination charges ensures that the costs of facilities used to deliver telecommunications traffic to the point of interconnection are borne by the originating carrier, and that the originating carrier recovers the costs of those facilities through the rates it charges to its own local customers.

[1] 47 U.S.C. §§ 251-252.

[2] *See* 47 C.F.R. § 51.703(b) (stating that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.").

5. The Exceptions suggest that the ALJ made three principal legal errors. First, the ALJ mischaracterized the scope of the FCC's preemption of state jurisdiction over ISP-bound traffic. Second, the ALJ's inference of broad FCC preemption over all interconnection matters relating to ISP-bound traffic is inconsistent with federal judicial preemption doctrine. Third, the ALJ erred by mischaracterizing ISP-bound traffic under the relevant FCC and judicial precedents by not finding that it is jurisdictionally mixed, with both local and long distance components, and that it is not "information access."

6. Level 3 asserts that the ALJ's findings were contrary to the FCC's *ISP Order on Remand*[3] because in that order the FCC only preempted states with respect to setting intercarrier compensation rates for ISP-bound traffic. Level 3 states that, instead of relying on the plain language of §§ 251 and 252, which grant the state commissions jurisdiction to arbitrate all interconnection disputes between all telecommunications carriers, the ALJ relied on the jurisdictional analysis rejected by the U.S. Court of Appeals for the D.C. Circuit,[4] and which the FCC has abandoned. Level 3 argues that §§ 251 and 252 "address both the interstate and intrastate aspects of interconnection, services and access to unbundled network elements."[5]

7. In arguing that the FCC has not preempted state commission jurisdiction over all ISP issues, Level 3 notes that the ALJ failed to address footnote 149 of the *ISP Order on Remand*. This footnote states that the FCC's interim intercarrier compensation regime for ISP-bound traffic:

> [A]ffects only the intercarrier compensation (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.

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

[4] *Bell Atlantic v. Federal Communications Commission,* 206 F.3d 1 (D.C. Cir. 2000).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order,* 11 FCC Rcd. 15, 499, 15,547 ¶ 92 (FCC 1996)

8. Level 3 continues that this footnote clearly and unambiguously states that the FCC did not otherwise alter interconnection obligations with respect to ISP-traffic or remove state commission jurisdiction over arbitration and enforcement of those interconnection agreements. The ALJ did not address this footnote in his decision. Rather, the ALJ took the position that the *ISP Order on Remand* can be read either as limited to intercarrier compensation issues, or all ISP traffic issues encompassed by §§ 251 and 252. This inference, Level 3 argues, is contrary to the FCC's own clear statements on the issue.

9. Likewise, Level 3 states that the ALJ ignored the plain meaning of §§ 251 and 252, which grants the state commission jurisdiction to arbitrate all interconnection disputes between all telecommunications carriers. Section 251(a) provides that "[e]ach telecommunications carrier has the duty – (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carrier." A "telecommunications carrier" is not limited to providers of exclusively local or intrastate telecommunications services, but rather encompasses interstate services as well. Level 3 has sought interconnection with CenturyTel under §§ 251(a) and (b), and under § 251(c) to the extent CenturyTel is not a rural telephone company with an exemption under § 251(f)(1). Level 3 contends that § 252 grants to state commissions the authority to approve or reject proposed interconnection agreements, to mediate or arbitrate disputes, and to enforce obligations falling under §§ 251 (a), (b), and (c). The ALJ mistakenly concluded that the scope of §§ 251 and 252 is limited to intrastate services. By extension, Level 3 contends that the ALJ erroneously claims that the interstate nature of ISP-bound traffic precludes state commissions from asserting jurisdiction over interconnection disputes involving ISP traffic.

10. Level 3 further disagrees with the ALJ's reliance on the FCC's end-to-end analysis of ISP traffic to justify that ISP traffic is interstate in nature. Level 3 notes that the D.C. Circuit vacated this rationale, stating that the FCC erred in focusing on the nature of the service (*i.e.*, local or long

distance).[6] Level 3 argues that this traffic, is in fact, jurisdictionally mixed with components of both intrastate and interstate traffic. Because of this hybrid nature, it is not traditional interexchange traffic such as WorldCom, Inc., or AT&T Communications of the Mountain States, Inc., carry. In the *Bell Atlantic* decision, the D.C. Circuit confirmed the jurisdictionally mixed nature of ISP-bound traffic stating:

> Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.

Level 3 asserts that this statement neutralizes the ALJ's conclusions that rely on a pure interstate classification.

11. Level 3 also asserts that the ALJ's inference of broad FCC preemption over all interconnection matters relating to ISP traffic is inconsistent with federal preemption doctrine. According to Level 3, a federal agency's intent to preempt state regulation must be explicit and unambiguous. In this case, the FCC did not state with clarity that it is preempting states with respect to ISP traffic. On the contrary, the FCC stated it was not preempting state commission jurisdiction over anything, but setting intercarrier compensation rates for ISP-bound traffic. Again, Level 3 claims that footnote 149 of the *ISP Order on Remand* supports this contention.

12. Level 3 then argues that the ALJ mistakenly concluded that ISP-bound traffic is an information service. Level 3 points to the *Bell Atlantic* decision, which rejected the FCC's characterization of ISP-bound traffic as exchange access or information access, and noted that ISP-bound traffic appears to be a telecommunications service. Similarly, in *WorldCom*[7] the D.C. Circuit rejected the FCC's argument that ISP-bound traffic was information access subject to § 251 (g) of the

[6] *Bell Atlantic Telephone Cos. v. FCC*, 206 F. 3d 1 (D.C. Circuit 2000)

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

Act and that the exchange of ISP-bound traffic between local exchange carriers (LECs) was the provision of "information access" by the originating LEC within the scope of § 251(g).

13. Finally, Level 3 contends that the ALJ mistakenly claimed that the Court in *WorldCom* found that the state commissions would no longer have § 251(e)(1) authority over interconnection for ISP-bound traffic. Level 3 asserts that the Court, *supra.* at 431-32, was simply summarizing the FCC's position – one that was rejected by the Court when it reversed and remanded the order. The ALJ's finding that the Court "appears" to have concluded that the FCC's preemption extended to all interconnection matters involving ISP-bound traffic is therefore erroneous.

14. In summary, Level 3 requests that we grant its Exceptions and assert jurisdiction over this arbitration, or, if we adopt the ALJ's decision, that we clarify that we are ceding jurisdiction over this proceeding to the FCC pursuant to § 252(e)(5) of the Act.[8]

C. CenturyTel's Response

15. In its Response, CenturyTel argues that the Commission lacks jurisdiction to arbitrate this matter, and, therefore, Level 3's Exceptions should be denied and the Recommended Decision adopted.

16. According to CenturyTel, ISP-bound traffic is not subject to this Commission's review under § 252 of the Telecom Act. The FCC, in the *ISP Order on Remand* (paragraph 52), not only preempted states with respect to intercarrier compensation for ISP-bound traffic, but also concluded that ISP-bound traffic is properly classified as interstate traffic. As such, it falls within the FCC's § 201 jurisdiction.[9] CenturyTel agrees with the ALJ's finding that the FCC has exclusive

[8] *See* § 252(e)(5) ("if a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.")

[9] 47 U.S.C. § 201.

jurisdiction over all ISP traffic interconnection issues under its § 201 authority, not only those involving reciprocal compensation.

17. CenturyTel acknowledges footnote 149 of the *ISP Order on Remand*, but states that the FCC did not specify in that order what a carrier's obligations are for transporting ISP-bound traffic under its Part 51 rules. CenturyTel asserts that this obligation does not exist in the Part 51 rules, but even if it did, CenturyTel would not have an obligation under § 251 of the Telecom Act to transport or terminate ISP-bound traffic that originates on CenturyTel's network. Interconnection, according to Centurytel, simply means the physical linking of two networks.

18. CenturyTel contends that the FCC's jurisdiction over ISP-bound traffic is based on the well-established principle that, when communications are jurisdictionally mixed and cannot be separated--the case with ISP-bound traffic--then, the FCC, not a state commission, has authority to regulate such communications.[10] CenturyTel asserts that the FCC, having concluded that ISP-bound traffic should be classified as interstate communications, preempted the state commissions from exercising jurisdiction over all prospective interconnection matters relating to ISP traffic.

19. According to CenturyTel, in classifying ISP-bound traffic as interstate, the FCC excluded this traffic from §§ 251 and 252 altogether, thereby leaving the state commissions no authority over interconnection issues related to this traffic. Significantly, the *ISP Order on Remand* prohibited any carrier from invoking § 252(i) to opt into any existing interconnection agreement addressing ISP-bound traffic. At paragraph 82 of that order, the FCC stated that § 252(i) applies only

[10] *Citing Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n. 4 (1986) (federal regulation of traffic is appropriate where it is not possible to separate the interstate and intrastate components of the asserted regulation); and *Southwestern Bell Tel. Co. v. FCC*, 153 F. 3d 523, 541-42 (federal regulation of "jurisdictionally mixed" traffic is appropriate).

to agreements arbitrated or approved by state commissions pursuant to § 252. Further, CenturyTel states, the ALJ appropriately points out that the Court's description in *WorldCom* of the FCC's holdings in the *ISP Order on Remand* supports this position. That description states in pertinent part, "[T]he state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to resolve LEC interconnection issues under 252(e) of the Act."[11]

20. CenturyTel addresses Level 3's request that this Commission cede jurisdiction to the FCC pursuant to § 252(e)(5), stating that Level 3 misapplies this section to the present circumstances. Section 252(e)(5) only applies to those instances in which a state commission fails to carry out its responsibilities under § 252. However, CenturyTel states, the FCC, the D.C. Circuit t, and the ALJ in this proceeding have all concluded that state commissions lack the authority to arbitrate the interconnection dispute at issue here. Thus, if the Commission adopts the Recommended Decision, such action would not constitute a failure to act; rather, the Commission does not posses the jurisdiction in the first instance.

21. CenturyTel contends that the ALJ's jurisdictional characterization of ISP-bound traffic is correct. While the FCC recognized that ISP-bound traffic has interstate and intrastate components, it also concluded that those components cannot be reliably separated. Therefore, ISP traffic is properly classified as interstate, and, as such, falls within the FCC's jurisdiction.[12] Thus, CenturyTel concludes, the Level 3 argument should be disregarded.

22. CenturyTel also points out that this Commission recently upheld the ALJ's decision to deny Level 3's declaration of intent to provide local services in CenturyTel's territory (Docket

[11] *WorldCom* at 432.

[12] *ISP Order on Remand* at ¶ 52.

No. 02U-236T). *See* Decision No. C03-0067. According to CenturyTel, the Commission concluded that the service Level 3 proposes to offer did not constitute a local exchange telecommunications service, and therefore, Level 3's certificate for local services should not be extended to serve in CenturyTel's exchanges. CenturyTel cites the FCC's Local Competition Order in which it states, "[a]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls)." Further, the FCC concluded that "an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbents LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)."[13]

23. CenturyTel continues: Level 3 erroneously argues that there are no limitations on state commissions' authority to arbitrate interconnection disputes. Not all interconnection arrangements are subject to § 252 arbitration and review. For example, intrastate and interstate access arrangements for the termination and origination of interexchange traffic are not arbitrated and reviewed by the state commissions pursuant to § 252. Section 252(a) makes reference only to §§ 251(b) and (c) and not to § 251(a) when describing the arbitration authority of a state commission. In relevant part, § 252(a) provides that,

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement...without regard to the standards set forth in subsections 251(b) and (c) of Section 251...The agreement ...shall be submitted to the State commission under subsection (e) of this section.[14]

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[13] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers;* First Report and Order, 11 FCC Rcd 15499, 15598 ¶ ¶190-91 (*Local Competition Order).*

[14] 47 U.S.C. § 252(a).

24. According to CenturyTel, § 252(a) makes no specific reference to interconnection pursuant to § 251(a). Further, § 252(d) supports this position. That provision sets forth pricing standards for interconnection pursuant to §§ 251(b)(5) and 251(c)(2)-(4) only. None of these interconnection provisions applies to the negotiations between Level 3 and CenturyTel. There are no pricing standards in § 252(d) for § 251(a) interconnection, CenturyTel claims, because it was not contemplated that § 251(a) interconnection agreements would be reviewed by a state commission under § 252(e).

25. Finally, CenturyTel argues that this arbitration does not fall under § 251(c) because CenturyTel is a rural provider exempt from the obligations contained in that section. This Commission has not terminated CenturyTel's rural exemption status (pursuant to § 251(f)); therefore, interconnection with CenturyTel could fall only under §§ 251(a) or (b). However, CenturyTel does note that due to the interstate nature of this ISP-bound traffic it also cannot fall under § 251 (b). With only 251(a) then remaining, CenturyTel reiterates that § 252 does not give state commissions authority to arbitrate an interconnection dispute involving only § 251(a) interconnection.

D. Decision

26. It is not clear to us whether the FCC has completely preempted state commissions' jurisdiction over issues relating to ISP-bound traffic, or whether the FCC intended only to carve out reciprocal compensation for such traffic and bring it within federal jurisdiction. The *ISP Remand Order* seems to want to have it both ways. On the one hand, it makes a jurisdictional determination that ISP-bound traffic is mixed and hence interstate; on the other hand, the Order seems to imply what seems a logical impossibility; namely, that only the compensation aspect of ISP traffic is FCC jurisdictional. To this extent we do not understand what the FCC means to do, we grant the Exceptions and do not accept the ALJ's rationale.

27. Ultimately, however, we agree with CenturyTel that, for reasons other than those cited by the ALJ, dismissal of Level 3's Petition for Arbitration is required. We conclude that in light of: (1) CenturyTel's status as a rural incumbent local exchange carrier (ILEC); and (2) the interexchange nature of the ISP traffic to be carried by Level 3 with its proposed interconnection with CenturyTel, the Commission lacks jurisdiction to arbitrate this dispute under § 252 of the Telecom Act.

28. On the issue of preemption, Level 3 is correct that the FCC's intent to preempt state commission authority must be clear and unambiguous. *Integrity Management International, Inc. v. Tombs & Sons*, 836 F.2d 485 (10th Cir. 1987). Because we see confused temporizing from the FCC, and nothing approaching clear and unambiguous intent to preempt, we cannot find ourselves preempted.

29. Generally, the Recommended Decision (and CenturyTel in its support of the Recommended Decision) relies on the *ISP Order on Remand* for its conclusion that the FCC intended to preempt state commission arbitration over all matters relating to ISP-bound traffic. That decision, however, contains no clear and unambiguous statements that the FCC intended such preemption. Furthermore, the most plausible interpretation of the *ISP Order on Remand* is that the FCC intended to preempt state commissions on ISP-bound traffic only with respect to compensation issues, and even then, only on matters that would conflict with the FCC's specific directives relating to compensation. For example, in paragraph 4 of the Executive Summary, the FCC stated its general determination "that intercarrier compensation for ISP-bound traffic is within the jurisdiction of this Commission under section 201 of the (Telecom) Act..." (emphasis added). And in attempting to point to specific language in the ISP Order on Remand to support its preemption argument, CenturyTel cited paragraphs 52 and 82 of the order. However, the language in those paragraphs is

clear that the FCC was addressing only its authority to establish intercarrier compensation requirements for ISP traffic.

30. We further note that the ISP Order on Remand explicitly acknowledges that state commissions have and would continue to have a role in arbitrating, reviewing, and enforcing interconnection agreements relating to ISP-bound traffic. *See ISP Order on Remand*, paragraph 79 (carrier may rebut presumptions regarding the amount of traffic that is ISP-bound traffic by providing evidence "to the appropriate state commission" in "state commission proceedings"); and paragraph 80 (FCC-ordered rate caps have no effect to the extent state commissions have ordered LECs to exchange ISP-bound traffic at rates below the caps or on a bill-and-keep basis).

31. CenturyTel points to the conclusion in the ISP Order on Remand that ISP-bound traffic is interstate traffic and within the FCC's § 201 jurisdiction. Interstate communications, CenturyTel argues, does not fall within state commissions' authority, but is exclusively within the FCC's jurisdiction. Accordingly, whether or not the FCC specifically articulated its intent to preempt the states on matters related to ISP traffic, preemption follows from the determination that this traffic is interstate communications. We disagree.

32. The FCC itself, in the *Local Competition Order* (footnote 11, *supra.*) observed that the Act abolished previously existing distinctions between the FCC's jurisdiction over interstate communications and the states' jurisdiction over intrastate communications. Specifically, the FCC stated that §§ 251 and 252 created "parallel jurisdiction for the FCC and the states." So, § 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection and unbundled network elements, and, similarly, the states' authority under § 252 extends to both interstate and intrastate matters. This interpretation of the Act is confirmed by the courts. *Southwestern Bell Telephone v. Public Utility Commission*, 208 F. 3d 475, at 480 (5th Cir.

2000). Therefore, the FCC's determination that ISP-bound traffic is interstate traffic is not particularly relevant on the question whether the Commission possesses jurisdiction over the present dispute between Level 3 and CenturyTel. For the reasons discussed above, we conclude that the FCC has not preempted state commission jurisdiction under § 252 of all disputes relating to ISP-bound traffic.

33. Nevertheless, we determine that § 252 gives the Commission jurisdiction only over matters arising under §§ 251(b) and (c). Level 3 argues that the only prerequisite for invoking the Commission's § 252 jurisdiction is a request for interconnection made to an ILEC. According to Level 3, § 252(a) refers only to a request for interconnection under § 251, without reference to any subsection of § 251. Thus, even a request for interconnection under § 251(a) is subject to arbitration by a state commission. We disagree.

34. CenturyTel points out that § 252(a) mentions §§ 251(b) and (c) specifically (ILEC may negotiate an interconnection agreement without regard to the standards set forth in subsections (b) and (c)), and makes no mention of § 251(a). Moreover, we note that § 252(a), according to its title, relates to interconnection agreements arrived at through negotiations. However, the provision where an ILEC's duty to negotiate is specified is in § 251(c) (which also incorporates the duties specified in § 251(b)). The duty to negotiate interconnection agreements, therefore, is itself a §§ 251(b) and (c) obligation, not one arising under § 251(a). We conclude that a state commission's § 252 authority is limited to requests for interconnection agreements implicating §§ 251(b) and (c) obligations. As such, a state commission has no arbitration authority over § 251(a) matters.

35. Level 3 purports to request interconnection under §§ 251(a), (b), and even (c), to the extent CenturyTel is not a rural ILEC with an exemption under § 251(f)(1). We conclude that no provision of § 251(b) applies to this case. The only § 251(b) obligation plausibly raised by Level 3's

Petition for Arbitration is that arising under § 251(b)(5) (duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications). However, the *ISP Order on Remand* clearly excludes ISP-bound traffic from § 251(b)(5). Therefore, Level 3's Petition states no plausible claim for interconnection under § 251(b).

36. Similarly, the Petition cannot state a claim for interconnection under § 251(c). In the first place, CenturyTel is a rural ILEC and, pursuant to § 251(f), is presently exempt from § 251(c) obligations. The Commission has not terminated CenturyTel's rural exemption (by finding that a request for interconnection with CenturyTel is not unduly economically burdensome, is technically feasible, and consistent with universal service requirements). Moreover, CenturyTel notes that the ISP customers that Level 3 seeks to serve are not located in CenturyTel's local calling area. As such, calls by CenturyTel's end-users to Level 3's ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls. Section 252(c)(2) is clear that the duty to interconnect under its provisions does not apply to interexchange calling. Rather, that section is limited to interconnection for the purpose of providing exchange service and exchange access. It is apparent that Level 3 does not propose to provide either service pursuant to its proposed interconnection with CenturyTel. For these reasons, the Petition does not state a request for interconnection under § 251(c).

37. Level 3's Petition can only state a request for interconnection under § 251(a). And, as explained above, state commissions' § 252 jurisdiction does not extend to such requests for interconnection. Consequently, we conclude that the Petition should be dismissed. For these reasons, we affirm the ALJ's recommendation to dismiss this proceeding.

II. ORDER

A. The Commission Orders That:

1. The Motion for Pro Hac Vice filed by Level 3 Communications, LLC is granted.

2. The Motion for Pro Hac Vice filed by CenturyTel of Eagle, Inc., is granted.

3. The Motion for Leave to File Additional Authority by Level 3 Communications, LLC submitted on January 16, 2003 is denied.

4. The Motion for Leave to File Additional Authority and Response by Level 3 Communications submitted on January 17, 2003 is denied.

5. The Exceptions by Level 3 Communications, LLC, to Decision No. R02-1242 are granted in part only consistent with the above discussion. Otherwise the Exceptions are denied.

6. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

7. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING January 17, 2002.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

POLLY PAGE

JIM DYER

Commissioners

CHAIRMAN RAYMOND L. GIFFORD
SPECIALLY CONCURRING.

III. CHAIRMAN RAYMOND L. GIFFORD SPECIALLY CONCURRING:

1. I support the Commission's rationale for dismissing this arbitration petition, but in a most reluctant way. There is much room here for help from the Federal Communications Commission (FCC), which has repeatedly twisted itself in knots over these ISP-bound traffic issues. I believe that the law, as it currently stands, does not give Level 3 Communications, LLC (Level 3) an arbitration right before a state commission under § 252. Level 3's request for interconnection falls under § 251(a), a category of interconnection obligation that we have never arbitrated or approved.

2. That said, I have misgivings that this is indeed the best course or the only course that the FCC could plot for Internet Service Provider (ISP) traffic interconnection. Surely, subjecting this traffic to access – as must be Centurytel of Eagle, Inc.'s desire – is not best for consumers or for competitive provision of ISP services. Neither, of course, do we want artificial inducements such as ISP-bound reciprocal compensation obligations falsely to signal the need to enter the ISP traffic market. Regulatory arbitrage—be it for universal service purposes or simply false price inducements—is something to be avoided.

3. I believe that the FCC has both the discretion and the power under the Telecommunications Act of 1996 to correct the confusion surrounding ISP traffic, its jurisdictional status, and compensation mechanisms attaching to it. The sooner that is done, in clear, unambiguous language, the better off consumers will be.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Chairman

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF OREGON

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

UNIVERSAL TELECOM, INC., dba US POPS, fka UNIVERSAL TELECOMMUNICATIONS, INC., an Oregon corporation

Defendant.

Civil No. 04-6047-AA

ORDER

AIKEN, Judge:

Defendant's motion in limine (doc. 89) is denied. Plaintiff's cross-motion in limine (doc. 92) is granted, however, plaintiff's alternative motion for scheduling conference (doc. 92) is denied. In further clarification of this court's opinion filed December 12,

2004 (doc. 66), and responding to an issue that has been raised during settlement negotiations concerning damages, the court finds the following:

> Regarding the court's statement in the Opinion and Order:
>
> for a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA or EAS and terminate at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the ISP.

Qwest Corporation v. Universal Telecom, Inc., 2004 WL 2958421, *10 (D. Or. 2004).

The court intended compensable traffic to include traffic that originates in one LCA or EAS area and "terminates" in that same LCA or EAS area only for that traffic that Universal maintains a point of interconnection in the same LCA or EAS area in which the call originates. In other words, the "termination point" is the location of the Universal modems that handle the call on behalf of the ISP. This interpretation is supported by both the GTE/ELI Decision[1] and the ISP Remand Order[2].

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[1] Commission Decision, In the Matter of the Petition of Electric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996, ARB 91 (March 17, 1999).

[2] 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).

The parties are ordered to return to Judge Coffin to resume settlement negotiations.

IT IS SO ORDERED.

Dated this 22 day of September 2005.

Ann Aiken
United States District Judge

EXHIBIT C

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: LEVEL 3 COMMUNICATIONS, LLC, Petitioner, vs. QWEST CORPORATION, Respondent.	DOCKET NO. ARB-05-4

ORDER ON RECONSIDERATION

(Issued July 19, 2006)

SUMMARY[1]

Level 3 has requested reconsideration of the Arbitration Order the Board issued in this matter on December 16, 2005. While a number of issues are raised, many of them are related to the fact that Level 3 wants to offer VNXX services in Iowa and would prefer an interconnection agreement that makes VNXX service possible on an economical basis. The Board has considered VNXX traffic in previous dockets and has consistently expressed a concern that VNXX allows a CLEC to use the ILEC's network to carry interexchange traffic without compensation to the ILEC. The Board has also indicated that VNXX service could be allowed if this intercarrier compensation issue were addressed. In this docket, Level 3 has proposed to address the compensation issue by either (1) requiring that Qwest make a payment to Level 3 for every minute of traffic delivered or (2) exchanging the traffic on a bill-and-keep basis. The Board finds that these proposals fail to properly address the Board's concerns in any meaningful way. Accordingly, the Board will not change the principle points of its Arbitration Order as a result of this reconsideration.

This order also addresses all 17 of the Tier II issues, that is, issues that have been described as being derivative of the more significant Tier I issues.

[1] This summary is provided solely for the convenience of the reader. It is not an official part of the Board's order and does not limit, alter, or affect the Board's actual decision in any way.

PROCEDURAL HISTORY

On June 3, 2005, Level 3 Communications, LLC (Level 3), filed a petition for arbitration of unresolved terms in an interconnection agreement between Level 3 and Qwest Corporation (Qwest). On June 13, 2005, the Utilities Board (Board) issued an order docketing the matter for arbitration.

On June 21, 2005, Level 3 and Qwest jointly filed a waiver of the time deadlines of 47 U.S.C. § 252(b)(4)(C) and a joint scheduling proposal. The proposed procedural schedule extended beyond the time period within which a decision would normally need to be made pursuant to 47 U.S.C. § 252(b)(4)(C). As such, the parties waived their rights to have the Board rule on the petition for arbitration within the time frame established by the federal statute. On June 30, 2005, the Board issued an order accepting the parties' joint waiver and establishing a procedural schedule.

On December 16, 2005, the Board issued an arbitration order resolving the issues identified as "Tier I issues" by adopting Qwest's proposed language. The Board directed the parties to derive the resolutions of the Tier II issues from the Board's Tier I decisions.

On January 5, 2006, Level 3 filed an application for reconsideration. Level 3 requested additional briefing and oral argument but did not request that any additional evidence be heard. Qwest filed a response on January 19, 2006, resisting Level 3's application. On February 24, 2006, the Board issued an order granting Level 3's request for additional briefing but denying the request for oral argument. Briefs were filed on March 27 and April 10, 2006.

On June 30, 2006, Level 3 made a filing which it described as "proposed settlement language." The filing consisted of a revised Disputed Points List reflecting a settlement package that Level 3 says it is now proposing. The Board has not reviewed the package in detail, but understands that Level 3 is proposing to accept Qwest's position on some issues if Qwest will accept Level 3's position on other issues. However, Qwest has not agreed to this package. Moreover, Level 3 presents its proposal only as a package; if it is not accepted in full, "Level 3 maintains its objections as set forth in the Disputed Points List that Level 3 previously offered to the Commission." (June 30, 2006, cover letter at page 2.)

Level 3 also submitted a copy of a June 9, 2006, order from the Washington Utilities and Transportation Commission[2] and a copy of a June 30, 2006, decision of the U.S. Court of Appeals for the D.C. Circuit.[3]

On July 10, 2006, Qwest filed a response to Level 3's filing, emphasizing that the parties have not reached a settlement, disputing Level 3's interpretation of the orders from the D.C. Circuit and the Washington commission, and asking the Board to strike the filing from the record.

The Board will not consider Level 3's proposed settlement offer. While the Board encourages parties to continue to negotiate even after a case has been submitted for decision, the Board is only interested in actual settlements, not

[2] "Order Denying Petition for Reconsideration," issued June 9, 2006, in Level 3 Communications, LLC, v. Qwest Corporation, WUTC Docket UT-053039.
[3] In re: Core Communications, Inc., Case No. 04-1368.

unilateral statements and packages presented on a "take it or leave it" basis, without any indication of the other party's position. If the Board were to consider Level 3's new settlement package, it would be necessary to allow Qwest an opportunity to consider and respond to it more fully. Level 3 might then expect an opportunity to reply to Qwest, and it might even be necessary to hold additional hearings on the matter to resolve new fact issues arising from Level 3's new contract proposal. The Board cannot allow this untimely interference with its decision-making process; the record closed when the hearing ended and the issues are what they were at that time.

I. Single Point of Interconnection Issues

This issue involves three subissues. These are the right to a single point of interconnection (POI), the cost recovery associated with a single POI, and the possible use of a Relative Use Factor (RUF) to divide certain costs. Each subissue will be discussed separately.

A. Right to a single POI

1. Level 3 arguments and Qwest responses

Level 3 argues that pursuant to Federal law it has an unconditional right to a single POI at its option. Level 3 avers that Qwest's proposed language would require that Level 3 establish separate physical facilities to each tandem if there is more than one tandem per Local Access and Transport Area (LATA), leaving open the possibility of additional POIs and circumventing Level 3's right to a single POI. (Level 3 Initial Brief at page 3, hereinafter "In. Br. p. 3.") Level 3 further states that the

Board's order permits a unified interconnection arrangement only by using Feature Group D (FGD) trunks and not Local Interconnection Service (LIS) trunks. Level 3 states this confuses the single POI issue because it is not clear that Qwest would have to provide connections for traffic aggregated on trunks other than LIS trunks.

Level 3 states that the single POI that Qwest envisions will not allow Level 3 to avoid paying access charges. Level 3 will be required to have a physical presence in every Qwest local calling area (LCA).

Level 3 says that any contract language that puts pressure on Level 3 to establish multiple POIs helps enshrine Qwest's legacy network architecture to the detriment of new competitors, especially those based on IP-voice service competition. Level 3 points to the testimony of Professor Hatfield in a Wyoming arbitration hearing, asserting that the right to a single POI should not be weighted down by additional terms and conditions that would have the effect of eviscerating the right. (In. Br. pp. 4-5.)

Qwest states that Section 7.1.1 of its proposed language gives Level 3 the right to request interconnection at a single point within Qwest's network within a given LATA and imposes on Qwest the obligation to provide it, assuming it is technically feasible. Qwest says it appears Level 3 is complaining that Qwest's proposed Section 7.1.2 does not say that this right is unconditional and at Level 3's option. Qwest states that the right to single POI exists only if it is technically feasible and if the Competitive Local Exchange Carrier (CLEC) compensates the Incumbent Local

Exchange Carrier (ILEC) for the provisioning of a technically feasible, but more expensive single POI. (Qwest Reply Brief at page 1, hereinafter "Reply p. 1.")

Qwest says that Level 3 has ignored Qwest's testimony stating that not all of Qwest's access tandems are connected to each other, making it technically infeasible to interconnect and deliver traffic at one tandem if the traffic is meant for customers served by another tandem. Qwest is concerned that Level 3's language could cause Qwest to incur burdensome interconnection costs if it has to connect its tandems without compensation. (Reply p. 2.)

Qwest states that Level 3's right to a single POI per LATA does not relieve Level 3 from the obligation to pay access charges for intraLATA long distance calls. The Federal Communications Commission (FCC) has stated, "access charges are not affected by our rules implementing section 251(c)(2) …" pertaining to interconnection.[4]

Qwest says that the testimony provided by Level 3's witness Mr. Hatfield in a Wyoming arbitration actually undermines Level 3's argument. Mr. Hatfield never reviewed either of the parties' proposed contract language in the Wyoming proceeding, so there is no connection between his general testimony and the actual language proposed by the parties. (Reply p. 3.)

Qwest says it is industry standard practice that direct end office trunking will be established when the traffic volume between a tandem and an end office reaches

[4] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC RCD 15499, ¶176 (1996) (*Local Competition Order).*

512 Centi Call Seconds (CCS). This threshold standard is used to determine the trunking arrangements established to the point of interconnection and is necessary to prevent switch exhaust. Qwest states that Level 3, in its testimony, does not dispute this need but has deleted this requirement from Section 7.2.2.9.6, effectively eliminating the direct end office trunking requirement. Qwest states that Level 3's proposed modifications to this section should be rejected. (Reply p. 4.)

2. Qwest arguments and Level 3 responses

Qwest asserts that its proposed language is the standard language from its Statement of Generally Available Terms (SGAT) and does not contain the numerous disclaimers that were included in Level 3's proposed language. (In. Br. p. 2.)

Qwest also says that a single POI is not an absolute right under the Act. Qwest states that there are two limitations to this right. The first is that a CLEC is entitled to single POI only if it is technically feasible. Level 3's proposed language did not include this limitation. (In. Br. pp. 2-3.)

Qwest states the second limitation is that § 252(d)(1) of the Act includes an obligation to compensate the ILEC for the costs of providing a single POI. Further, the FCC held in its *Local Competition Order* that "a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of the interconnection, including a reasonable profit."[5] Qwest states that Level 3's proposed language ignores this compensation

[5] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC RCD 15499, ¶ 199 (1996).

requirement and instead provides that each party must bear all of the costs on its side of the point of interconnection. (In. Br. p. 3.)

Qwest also says that the rules relating to single POI and access charges are not linked. Access charges are based on the location of the parties to the call, not the location of the POI. (In. Br. pp. 3-4.)

Level 3 states that contrary to Qwest's assertion, Section 7.1.1.1 of Level 3's proposed language addresses technical feasibility: "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." (Reply pp. 5-6.)

Level 3 states that each party is responsible for the costs it incurs on its side of the meet point and that meet point interconnection is the only kind Level 3 wants. Level 3 says its contract language makes this clear and is consistent with 47 C.F.R. § 51.5. Level 3 says the Board issued interconnection arbitration orders in Docket Nos. ARB-05-2 and ARB-05-3 in which the Board stated that each carrier pays all of its own costs on its side of the POI. Thus, Level 3 concludes, the Board issued an inconsistent decision in this case and should reconsider Qwest's language. (Reply pp. 7-8.)

3. Analysis

In its arbitration order, the Board stated that each party agreed that the Telecommunications Act of 1996 (Act) allows Level 3 to interconnect with Qwest's network at a single POI per LATA at any technically feasible point. The Board noted

that Qwest's language provides for a single POI and also provides additional flexibility if there is a legitimate, reasonable need for more than one POI.

Both the language of the Act and the FCC's *Local Competition Order* indicate that Level 3 has the right to designate the location of the POI for the exchange of local traffic. The FCC's *Local Competition Order* gives competing carriers, such as Level 3, the ability to choose the most efficient point to exchange traffic with the incumbent, Qwest. Contrary to Level 3's assertions, the Board has applied consistent logic and has come to the same conclusion in each arbitration. Qwest's language is consistent with this analysis. Therefore, the Board will not change its original arbitration order with respect to single POI issues. The arbitrated interconnection agreement should use Qwest's language on all single POI issues.

Qwest also states that there may be instances where direct end office trunking should be established when the traffic volume between a tandem and an end office reaches a certain level. This threshold standard is used to determine the trunking arrangements established to the point of interconnection and is necessary to prevent switch exhaust. Level 3 never disputed this point. Thus, there may be a legitimate need for multiple POIs in some situations. Qwest's language provides the flexibility to handle these potential situations. There is no provision for these situations in Level 3's proposed language.

Level 3 wishes to interconnect in a manner that will allow it to avoid access charges. This is the underlying reason that Level 3 has opposed the use of FGD trunks for the POI, as opposed to LIS trunks. Qwest states that rules relating to

single POI and access charges are not linked. The Board finds Qwest's analysis more persuasive as Section 251(c)(2) clearly addresses local traffic, not interexchange traffic.

Level 3 relied upon the testimony of Professor Hatfield in an arbitration case in Wyoming to the effect that a single POI should not be weighed down by additional terms and conditions that would have the effect of eviscerating that right to a single POI. (In. Br. pp. 4-5.) Qwest countered that when offering that testimony, Professor Hatfield had not reviewed Qwest's proposed language to see whether it included additional terms and conditions that might have that undesirable effect. (Reply p. 3.) The Board does not find references to Professor Hatfield's testimony in another state's arbitration proceeding to be persuasive in this docket, particularly when he did not have the opportunity to review the language at issue to see if there were any terms and conditions that would be detrimental in the manner he described.

B. Cost of interconnection

1. Level 3 arguments and Qwest responses

Level 3 claims that the Board's arbitration order did not provide a clear ruling that Level 3 should not be charged for the facilities and services Qwest uses to deliver Qwest-originated traffic to the POI. Level 3 states that the Board's order discussed the different types of interconnection but not the differences in the compensation schemes. This could lead to Qwest charging Level 3 for Qwest-originated traffic, according to Level 3.

Level 3 states the Board reached a policy decision in its July 22, 2005, order in *LTDS v. Iowa Telecom*, Docket No. ARB-05-3, in which the Board ordered that each party pay 100 percent of the trunking and transport costs on its side of the POI. Level 3 asserts that language was not limited to a certain type of interconnection and that the Board's analysis was based on defaulting to bill-and-keep arrangements. Level 3 then says that the Board did not apply the same analysis and result in this docket. Level 3 requests the order in this docket be revised to comply with the Board's prior precedent and with the FCC's *Local Competition Order* at ¶ 553. (In. Br. pp. 7-8.)

Level 3 takes issue with the Board's analysis stating that ISP-bound and VoIP traffic are "information access" traffic. Level 3 says this is inconsistent with the Board's "*Order in Lieu of Certificate"* issued to Level 3 in TF-05-31. Level 3 states that in that order the Board found Level 3's voice offering to be a wholesale telecommunications service. As such, Level 3 is providing telecommunications services to its customers and the traffic exchanged with Qwest is telecommunications traffic. (In. Br. p. 8.)

Qwest responds that the applicable federal rule requires that the CLEC compensate the ILEC for the costs incurred to provide interconnection. (*See Local Competition Order, ¶¶ 199-200).* Qwest says that the disclaimer Level 3 proposes, that each party would be responsible for costs on its side of the POI, is not applicable to various provisions in dispute. These include the manner of interconnection, termination of traffic, bill-and-keep arrangements, and recovery of interconnection

costs for installing or rearranging LIS trunks. None of these provisions discuss compensation for the origination of traffic. (Reply pp. 4-5.)

Qwest states that, contrary to Level 3's assertion, the only interconnection arrangement where each party bears all costs on its own side of the POI is the mid-span meet arrangement. Qwest also refers to the *Local Competition Order* at ¶ 553 and says this paragraph refers to only the costs for the facility that is built out to the point of interconnection. (Reply p. 5.) Interconnection through a mid-span meet and through collocation are not the same, as the FCC has listed them separately in the *Local Competition Order* at ¶ 553. (Reply p. 6.)

Qwest says there is a presumption of a mutual exchange of traffic through a mid-span meet point, but that presumption does not apply here, as Level 3 is focusing on serving Internet service providers (ISPs) (which tend to receive far more traffic than they originate). Qwest says that the *LTDS v. Iowa Telecom* arbitration does not support Level 3's position, as the parties to that arbitration had a pre-existing interconnection arrangement where each party agreed to pay 100 percent of the trunking and transport costs on its side of the point of interconnection. (Reply p. 6.)

Qwest states that the Board was correct to adopt Qwest's language regarding the three types of interconnection, as there is no pre-existing agreement in this case and all three interconnection arrangements may be necessary at some time. Thus, the *LTDS v. Iowa Telecom* decision does not constitute precedent that is applicable, let alone binding, in this proceeding. (Reply pp. 6-7.)

2. Qwest arguments and Level 3 responses

Qwest argues that its proposed language addresses the different types of interconnection (collocation, entrance facilities, and mid-span meet) and that each has its own compensation scheme, consistent with applicable law. Level 3's proposed language does not address these types of interconnection or the compensation schemes for each and should therefore be rejected. (In. Br. p. 4.)

Qwest also says that Level 3 has placed disclaimers of responsibility for the costs incurred by Qwest throughout its proposed language in the apparent hope that if one of the disclaimers is adopted, Level 3 would be shielded from costs for which it should be responsible. Qwest states these disclaimers are inconsistent with federal law.

Qwest further argues that the cases that Level 3 relies on make this exact point. In *U S WEST Communications v. Jennings*, 304 F.3d 950 (9th Cir. 2002) and *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3rd Cir. 2003), the Ninth Circuit and Third Circuit noted that costs could be shifted from the ILEC to the CLEC when the CLEC's desired interconnection points prove to be more expensive to the ILEC. (In. Br. pp. 5-6.)

Level 3 did not directly respond to the cost issue under a separate section but indirectly included some discussion under the Single POI issue in its brief, summarized in the preceding section.

3. Analysis

The Board's arbitration order stated that Level 3 and Qwest agreed that each party is responsible for costs on its side of the meet point if a mid-span meet point is used. The order also stated that it appeared that Level 3 applied the meet point analysis to all types of interconnection, whereas Qwest's proposed language recognized that there are other types of interconnection, that each has its own compensation scheme, and that § 251(c)(2)(b) of the Act requires Level 3 to compensate Qwest for certain interconnection costs, depending upon the type of interconnection used.

The Board will not change the arbitration order with respect to these cost responsibility issues. The arbitrated interconnection agreement should use Qwest's language on all cost responsibility issues.

Level 3 has attempted to rationalize all three different types of interconnection as variants of the mid-span meet point method. This is the only method of interconnection Level 3 addresses in its proposed language. Level 3 relies on the *Local Competition Order* at ¶ 533 for this interpretation. However, as Qwest points out, in the paragraph cited the FCC recognizes that collocation is different from the mid-span meet point method. While Level 3 may currently intend to use only the mid-span form of interconnection, the Board finds it would be prudent for the initial agreement to address the other arrangements and the corresponding cost responsibilities under each of these methods, even though they may not be used. This should help to reduce or eliminate future disagreements between the parties.

Level 3 states the Board made a policy decision in *LTDS v. Iowa Telecom* in which the Board ordered a contract provision that said each party must pay 100 percent of the trunking and transport costs on its side of the POI. (In. Br. pp. 7-8.) Qwest counters that the decision in *LTDS* was based on a pre-existing interconnection arrangement where each party agreed to pay 100 percent of the trunking and transport costs on its side of the point of interconnection, as each used 50 percent of the trunk capacity connecting their respective switches. Thus, according to Qwest, the present docket is distinguishable from *LTDS*. The Board agrees; in particular, that decision was based on the provisions of a pre-existing interconnection agreement that has no counterpart in this docket.

C. Relative Use Factor (RUF)

1. Level 3 arguments and Qwest responses

Level 3 states that with a meet point interconnection, a RUF does not apply. However, Level 3 also believes that its proposed language, which makes this point even more clear, should have been adopted. Level 3 says that the adoption of Qwest's proposed language presents two problems. (In. Br. pp. 8-9.)

First, under Qwest's language there will be disputes because Qwest may try to assess traffic origination charges, including charges imposed under the guise of the RUF, contrary to federal law, notably 47 C.F.R. §§ 51.703(b) and 709(b). The parties should be directed to establish language that clearly reflects the Board's ruling. (In. Br. p. 9.)

Second, Level 3 states, if the parties establish an interconnection where the RUF might apply, Qwest's proposed language does not comply with 47 C.F.R. § 51.709(b). Level 3 states that this FCC rule only allows Qwest to charge Level 3 based on the amount of capacity that Level 3 uses to send traffic to Qwest over those facilities. (In. Br. pp. 9-10.)

Level 3 states that the Board's analysis of this issue relied almost exclusively on an earlier ruling in Re: AT&T Communications of the Midwest, Inc., vs. Qwest Corp., Docket No. ARB-04-1, rather than any analysis of Rule 51.709(b). Level 3 argues that the Board's previous ruling does not support the Board's decision here. The previous decision concerned the application of RUF language to private lines, but Level 3 does not propose to purchase Qwest private lines to establish connections between Qwest end office switches and Qwest tandems for the purpose of accepting Qwest-originated traffic. (In. Br. pp. 10-11.)

Qwest responds that the underlying principle in this discussion is the FCC's statement that "[t]he amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility." (*Local Competition Order* at ¶ 1062.) Qwest proposed language for a RUF while Level 3 stated that a RUF should be used for shared facilities but did not propose any language. (Reply p. 7.) Qwest's language is consistent with FCC Rules 703(b) and 709(b), which are included in the rules addressing the transport and termination of "telecommunications traffic." Telecommunications traffic is defined by the FCC to exclude "interstate or intrastate exchange access" and "information access" pursuant to Rule 701(b).

Qwest says ISP traffic is “information access” and VNXX traffic is “interstate or intrastate exchange access.” (Reply pp. 7-8.)

Qwest says that the exclusion of ISP traffic from the definition of "telecommunications traffic" allows the cost of Internet service to be borne by the customers who make calls to ISPs. Qwest says the Colorado Public Utilities Commission recognized that when a caller dials his or her ISP, the caller is acting primarily as a customer of the ISP.[6] Qwest states that virtually all of the exchanged traffic is one-way traffic from ISP customers on Qwest’s network to ISPs on Level 3’s network. Qwest believes the ISPs should bear the full cost of providing Internet service and the proposed RUF makes the terminating carrier responsible for ISP traffic so that the costs of providing service to ISPs is ultimately borne by the cost-causing customers of the ISPs. Qwest believes Level 3’s proposed language will cause it or its ratepayers to bear these costs. (Reply pp. 8-9.)

2. Qwest arguments and Level 3 responses

Qwest says that proposed RUF language is necessary and appropriate because at some time during the term of this agreement Level 3 may desire a form of interconnection to which the RUF properly applies. The proposed language is

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[6] In its Arbitration Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Docket No. 00B-601T, the Colorado Commission stated the following in ¶ 20:

> We find Qwest’s ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and

substantially identical to the language in Qwest's SGAT. Qwest says that while Level 3 may not currently intend to use forms of interconnection to which the RUF would apply, its witness testified that a direct trunk group between an end office and Level 3 may be established when traffic reaches a reasonable volume and that the cost of those facilities would be split based on relative use. (Tr. 32-34.)

Qwest also takes issue with Level 3's assertion that the RUF language contravenes FCC Rule 709(b). Qwest states that Rule 709(b) does not apply, as the traffic at issue is ISP traffic and ISP traffic does not fall under the FCC's definition of "telecommunications traffic." (In. Br. p. 7.) According to Qwest, the FCC found that ISP-related traffic "falls under the rubric of 'information access'" in its *ISP Remand Order*.[7] Qwest further states that information access is specifically excluded from the definition of telecommunications traffic. (In. Br. p. 7.)

Qwest further states that the Colorado federal district court has held that the term "traffic" in Rule 709(b) refers only to telecommunications traffic and that this point was reaffirmed last year.[8] (In. Br. p. 7.)

Level 3 responds that the basic rule, 47 C.F.R. § 51.703(b), is that one carrier cannot charge to send traffic to an interconnected carrier and that the Board followed

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Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.

[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] *Level 3 Communications v. Colorado Pub. Util. Comm'n,* 300 F. Supp.2d 1069, 1078 (D. Colo. 2003) (*Level 3 Decision*) and *AT&T v. Qwest Corporation,* Civil Action No. 04-cv-00532-EWNOES, at 22-26 (D. Colo. 2005).

this rule in the recent Sprint arbitration decision in Docket No. ARB-05-2, et al. Level 3 says this rule also applies to the physical facilities and trunking used to send traffic back and forth. (*See* 47 C.F.R. § 51.709(b).)

Level 3 describes Qwest's position as follows: (1) the FCC defined "telecommunications traffic" in a way that excludes ISP-bound traffic; (2) the rule banning charges for facilities used for outbound traffic – 47 C.F.R. § 51.709(b) – is in the same part of the rules as the definition of "telecommunications traffic"; (3) the ban on charging for facilities used to carry outbound traffic does not apply to ISP-bound traffic; and (4) a charge should therefore be made for those facilities when they carry ISP-bound traffic. Level 3 argues that points (3) and (4) are wrong. Level 3 argues that Rule 709(b) applies to "traffic" without limitation and that a proper reading is that Qwest cannot charge Level 3 for inter-network facilities, except to the extent that Level 3 uses them to send traffic to Qwest. Level 3 also states that the Colorado district court is simply wrong on this point. (Reply pp. 9-10.)

Level 3 also states that Qwest's interpretation is in conflict with the *ISP Remand Order* at ¶ 90, where the FCC said there was no reason to impose different rates for ISP-bound and voice traffic and that the FCC was unwilling to take actions resulting in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic. Level 3 states that Qwest never showed that it incurred any costs or provided factual, economic, or legal justification for the Board to change the concept of "calling network pays" in arbitrations involving Level 3, but not for other carriers. (Reply pp. 10-11.)

3. Analysis

In the arbitration order, the Board noted that the parties agree that RUF does not apply to a mid-span meet point but that a RUF can be used to allocate the cost of jointly-used facilities, entrance facilities, and direct-trunked transport. The order also stated that ISP traffic should be excluded from RUF calculations as there is nothing in this record to change the Board's previous determination on this point, made in Docket No. ARB-04-1.

Level 3's argument centers on two claims. The first is that Qwest and the Board have misinterpreted federal law. The second is that the Board's decision regarding the RUF is not consistent with the decision reached in Docket No. ARB-04-1. Level 3 states that Qwest has misinterpreted FCC Rule 709(b) when Qwest says that the ban on charging for facilities used to carry outbound traffic does not apply to ISP-bound traffic and a charge should therefore be made for those facilities when they carry ISP-bound traffic. (Reply pp. 9-10.)

The Board's review of the FCC rules shows Rule 701 to be the first rule under the caption "Subpart H—Reciprocal Compensation for Transport and Termination of telecommunications Traffic." This section excludes interstate or intrastate exchange access and information access from the definition of telecommunications traffic. Rules 703(b) and 709(b) follow under the same Subpart H. It is reasonable to conclude that references to telecommunications traffic in subsequent paragraphs under the same subpart should have the same definition. This construction is consistent with Qwest's interpretation and proposed language. Contrary to Level 3's

assertion, this construction is also consistent with the decision the Board made in Docket No. ARB-04-1.

Even though Level 3 does not currently propose to use any form of interconnection that would trigger the RUF, the RUF language should be included in the agreement because the parties may use different forms of interconnection in the future. The inclusion of the RUF should help avoid future compensation problems if one of the other interconnection methods is used. For this reason, the Board will not change its original arbitration order with respect to the inclusion of RUF language. The arbitrated interconnection agreement should use Qwest's language on all RUF language issues.

II. Commingling of switched access traffic with local traffic

A. Level 3 arguments and Qwest responses

Level 3 says it wants to avoid wasteful duplication of facilities and combine both access and local traffic on LIS trunks. Level 3 says the Board's decision to approve Qwest's language that allows for combined traffic over FGD trunks is wrong for at least three reasons.

First, interconnection under Section 251(c)(2) exists for the purpose of exchanging both "telephone exchange service" and "exchange access" traffic. Level 3 states that Qwest has an obligation to make changes in its network to recognize changes in the industry. (In. Br. pp. 12-13.)

Second, FCC Rule 51.305(c) states that interconnection is technically feasible in networks employing substantially similar facilities. Level 3 testified that it reached

agreement in 36 states to exchange all traffic over a single set of interconnection trunks and that the burden is on Qwest to show why LIS trunks are infeasible.

Third, Qwest's SGAT in several states shows language quite similar to Level 3's proposals for allowing exchange of traffic over LIS trunks. (In. Br. pp. 14-15.) Qwest should be required to explain why the SGAT language does not present the same problems as Level 3's proposed language.

Finally, Level 3 states its recently-completed arbitration in the state of Washington allows for the use of LIS trunks.[9] If there really are billing problems with LIS trunks, Level 3 maintains there are several solutions. Level 3 states that testimony from Re: Transit Traffic, Docket No. SPU-00-7, identified three methods by which commingled traffic for the rural LECs can be identified.[10] (In. Br. pp. 13-14.) Qwest should be required to show why the same alternatives will not work here.

Qwest responds that Level 3 can terminate all traffic types over FGD interconnection trunks. Qwest states that LIS trunks cannot properly record switched access traffic and this is a particular concern in this case because Level 3 has just purchased Wiltel, a major interexchange carrier. Qwest believes that this purchase will substantially increase the volume of interexchange traffic Level 3 delivers to Qwest.

Qwest argues that Level 3's interconnection rights under § 251(c) are limited to "telephone exchange service" or "exchange access" and do not include

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[9] *Level 3 Communications, LLC v. Qwest Corp.,* Dk. UT-053039, Order No. 5, Order on Interlocutory review (WUTC, Feb. 10, 2006).

interexchange traffic the CLEC wishes to terminate on the ILEC's network. Qwest states that if Level 3 wants to include all traffic on one type of trunk, then the trunk should be one that can record all types of traffic. (Reply pp. 9-10.)

Qwest argues that Section 251(g) governs interconnection for the purpose of originating or terminating long distance calls. This section requires Qwest to provide interconnection to IXCs on a nondiscriminatory basis. (Reply pp. 10-11.)

Qwest avers that Rule 51.305 parallels § 251(c)(2) and addresses only whether interconnection at a particular point is technically feasible. It does not give a CLEC the right to deliver switched access traffic over LIS trunks. (Reply p. 11.)

Qwest states that the reason behind Level 3's request is Level 3's desire to avoid access charges. Level 3 claims that all VoIP traffic is exempt from such charges and that access charges should not apply to long distance calls made to ISPs.

In response to Level 3's claim that it combines traffic in 36 other states, Qwest argues that Level 3 did not provide any evidence that the interconnection trunks Level 3 has established in those states lack the capability to properly record switched access traffic. (Reply p. 12.) In other words, Qwest says those trunks may have measurement capabilities that LIS trunks do not offer; the record is, at best, unclear on this question, so the situation in the other states is not shown to be comparable to this one.

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[10] Those methods are direct trunking, the use of the JIP parameter, and the use of category 11-05-21 records.

Qwest also disagrees with the three solutions Level 3 proposes to implement if LIS trunks are used and measurement is not possible, as derived from the record in the Transit Traffic case. Qwest states direct trunking is not viable because Level 3 has not committed to establishing direct trunking with every independent telephone company to which traffic would be delivered. Qwest argues that industry standards do not require the jurisdictional identification parameter (JIP parameter) to be populated, so it may not always provide the necessary information, and that category 11-05-21 records are not useful for this purpose because Qwest develops these records from FGD trunks. (Reply pp. 12-13.) Without FGD interconnection, the input necessary to develop the records will be unavailable.

Qwest states that Level 3 has erroneously interpreted Qwest's SGATs from other states. Qwest says that Section 7.2.2.9.3.1 of the SGAT refers to LIS trunks and is the same language as Qwest proposed in this arbitration; Section 7.2.2.9.3.2 does not refer to LIS trunks; and Section 7.2.2.9.3.2 allows for traffic to be combined on the same trunk group but this is done using FGD interconnection trunks throughout Qwest's territory. (Reply p. 13.)

Qwest also addressed the Washington commission's decision. Qwest argues that the Washington commission declined to address the propriety of VNXX and reserved that issue for a separate proceeding. There was no decision to allow the use of LIS trunks in that state. (Reply p. 13.)

B. Qwest arguments and Level 3 responses

Qwest recognizes that Level 3 would like to be allowed to combine all traffic types, including switched access traffic, over the same interconnection trunks. Qwest has offered FGD interconnection trunks to handle this request, while Level 3 insists on using LIS trunks. Qwest says LIS trunks cannot record switched access traffic, whereas FGD trunks can, because of the software in the switch.

Qwest argues there are two reasons to send switched access traffic over FGD trunks. First, it would allow Qwest to provide industry-standard terminating records to independent telephone companies and CLECs. This would allow these companies to bill Level 3 for traffic delivered to them. Qwest states that Level 3's proposal of a new system of billing factors would force all other parties to rework their billing systems. Qwest also states that all other carriers use FGD trunks for this switched access traffic. (In. Br. p. 9.)

Second, Level 3 will achieve the trunk efficiencies it seeks by using the FGD trunks and this will negate Level 3's attempt to evade access charges applicable to switched access traffic. (In. Br. pp. 9-10.)

Level 3 states the use of FGD trunks is more expensive or would cause Level 3 to set up a dual-trunked network with both LIS and FGD trunks. (Reply p. 12.) Either option would force Level 3 to incur greater expense.

Level 3 states other large ILECs handle combined traffic on one trunk and if detailed records are not available, traffic allocation factors can be developed. Level 3

states that the burden should be on Qwest to prove it is technically infeasible to use LIS trunks.

Level 3 states that § 251(c)(2)(A) says that an ILEC has to offer interconnection for both "telephone exchange service" and "exchange access" traffic. Level 3 states that the way Qwest interprets this section, a carrier like AT&T or MCI could not go to Qwest and connect using LIS trunks instead of FGD trunks for toll traffic. (Reply p. 13.)

C. Analysis

In its arbitration order, the Board found that Level 3 wants to commingle all forms of traffic on LIS trunks, including switched access traffic that is subject to access charges. Qwest argued that LIS trunks do not provide the functions required for proper rating and for generating billing reports that it supplies to rural LECs; that LIS trunks are not set up to handle switched access service; certain types of VoIP traffic would be difficult to handle; and costly overhauls to Qwest's and other's billing systems would be required. The Board's decision was to approve Qwest's proposed language.

Level 3 states that billing problems related to using LIS trunks could be resolved by one of three methods discussed in the record of In Re: Transit Traffic, Docket No. SPU-00-7. These methods were direct trunking, use of the JIP parameter, and the use of 11-05-21 reports. Qwest countered that Level 3 has not committed to direct trunking with every independent company, that there was no

industry standard for populating the JIP parameter, and that Qwest uses the FGD trunks for deriving the 11-05-21 reports.

Based on this record, the Board is persuaded that Level 3's proposed solutions to the LIS trunk measurement problems will not work in these circumstances. Level 3 has not committed to use direct trunking in all circumstances where it would be required or appropriate. The use of the JIP parameter would require that all affected companies populate and use the JIP parameter for this purpose, even if they are not parties to this proceeding. It also appears that Qwest's LIS trunks are not capable of deriving the information required to prepare the 11-05-21 reports, so the reports would not be useful for this purpose.

Level 3 says that interconnection under § 251(c)(2) exists for the purpose of exchanging both "telephone exchange service" and "exchange access" traffic. (In. Br. p. 12.) Qwest counters that Level 3's interconnection rights under § 251(c) are limited to "telephone exchange service" or "exchange access" traffic and do not include interexchange traffic the CLEC wishes to terminate on the ILEC's network. (Qwest Reply p. 9.) Qwest cites the following FCC language in support of its argument:

> [A]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls).
>
> We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of

> telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).

(*Local Competition Order* ¶¶ 190-91.) Thus, the FCC has recognized a clear separation between interexchange and non-interexchange traffic for purposes of § 251(c)(2).

Qwest also argues that § 251(g) governs interconnection for the purpose or originating or terminating long distance calls and that section requires Qwest to provide interconnection to IXCs on a nondiscriminatory basis. That section states:

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

The Board finds this language supports Qwest's position that it is required to provide interconnection to interexchange carriers (IXCs) on a nondiscriminatory basis and charge Level 3 the same charges applicable to other IXCs. Based on the record, this commingling of traffic on LIS trunks and the subsequent billing and recordkeeping cannot be done if LIS trunks are used for interconnection; that means that if Level 3 intends to commingle traffic, it will have to do so on FGD trunks, as other CLECs do.

Level 3 argued that it has agreements in 36 other states where LIS trunks are used to commingle all types of traffic, including switched access traffic, showing that it is technically feasible to do so. Qwest countered that Level 3 did not show whether those LIS trunks have capabilities that allow them to handle the proper recording of switched access traffic. The issue here is whether Qwest's LIS trunks have those capabilities, not whether some other ILEC's LIS trunks (or equivalent) have them.

The Board will make no change in the Board's original arbitration order with respect to commingled traffic on Feature Group D trunk issues. The arbitrated interconnection agreement should use Qwest's language on all commingled traffic issues.

III. VNXX Traffic Issues

A. Level 3 arguments and Qwest responses

Overall, Level 3 is arguing that VNXX service should be permitted under this interconnection agreement and the traffic should be treated like local calls and handled either pursuant to the FCC's ISP Remand Order (in which case Qwest will pay Level 3 $0.0007 for each minute Qwest delivers to Level 3) or under the Board's bill and keep rule. Qwest responds that VNXX should not be permitted in Iowa. Various arguments and sub-arguments are presented, as identified by the headings below.

Relationship to Qwest's "OneFlex" service. First, Level 3 argues that Qwest's "OneFlex" service, a VoIP-based service, is actually VNXX service, so if VNXX is not allowed in Iowa, OneFlex should be shut down. (In. Br. p. 16.) Level 3 admits its

proposed service is not technically identical to Qwest's OneFlex, but argues the services are "parallel." (Id.)

Qwest responds that its OneFlex service is not VNXX service. According to Qwest, VNXX involves the improper assignment of telephone numbers in the public switched telephone network (PSTN), giving a customer a telephone number for a place where the customer does not have local service, such that a customer in Chicago gets a Des Moines telephone number, for example. OneFlex does not involve virtual numbers of this nature; a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. (Reply pp. 14-15.)

Effect of the FCC's *ISP Remand Order*. Next, Level 3 recognizes that the Board has previously expressed two concerns with VNXX service, relating to waste of telephone numbers and intercarrier compensation. (In. Br. p. 16.) Level 3 argues telephone number efficiency is no longer an issue with thousands-block number pooling, so the Board's focus should be on intercarrier compensation. Further, Level 3 argues that intercarrier compensation is no longer an issue for the Board to decide because the FCC addressed it in the ISP Remand Order, which applies to all ISP-bound traffic and requires that Qwest pay Level 3 $0.0007 per minute to terminate these calls. In support of its interpretation of the ISP Remand Order, Level 3 cites a recent decision of the Washington Utilities and Transportation

Commission[11] (WUTC) and an amicus brief the FCC filed in a case before the First Circuit Court of Appeals involving a company called Global NAPs. The WUTC order says that the ISP Remand Order should be interpreted to apply to all ISP-bound traffic, including VNXX traffic. In the Global NAPs brief,[12] the FCC's general counsel says that the ISP Remand Order can be read to support either interpretation (Level 3's or Qwest's, in this case); given this ambiguity, Level 3 believes the Board should choose Level 3's interpretation, which Level 3 characterizes as pro-competitive.

Qwest responds that the Board properly interpreted the ISP Remand Order as being limited to calls to an ISP located in the same local calling area. Qwest says this interpretation is supported by the decision in WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002) and by recent decisions from the Minnesota Public Utilities Commission,[13] the South Carolina Public Utilities Commission,[14] and several recent Oregon Public Utilities Commission (PUC) orders.[15] (Reply pp. 15-17.) Qwest argues that the WUTC decision lacks analysis of key issues and relies on a "flawed" decision in Southern New England Tel. V. MCI WorldCom Communications, 359 F.Supp.2d 229 (D. Conn. 2005).

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[11] Level 3 Comm. LLC v. Qwest Corp., Dk. UT-053039, Order No. 5, "Order on Interlocutory Review" (WUTC 2/10/06), attached to Level 3's Initial Brief on Rehearing as Attachment A.

[12] Brief for Amicus Curiae Federal Communications Commission, Global NAPS, Inc., v. Verizon New England, Inc., No. 05-2657 (1st Cir.) filed March 13, 2006.

[13] Recommendation on Motions for Summary Disposition, *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, 3-2500-16646-2 P-421/C-05-721 (Minn. PUC Office of Admin. Hearing, January 18, 2006), adopted by the Minnesota Commission on April 6, 2006.

[14] "Order," *Petition of MCImetro Access Transmission Services, LLC, for Arbitration with Horry Telephone Cooperative, Inc.*, 2006 SCPUC LEXIS 2 (SC PUC, January 11, 2006).

Relationship to earlier Board actions. Level 3 also argues that the Board's ruling in this docket effectively reverses the Board's actions in two earlier dockets. The first of these is In re: Level 3 Communications, Inc., Docket No. TF-05-31, in which the Board issued an "Order in Lieu of Certificate" to Level 3. Level 3 argues that the order implicitly authorizes the use of VNXX for VoIP services because it explicitly prohibits the use of VNXX for non-voice calls and does not mention voice services.

The second Board action that Level 3 says is being reversed is the settlement the Board entered into in late 2005 in connection with the appeal of the Board's decision in Re: Sprint Communications Company LLC and Level 3 Communications LLC, Consolidated Docket Nos. SPU-02-11 and SPU-02-13, which Level 3 calls the "Managed Modem" case. That case involved a Board order denying Level 3's request for telephone numbering resources for use in providing VNXX services in Iowa. Level 3 sought judicial review of the Board's decision and the matter was pending before the courts when the parties settled. As a part of the settlement, the Board agreed that Level 3 could have numbers for providing VNXX service "upon future approval of an appropriate interconnection agreement in which the compensation issues are addressed." (In. Br. p. 21 and Attachment B thereto.) Level 3 argues that when the Board entered into the settlement, the Board must have

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[15] Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Oregon PUC, ALJ Petrillo, August 16,2005), *affirmed*, Order No. 06-037 (Oregon PUC, January 30, 2006).

known it would be resolving the compensation issue in this docket and VNXX would be permitted.

Finally, Level 3 argues that the Board has failed to resolve the VNXX issue in this docket even though it was identified in the original filings as an issue to be arbitrated, as required pursuant to §§ 252(b)(4)(c) and 252(c)(1). (In. Br. p. 17.) This failure to resolve the issue is alleged to create an unreasonable barrier to competitive entry, in violation of § 253(a). (In. Br. p. 18, n. 9.) All of this ties to Level 3's position regarding the settlement of the Managed Modem case; Level 3 argues it would not have settled if it had not been confident that the Board would address the compensation issues in this docket.

B. Qwest arguments and Level 3 responses

Has the Board banned VNXX? Qwest begins by arguing that in this docket, the Board has "properly continued its ban on VNXX." (In. Br. p. 10.) Qwest argues that a ban on VNXX is consistent with the decisions of the Vermont Public Service Board (upheld by the federal district court in Global NAPs, Inc., v. Verizon New England, Inc., 377 F.Supp.2d 290 (D. Vt. 2004)), and a recent order from an administrative law judge (ALJ) for the Oregon Public Service Commission, "Arbitrator's Decision," In the Matter of Qwest Corporation's Petition For Arbitration, etc., Docket ARB 671, issued February 2, 2006, in which the arbitrator ordered that Qwest and the CLEC "shall not exchange VNXX traffic."

Level 3 responds that it was an error to ban VNXX in Iowa because the Board had a statutory obligation to decide the issue when it was raised in Level 3's petition

for arbitration. Level 3 also argues that the Board lacks authority to ban VNXX service because ISP-bound calls are jurisdictionally interstate in nature. (Reply p. 15, n. 14.)

Effect of other Iowa laws. Qwest says the FCC has recognized that defining local calling areas for wireline traffic (and therefore drawing the line between local and long distance calls) is a matter for state commissions, not the FCC, citing the FCC's Local Competition Order at ¶ 1035. With that in mind, Qwest analyzes Iowa law to conclude that VNXX service is prohibited. First, Qwest relies on Iowa Code § 477.10(1), which defines "local exchange" in terms of a limited geographic area. Next, Qwest notes that 199 IAC 22.1(3) defines "Local Services" as telephone service furnished between users "within an exchange area," while "interexchange service" is defined as the provision of telecommunications services "between local exchanges … ." Further, Qwest notes that the Board's local exchange competition rules prohibit carriers from delivering calls as local traffic if it is really long distance traffic that should be subject to access charges, see 199 IAC 38.6(4).

Qwest also argues that the Board's decision in this docket is consistent with the decision in Re: AT&T Communications of the Midwest, Inc., vs. Qwest Corp., Docket No. ARB-04-1. In that arbitration case, the Board adopted Qwest's proposed language relating to VNXX service, rejecting AT&T's language that would have required reciprocal compensation for VNXX traffic. (In. Br. pp. 12-13.) Qwest argues that the Board's decision in the AT&T arbitration directly supports Qwest's position in this case.

Level 3 responds that Qwest's arguments based on Iowa law and prior Board rulings prove too much, because the same strict analysis would mean that Qwest's OneFlex service is banned. (Reply p. 15.) Further, Level 3 argues that the link between telephone numbers and geography is no longer the norm, noting that wireless carriers use NPA-NXXs within an entire Major Trading Area (MTA), leading the FCC to declare all calls between a wireless carrier and an ILEC within an MTA to be "local" and subject to reciprocal compensation, not access charges. (Reply pp. 16-17, citing ¶ 1036 of the Local Competition Order.)

Level 3 also argues that its proposal is supported by the access charge rules of the FCC and the Communications Act, which control over state law provisions. 47 USC § 153(16) defines "exchange access" as using local exchange facilities and services to originate or terminate "telephone toll service." That term, in turn, is defined as a call between two exchange areas for which the end user receives a "separate charge," over and above the charge for exchange service. (Section 153(48).) Level 3 concludes that as long as no separate charge is made to the end user, access charges do not apply. (Reply pp. 25-27.) Therefore, because Level 3's customers are expected to sell flat-rated service for essentially all calls, Level 3 concludes that access charges do not apply to this traffic.

Effect of the FCC's *ISP Remand Order*. Next, Qwest argues that the Board correctly interpreted the FCC's ISP Remand Order as applying only to ISP-bound traffic that originates and terminates in the same local calling area. Qwest notes that

recent decisions by the Oregon PUC and a Minnesota ALJ agree with the Board's decision.[16]

In response, Level 3 re-summarizes its arguments regarding the proper interpretation of the ISP Remand Order, saying it is possible to read the FCC's order to support either outcome and therefore possible to read it to apply to *all* ISP-bound traffic, not just ISP-bound calls that are within a single local calling area. (Reply p. 23.)

Level 3 also argues that the issue of how to read the ISP Remand Order is less significant if the Board adopts Qwest's theory regarding its OneFlex service. Level 3 characterizes that theory as follows: Qwest "basically says that if there is a direct trunk connecting the affected originating end office to the interconnected network, such connectivity should count as 'local' enough for call rating purposes." (Reply pp. 23-24.) Level 3 then says it expects it will have direct trunks to many Qwest end offices, so if that is what it takes to make a call "local," then most of Level 3's calls will be "local."

Finally, Qwest argues that with respect to ISP-bound traffic that originates and terminates in a single local calling area, the Board correctly applied its bill-and-keep policy, rather than the default rate of $0.0007 per minutes specified in the ISP

[16] Qwest cites the "Ruling," *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC*, IC 12 (Ore. PUC, ALJ Petrillo, August 16, 2005), *affirmed*, Order No. 06-037 (Ore. PUC, Jan. 30, 2006); and the "Recommendation on Motions for Summary Disposition," *In the Matter of the Complaint Of Level 3 Communications, LLC, against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, 3-2500-16646-2 P-421/C-05-721 (Office of Admin. Hearing, Jan. 18, 2006).

Remand Order. Qwest asserts the FCC rate is a cap, not a mandatory rate, citing paragraph 80 and footnotes 150 and 152 of that order.

C. Analysis

When the Board first considered the issues presented by VNXX service (in Docket Nos. SPU-02-11 and SPU-02-13), the Board expressed two concerns about them: First, it is potentially wasteful of telephone numbering resources, and second, because VNXX service effectively results in a CLEC (like Level 3) using Qwest's network to carry calls from one exchange to another for free, the Board was concerned with the intercarrier compensation aspects of the service, that is, that Qwest should not be required to carry interexchange traffic for a CLEC without reasonable compensation.

Since that order was issued, the Board's numbering efficiency concerns have been substantially reduced by the implementation of thousands-block number pooling in Qwest exchanges. However, the intercarrier compensation concerns remain and Level 3's proposals in this arbitration proceeding do not address those concerns.

As far as reconsideration is concerned, the Board will make no change in the original arbitration order with respect to VNXX issues. The arbitrated interconnection agreement should use Qwest's language on all VNXX issues. However, the Board does not agree that this is a "ban" on VNXX service, as characterized by Qwest. Instead, it represents a continuation of the Board's position that VNXX services present special problems that must be solved before VNXX is offered in Iowa.

As to the specific issues raised, the Board offers the following analysis and findings:

OneFlex is not VNXX. Qwest's offering of OneFlex service is fundamentally different from Level 3's VNXX proposal in at least one way: Level 3 has not cited any evidence in this record that Qwest's system uses another carrier's network in Iowa to carry interexchange calls without compensation to that other carrier. This has been the Board's primary concern with VNXX service from the time it was first presented to the Board; Level 3's proposal does not offer an answer to this problem, while Qwest's service avoids it altogether. There may be other features that distinguish OneFlex from VNXX, but this one, by itself, appears to be sufficient.

Moreover, as Qwest points out, a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. According to Qwest, when structured this way the service has no impact on the public switched telephone network (PSTN). This also differentiates OneFlex from VNXX.

Level 3's compensation proposals do not address the Board's concerns. Level 3 argues that the FCC's ISP Remand Order resolved the VNXX compensation issues by requiring that the originating carrier pay the terminating carrier at the default rate of $0.0007 per minute. Qwest argues, and the Board found, that the ISP Remand Order applies only to ISP-bound traffic in situations where the calling party and the ISP are physically located in the same local calling area. In a decision

issued after the briefs were filed in this docket, the First Circuit reaches the same general result, as described below.

In support of its preferred interpretation, Level 3 relies, in part, on an amicus brief the FCC filed in Global NAPs, Inc., v. Verizon New England, Inc., a proceeding before the First Circuit Court of Appeals. In that brief, counsel for the FCC said that the ISP Remand Order is ambiguous and could be read to support either interpretation, that is, it might mean that the default reciprocal compensation rate applies to VNXX or it might mean that the rate does not apply to VNXX. Level 3 argues that to the extent the ISP Remand Order is ambiguous, the Board should interpret it in a manner that allows Level 3 to offer VNXX service.

After the briefs were filed in this docket, the First Circuit issued its decision.[17] Qwest filed the decision with the Board on April 26, 2006, as supplemental authority. After reviewing the procedural history of the Global NAPs case and the ISP Remand Order, the Court found that the FCC's order does not preempt state regulation of access charges as applied to VNXX traffic. The Court says:

> We find that there is a lack of clarity about whether the *ISP Remand Order* preempts state regulation of the access charges at issue here. Given the requirement of a clear indication that the FCC has preempted state law, the *ISP Remand Order* does not have the broad preemptive effect that Global NAPs seeks to assign to it.

[17] Global NAPs v. Verizon New England, Inc., ___ F.3d ___, 2006 WL 924035 (C.A. 1 (Mass.))

(2006 WL 924035, page 13.) The Court therefore affirmed an order from the Massachusetts Department of Telecommunications and Energy that required Global NAPs to pay access charges to Verizon for VNXX traffic.

In the end, the Board finds that Level 3's proposed solutions do not address the Board's compensation concerns in any meaningful manner. The Board's 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. Instead, Level 3 claims that Qwest should make a payment to Level 3 or, at best, that the Board's bill-and-keep policy should apply, such that neither party would pay the other. Neither of these proposals addresses the problem identified by the Board.

Effect of this decision on prior Board actions. Level 3 claims that the Board's decision in this proceeding is inconsistent with the Board's actions in two prior matters, specifically the "Order In Lieu Of Certificate" issued in TF-05-31 and the settlement the Board entered into in the "Managed Modem" appeal. The Board disagrees with Level 3 on these points.

First, Level 3 argues the "plain language" of the Board's order in lieu of certificate "authorizes the use of VNXX for VoIP services." (In. Br. p. 20.) Level 3 says the order defined (and prohibited) VNXX in terms of non-voice, dial-up, ISP-bound traffic. Level 3 then concludes that all other uses must be permitted. However, the Board's order was based on the Board's understanding that VNXX is limited to dial-up services (as opposed to broadband) and that dial-up service offers

inadequate speeds for VoIP service. In other words, at the time the order was issued the Board understood that VNXX could not be used for VoIP services. This record does not contain any evidence that this understanding is incorrect; it appears Level 3 is trying to create an exception for a non-existent service, perhaps in order to open the door to the services it actually proposes to offer.

Further, Level 3's argument is logically incorrect. Level 3 says, in effect, that because the Board described VNXX in terms that do not involve VoIP, VNXX must be permitted when it involves VoIP. This is not a logical interpretation of the Board's order. The Board defined VNXX in terms of its understanding of the service as it existed at that time and clearly indicated that VNXX would not be permitted until the intercarrier compensation issues are resolved to the Board's satisfaction. Thus, if VNXX has now evolved to include features that were not a part of VNXX at the time of the order that does not mean that these new features are automatically permitted. Instead, logic dictates that as long as the new features present the same intercarrier compensation issues as the original form of VNXX, then those new features also are not permitted until the issues are resolved.

Second, Level 3 argues that when the Board settled the Iowa Supreme Court appeal of the "Managed Modem" case, the Board actually "authorized VNXX for ISP-bound traffic in areas where thousand-block number pooling was in place." (In. Br. p. 21.) The Board finds this is a mischaracterization of the settlement agreement. In the settlement, the Board agreed that Level 3 could "obtain number resources and utilize VNXX architecture consistent with this Stipulation pursuant to or upon future

approval of an appropriate interconnection agreement in which the compensation issues are addressed." (Settlement, page 3, section 4.a, emphasis added; attached to Level 3's In. Br. at Attachment C.) Thus, the settlement is perfectly consistent with the Board's decision in this case; the Board's one remaining concern with VNXX is the intercarrier compensation issue, and once that issue is addressed in an agreement approved by the Board, VNXX will be permitted. The problem in this case is that Level 3's proposed solutions fail to address the Board's intercarrier compensation concerns in any meaningful manner.

IV. VoIP and Intercarrier Compensation Issues

This issue concerns VoIP calls and the potential application of access charges to some of those calls. The issue is related to the VNXX issue, above, in the sense that adopting Level 3's proposed language would potentially allow Level 3 (and its ISP customers) to offer voice communications services over large geographic distances without charging per-minute toll charges or paying access charges. In the arbitration order, the Board rejected Level 3's position and instead ruled that a voice call between separate local calling areas (LCAs) is a toll call and must be treated as such, regardless of the technology used, such that access charges would apply. (Arb. Order at 33.) Further, the Board agreed that the VoIP provider's point of presence (POP) is the relevant point to consider when determining whether a call is "between separate LCAs," because that is the point at which the call enters or leaves

the public switched telephone network (PSTN) and because the VoIP provider's POP is treated as the end user under the FCC's "ESP Exemption."[18]

A. Level 3 arguments and Qwest responses

Level 3 argues that the Board's decision on this issue is in error in two respects. First, Level argues that a telephone call is not a "toll call" just because it is made between local calling areas, and second, Level 3 argues that the FCC's ESP exemption does not require that the VoIP provider's POP be considered an end-point of the telephone call. (In. Br. p. 22.)

In support of its first argument, Level 3 says that under Federal law a call is not "telephone toll service" unless the call is both "long distance" (i.e., a call between separate LCAs) and "toll" (that is, subject to a separate charge other than a local service charge), citing 47 USC §§ 153(16) and (48) and 47 CFR § 51.701(b). Level 3 asserts that VoIP will not meet the second test. [The Board assumes this is because VoIP is typically offered on a flat-rate basis for all calls in the lower 48 states, although Level 3 does not go into detail. (In. Br. p. 23.)]

Qwest responds that the Act's definition of "telephone toll service" is unrelated to the question of whether access charges apply, noting that Level 3 cites no authority to establish this connection. Further, Qwest notes that under the FCC's rule 51.701(b)(1), VoIP calls that fall within the category of "interstate or intrastate

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

exchange access, information access, or exchange services for such access" do not constitute "telecommunications traffic" that is subject to reciprocal compensation.

In support of its second argument, Level 3 says that the ESP exemption does not apply in the manner described in the Board's order. The exemption allows ESPs to obtain connections to the PSTN on the same terms as any business customer, but that does not control the intercarrier compensation between two LECs involved in carrying calls to and from that ESP, according to Level 3. Level 3 cites the FCC's first ISP-bound traffic order,[19] in which the FCC said: "The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs." (Id.)

Qwest responds that the FCC has clearly stated, "ESPs, including ISPs, are treated as end-users for the purpose of applying access charges." (ISP Remand Order, ¶ 11.) Level 3's argument ignores this FCC statement and confuses the concept of "termination" with the end user status of the VoIP provider. Qwest has not argued, and the Board did not find, that a VoIP call "terminates" for jurisdictional purposes at the ESP's POP. Instead, the ESP exemption simply treats the VoIP providers as an end point for access charge purposes.

Level 3 also points out that Qwest's position on this issue has the potentially absurd effect of changing some local calls into toll calls. This could happen if, for

[19] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) at ¶ 16, *vacated on other grounds,* Bell Atlantic v. FCC, 206 F.3d 1 (2000).

example, an end-user in Des Moines chooses to take local service from a VoIP provider with a POP in Ames. If that customer's next-door neighbor were to call that end-user, under Qwest's proposed language the call would be treated as a long-distance, or toll, call because the end points would be considered to be in Des Moines and Ames, even though the customers were actually next door to each other in Des Moines. (In. Br. pp. 22-23; Tr. 890-91.)

Qwest responds that, while it is true that Qwest's position could cause a local call to be treated as long distance, Level 3's position does the opposite, causing some long distance calls to be treated as local calls. Moreover, it is entirely within the control of the VoIP provider to avoid the local-to-long-distance conversion, because the VoIP provider has control over how it delivers calls to the PSTN. A reasonable VoIP provider would use Level 3's language to turn long distance into local (to avoid access charges), but would never use it to convert traffic the other way. Thus, Level 3's absurd outcome is not a realistic concern.

Finally, Level 3 states that it does not object to using bill-and-keep for this traffic, but asserts that Qwest should not be permitted to apply access charges "when the record shows that Qwest's costs are *de minimus* (*see* Tr. at 511) … ." (In. Br. p. 24.)

Qwest disagrees with Level 3's claim that Qwest's costs are *de minimus.* (Reply p. 21, n. 20.) Qwest points to its TELRIC-based transport costs as evidence that Qwest incurs real costs to transport interexchange traffic around Iowa. Bill and

keep is intended to apply only to the exchange of local calls and these calls are not local.

B. Qwest's arguments and Level 3's responses

Qwest argues that the Board's VoIP ruling properly reflects federal law, which provides that for purposes of applying access charges, an ESP is to be treated like an end user with the calls rated on the basis of the location of the ESP's POP. (ESP Exemption Order at ¶¶ 2, n. 8, and 20, n. 53.) According to Qwest, Level 3's proposed language for the interconnection agreement is an attempt to avoid the FCC's rulings and allow Level 3 to terminate traffic throughout the LATA without access charges, converting interexchange calls to "local."

Level 3 responds by repeating its earlier argument that access charges do not apply to a call if there is no extra charge to the customer to complete the call. (Reply pp. 27-28.) Accordingly, VoIP service, "where end users normally get unlimited calling for a flat fee," should not be subject to access charges.

Level 3 also argues that the ESP exemption only governs what the ESP can be charged; it does not control the issue of intercarrier compensation. As a result, Level 3 argues, the Board is not legally required to impose access charges on VoIP traffic. "The very most Qwest has shown is that might be permissible for the Board to do so." (Reply p. 29.) Level 3 says this is really a policy decision, not a legal issue, and the Board should prefer Level 3's pro-competitive policy.

C. Analysis

The Board will not change its arbitration decision on this issue. Level 3 basically admits that the Board's decision is permissible, i.e., is not in violation of federal law. Moreover, Qwest cites the Board to language in the FCC's ESP Exemption Order that makes it clear that ESPs are to be treated as end users for access charge purposes:

> Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. … Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.
>
> * * *
>
> 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 they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.

(ESP Exemption Order at ¶¶ 2, n. 8, and 20, n. 53.)

Moreover, Level 3's argument that VoIP calls are not "toll telephone service" because VoIP providers typically provide unlimited calling for a flat rate simply proves too much. Under that analysis, any interexchange carrier could charge a flat monthly rate for unlimited calling and avoid paying access charges. Level 3 has not shown any legal connection between the definition of "toll telephone service" and the application of access charges, and it seems clear there is no such connection. The alternative would be the end of access charges.

The Second Circuit Court of Appeals agrees with this conclusion. In a decision issued after briefing was completed in this docket[20], Global NAPS made the same argument regarding the "separate charge" language in the statutory definition of "telephone toll services." The Second Circuit rejected the argument, saying it "attributes far too much significance to the term 'separate charge.'" (Slip op. at 12.) The Court goes on to say

> It seems likely that the "separate charge" language in the statute was written to underscore that "tolls" applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers. Thus, Global's argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point.

(Slip op. at 13.) In other words, the statutory definition is directed to the relationship between a carrier and its customers, not to relationships between carriers.

The Second Circuit's Global NAPS decision is relevant to this order in other respects, as well. The Court was reviewing a district court decision that affirmed two rulings by the Vermont Public Service Board to the effect that (a) state-determined local calling areas continue to control whether a call is a toll call or a local call and (b) prohibiting Global NAPS from offering VNXX service. The Court affirmed the district court, finding that the Vermont Board properly exercised jurisdiction and properly applied federal law. In doing so, the Court concluded that state commissions continue to have the authority to determine what geographic areas should be

[20] Global NAPS, Inc., v. Verizon New England, Inc., et al., ___ F.3d ___, ____ WL ___, Docket No. 04-4685-cv (July 5, 2006).

considered local call areas (slip op. at 11-13); that state-commission-determined local calling areas should be allowed to govern intercarrier compensation (slip op. at 14); that the FCC's ISP Remand Order did not preempt states with respect to all ISP-bound traffic issues (slip op. at 17); and that the Vermont Board did not violate any federal rules or act arbitrarily or capriciously when it prohibited Global NAPs from using VNXX in Vermont (slip op. at 19). In particular, the Court held that the Vermont decision does not constitute a general barrier to entry as proscribed by 47 U.S.C. § 253 because a prohibition of VNXX does not prevent a CLEC from entering the market. (Slip op. at 20.)

Finally, the Court distinguished between VNXX and FX services on the basis that a retail customer purchasing FX service pays the costs associated with providing the service, while VNXX customers "rely on the terminating carrier to provide the service without cost. The prohibition of virtual NXX does not necessarily prevent users form obtaining nongeographically correlated numbers; the ban simply requires that someone pay Verizon for use of its infrastructure." (Slip op. at 22.) This statement precisely matches the Board's position on VNXX in Iowa; it is not permanently banned, but it will not be allowed until it can be done in a manner that appropriately compensates Qwest (or some other ILEC) for use of its infrastructure.

V. Tier II Issues

In its petition for arbitration, Level 3 identified five "Tier I" issues and 17 "Tier II" issues, saying that "Level 3 ranks only the most fundamental interconnection

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issues as 'Tier I issues'" and that "most [of the Tier II issues] are derivative of fundamental points of business, law and policy presented by Tier I issues." (Petition, pp. 6-7.) In the arbitration order, the Board said it understood this to mean that once the Tier I issues were decided, the appropriate resolution of the Tier II issues could be derived from those decisions, so the Board decided the Tier I issues and directed the parties "to determine the outcome of the Tier Two issues based on the Board's determinations in this order." (Arbitration Order, p. 2.)

Level 3 now argues that the Board failed to decide the Tier II issues, in violation of § 252. Level 3 says a substantial number of the Tier II issues involve definitions for which the arbitration order provides little, if any, insight as to the proper resolution. (In. Br. p. 25.) Further, the arbitration order leaves many terms undefined (such as "VoIP POP") and the Board should proceed to decide the Tier II issues, identified as Issue Nos. 6 through 22.

Qwest responds that Level 3 mentions only two of the Tier II issues in its initial brief and is now seeking definitions of terms that were never identified as issues in the first place. Qwest says it is too late to raise new issues, citing § 252(b)(4). Moreover, in many cases Level 3 does not offer a definition, but instead just complains that a term is undefined, without showing why it might be a problem. Qwest says Level 3's arguments regarding the Tier II issues are without merit.

In general, Qwest argues that most of the Tier II issues involve definitions of terms that are used in connection with the Tier I issues. Because most of the Tier I issues were decided by adopting Qwest's proposed language, the Board should

decide the definition issues with Qwest's proposed language, as well, so that the definitions will match the language adopted in the Tier I resolutions. Qwest then addresses each of the Tier II issues in turn.

Level 3's response is somewhat difficult to track. Level 3 fails to identify its arguments with the issue numbers that it assigned to the issues in its petition; in other words, Level 3 fails to use its own issue identification system. Moreover, Level 3's general response begins with the statement that "We have addressed some of Qwest's 'Tier II' issues in footnotes above," without identifying the footnotes or the issues that Level 3 believes it has addressed. It appears that Level 3 is referring to footnote 12, which appears to be addressed to Issue 18, and to footnote 37, which is not tied to any specific Tier II issue but addresses the subject in general. The Board has not identified any other footnotes in Level 3's reply brief that address Tier II issues and will not be responsible for Level 3's failure to do so.

Finally, it appears that Level 3 has not submitted any specific argument at all on some of the Tier II issues, as shown below. To the extent Level 3 has addressed these issues, it has not referred to them in its briefs on reconsideration; the Board does not believe it is required to search the record for arguments a party may believe it has hidden there.

Issue 6, AMA Switch Technology. Qwest says it agreed to remove a phrase from this definition that Level 3 found objectionable, so this should no longer be an issue. (In. Br. p. 21.) The Board will not address it further.

Issue 7, "Basic Exchange Telecommunications Service." Qwest proposes to use the same definition that has been approved by every state in Qwest's region as a part of Qwest's SGAT proceedings. (In. Br. p. 21.) Level 3 has not proposed an alternative definition, so Qwest's language should be adopted, according to Qwest.

Level 3 does not specifically respond to this issue.

Issue 8, "Call Record." The parties propose different definitions.

Qwest proposes:

> "Call Record" means a record that provides key data about individual telephone calls. It includes 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.

Level 3 proposes:

> "Call Record" shall include identification of the following: charge number, Calling Party Number ("CPN"), Other Carrier Number ("OCN"), or Automatic Number Identifier (ANI), Originating Line Indicator (OLI). In the alternative, a "Call Record" may include any other information agreed upon by both Parties to be used for identifying the jurisdictional nature of the calling party or for assessing applicable intercarrier compensation charges.

Qwest says its definition is consistent with the Board's decisions on the Tier I issues and provides the information necessary to properly rate and bill each call. Level 3's definition would not provide all of the necessary information and would require other information that is not required by the industry today. (Tr. 1103-06.)

Level 3 responds that Qwest's definition would require information that "may not always be available for VoIP-originated calls." (Reply p. 30.) However, Level 3 says this difference will not matter if the Board adopts Level 3's proposal to apply the default rate from the ISP Remand Order, or the Board's bill-and-keep policy, to all ISP-bound traffic, since at that point all of these minutes will be subject to the same rate and detailed call rating information will be unnecessary.

Issue 9, "Exchange Access." Qwest has agreed to Level 3's proposal, subject to one condition, that the term "IntraLATA LEC toll" should be used in Section 7 of the Agreement in lieu of the term "Exchange Access (IntraLATA Toll carried solely by local exchange carriers)." (In. Br. p. 22.)

Level 3 did not respond on this issue.

Issue 10, "Interconnection." The parties propose different definitions.

Qwest proposes:

> "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 proposes:

> "Interconnection" is the linking of two networks for the mutual exchange of Telecommunications Including Telephone Exchange Service and Exchange Access traffic. Telecommunications includes, but is not limited to Section 251(b)(5) Traffic, which is defined as Telephone Exchange Service, Exchange Access Service, Information Service, and Telephone Toll Service (including but not limited to IntraLATA and InterLATA Toll) traffic and is also defined to include ISP-

> Bound traffic, VoIP traffic. Interconnection also includes the exchange of Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Section 251(b)(5) traffic does not include Jointly Provided Switched Access traffic.

Qwest says its definition is used in other Qwest interconnection agreements and SGATs, uses standard industry terminology, and is consistent with the Board's Tier I decisions. Qwest says Level 3's proposal is wrong as a matter of federal law because it would include services for which there is no right of interconnection under § 251(c) and it would include services that are not subject to reciprocal compensation under § 251(b)(5). Qwest says Level 3's proposal is part of a scheme to receive favorable regulatory treatment and to avoid applicable access charges. (In. Br. p. 24.)

Level 3 did not specifically respond on this issue.

Issue 11, "Interexchange Carrier."

Qwest proposes:

> "Interexchange Carrier" or "IXC" means a Carrier that provides ***InterLATA or IntraLATA Toll services.*** (Emphasis added)

Level 3 proposes:

> "Interexchange Carrier" or "IXC" means a Carrier that provides ***Telephone Toll Service.*** (Emphasis added)

Qwest says that its proposed definition uses standard interconnection agreement language that has been approved by every state in Qwest's region.

Level 3 did not respond on this issue.

Issue 12, "IntraLATA Toll Traffic."

Qwest proposes:

> IntraLATA Toll Traffic describes IntraLATA Traffic outside the Local Calling Area.

Level 3 proposes:

> IntraLATA Toll Traffic describes IntraLATA Traffic that constitutes Telephone Toll Service.

Qwest argues its proposed definition is consistent with the Board's decision on the Tier I issues; the Board said that "a voice call between separate LCAs is a toll call and must be treated as such." (Arbitration Order at 33.)

Qwest also says Level 3's proposed definition is an attempt to avoid paying access charges for calls that are between different LCAs. (Tr. 648-49.)

Level 3 does not specifically respond to this issue.

Issue 13, "Local Interconnection Service or 'LIS' Entrance Facility."

Qwest proposes:

> "Local Interconnection Service or "LIS" Entrance Facility" is a DS1 or DS3 facility that extends from CLEC's Switch location or Point of 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 did not propose alternative language.

Qwest says that Level 3 objects to Qwest's definition because Level 3 believes it will shift costs of Qwest's network to Level 3. Qwest points out that the definition does not contain any language that determines who should bear the cost of the

facility; it merely defines an interconnection facility. Accordingly, Qwest argues, it is a defined term that should be included in the Agreement.

Level 3 did not specifically respond to this issue.

Issue 14, "Exchange Service."

Qwest proposes:

> Exchange Access as used in the Agreement shall have the meaning set forth in the Act.
>
> 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 proposes:

> 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.

Qwest proposes to define "Exchange Service" as "traffic that is originated and terminated within the Local Calling Area as determined by the [Board]." (Tr. 649.) Level 3 proposes to define the similar, but not identical, term "telephone exchange service" using the definition from the Act. (Tr. 650.) Qwest points out that the term it is defining is used hundreds of times throughout the Agreement, while Level 3's proposed term is not. Further, Level 3's proposed definition uses the word

"subscriber," which is not a defined term, while Qwest's proposed definition uses the term "end user," which is.

Level 3 does not specifically respond to this issue.

Issue 15, "Telephone Toll Service."

Qwest did not file a proposal.

Level 3 proposes:

> Telephone toll service - the term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Level 3 proposes a definition for this term; Qwest does not believe one is necessary. (Tr. 651.) Qwest says that Level 3 only wants this definition to support Level 3's argument that as long as Level 3's VNXX service does not involve a separate charge for each interexchange call, the service is not subject to access charges. Qwest describes this as an "erroneous conclusion" that was recently rejected by an ALJ for the Oregon PUC in the Oregon Universal ALJ Order. Qwest concludes that the Board should reject Level 3's proposed definition.

Level 3 does not offer any response on this issue.

Issue 16, "VoIP."

Qwest proposed the following definition of "VoIP":

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

for a specific call.

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

Level 3 proposes:

7.2.2.12 Left blank

The first issue is that Level 3 proposes to remove two phrases from Qwest's proposed definition, "at the premises of the party making the call" and "end user premises," both of which were included by Qwest to emphasize that VoIP calls must originate in Internet Protocol (IP). Otherwise, Qwest argues, the call is originating in traditional time division multiplexing (TDM) format and being converted to IP at some later point. In other words, nearly every call would arguably become "VoIP" if it is converted to IP at some point in its transmission path, even though the customer/end user was just using traditional telephone service. Qwest's proposed definition limits the descriptor "VoIP" to calls that originate in IP, according to Qwest. (In. Br. p. 28.)

The second issue is that Qwest's language requires that a VoIP call be "transmitted over a broadband connection to the VoIP provider." Level 3 proposes to modify that to say the call must be "transmitted over a broadband connection to or from the VoIP provider." (Emphasis added.) Level 3 proposed this definition to reflect its position that a call that starts in TDM and finishes in IP format should be included as a VoIP call. (Tr. 419.) Qwest responds that this argument is inconsistent with other language proposed by Level 3, which defines VoIP traffic as "traffic that

originates in IP Protocol using IP Telephone handsets." Thus, says Qwest, Level 3's language and its stated position "are hopelessly inconsistent" and "incomprehensible." (In. Br. p. 28.)

Level 3 does not offer any specific response to this issue.

Issue 17, Forecasts.

Qwest proposes:

> 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 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.
>
> 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 did not file a proposal.

Qwest proposes that the agreement should include language requiring that CLECs provide Qwest with forecasts of their expected trunking needs. (Tr. 938.) Qwest says the forecasts are necessary to enable Qwest to plan for CLEC demands on its network. (In. Br. p. 29.) Qwest is concerned that a CLEC might have an incentive to overstate its expected needs, in order to cause Qwest to build capacity that is adequate to handle the CLEC's most optimistic needs.

To offset this incentive, Qwest originally proposed that Level 3 would have to back up its forecasts with deposits. After Level 3 objected to that, Qwest proposed language that would allow Qwest to adjust Level 3's forecasts downward if experience showed that Level 3 tended to overstate its projected needs. (Tr. 937-40.) Qwest says that Level 3 has not disputed the need for forecasts or Qwest's most recent forecasting proposal. Accordingly, Qwest urges the Board to adopt Qwest's language for paragraphs 7.2.2.8.4 and 7.2.2.8.5.

Level 3 does not offer any response on this issue.

Issue 18, Jurisdictional Allocation Factors.

This issue relates to Issue 2, regarding commingling of traffic on LIS trunks or use of Feature Group D trunks. The Board adopted Qwest's position on Issue 2 and required the use of Feature Group D trunks for commingled traffic in order to allow for proper identification and measurement of various types of traffic. (Arbitration order at 17.) Qwest asserts that this issue, involving proposed allocation factors for use when commingled traffic cannot be identified and measured, is now moot. (In. Br. p. 30.)

Notwithstanding that position, Qwest takes issue with Level 3's proposed allocation factors because, according to Qwest, they are based on Level 3's incorrect interpretation of the existing intercarrier compensation rules. For example, Level 3 does not propose a factor for traffic that is subject to intrastate switched access charges, apparently based on Level 3's belief that none of its traffic will be subject to intrastate access charges. Qwest offers other examples that demonstrate Level 3's alleged intent to improperly apply the ESP exemption and to improperly rate traffic

and concludes that Level 3's proposed jurisdictional allocation factors should be rejected.

Level 3 responds that its proposed factors "would clearly result in the application of access charges versus reciprocal compensation in a manner consistent with Level 3's substantive compensation proposals." (Reply p. 12, n. 12.) In other words, Level 3 agrees that its proposed factors are consistent with its position as to which traffic should, and should not, be subject to access charges or reciprocal compensation.

Issue 19, ISP-Bound Traffic.

Level 3 proposes language for identification of ISP-bound traffic. Qwest says it is willing to accept the language proposed by Level 3 with the exception of the last sentence. That sentence reads "Traffic exchanged that is not ISP-Bound traffic will be considered to be section 251(b)(5) traffic." Qwest says this sentence is inconsistent with federal law and would convert a number of different categories of traffic into § 251(b)(5) traffic when they should not be. Qwest says that 47 CFR § 51.701(b)(1) specifically excludes interstate or intrastate exchange access, information access, and exchange services for such access from the category of telecommunications traffic that is included within § 251(b)(5). Accordingly, Qwest urges that the last sentence of Level 3's proposed paragraph 7.3.6.2 be rejected.

Level 3 does not offer any specific response on this issue.

Issue 20, Signaling Parameters. Both Qwest and Level 3 have proposed language for paragraph 7.3.8. (Tr. 1110-12.) Qwest says its language includes

industry-defined terms (Tr. 1112-27), while Level 3's language uses undefined terms that do not have an accepted meaning in the industry, such as "CRI." (Tr. 1112.) Qwest says that Level 3's language would excuse Level 3 from providing calling party information that is essential to properly rate and bill a call. (Tr. 1116-17.) Qwest says Level 3's language also requires the use of signaling parameters that are not used in standard industry practice, requiring that Qwest provide additional special information for Level 3. (Tr. 1114.) Qwest believes the Board should adopt Qwest's language, which requires the information the industry uses to properly rate and bill calls and does not require the use of information that other carriers do not use.

Level 3 responds that this issue relates to Issue 8, the definition of "Call Record." Level 3 says Qwest's language "does not embrace the broader scope of information that SS7 signaling can contain … ." (Reply p. 30.) Level 3 argues its proposed language is more flexible and will be more useful as IP services become more prevalent.

Issues 21 and 22, Cost Responsibility Disclaimers, LIS and Special Construction.

Qwest does not propose any specific language for Issues 21 and 22. Level 3 proposes the following with respect to Issue 21:

> 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.

For Issue 22, Level 3 proposes:

> 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 any activities or functions under this Agreement. All references in this section 19 to construction charges 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.

Qwest says that these two issues should be considered together, as they involve language proposed by Level 3 disclaiming any obligation on the part of Level 3 to pay for interconnection services that it orders or for special construction that it orders. (Tr. 944-46.) Qwest says this language is inconsistent with the Board's decision on Issue 1 regarding the use of a single POI.

Level 3 responds that its language would make it clear that merely ordering trunks from Qwest would not mean that Level 3 is responsible for paying for those trunks. (Reply p. 31.) Instead, cost responsibility would be addressed by the sections of the Agreement that are specifically addressed to cost responsibility. Level 3 says the correct interpretation of those sections "should not be clouded by which party has to take on the administrative task of 'ordering' trunks needed to keep traffic flowing." (Id.)

C. Analysis of Tier II Issues

Overall, the Board agrees with Qwest's argument that the Board should adopt Qwest's proposed language (or Qwest's position, where Qwest has not proposed

language) on each of the Tier II issues in order to ensure uniformity with the Tier I decisions. Application of this principle is enhanced by the lack of any specific evidence or argument from Level 3 on many of these issues. Beyond that general principle, there are a few Tier II issues that are deserving of further comment because Level 3 submitted specific responses to Qwest's arguments or for other reasons.

Issue 6, AMA Switch Technology. It appears the parties have agreed on this language, so there is no issue to decide.

Issues 8 and 20, Call Records and Signaling Parameters. Qwest's proposed language relating to these issues requires that all of the information necessary to rate and bill calls must be provided. The Board finds that this is appropriate. Level 3 argues that Qwest's language requires Level 3 to provide information that "***may*** not always be available for VoIP-originated calls." (Reply p. 30, emphasis added.) Level 3 does not cite to any evidence in the record to support its assertion and offers no explanation as to when the information might be unavailable or why that might occur. Under these circumstances, the Board finds Level 3's claim unpersuasive. Accordingly, the Board will approve Qwest's proposed language, at least until such time as Level 3 can demonstrate the required information is truly unavailable for VoIP-originated calls, at which time the parties should try to negotiate alternative arrangements.

Issue 18, Jurisdictional Allocation Factors. Allocation factors of some type would be required if the parties were commingling traffic on LIS trunks that cannot

adequately identify the various types of traffic. Because the Board has rejected Level 3's position regarding the appropriate application of access charges to VNXX and VoIP traffic, the Board will also reject Level 3's proposed jurisdictional allocation factors.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Request for Reconsideration" filed in this docket on January 5, 2006, by Level 3 Communications, LLC, is granted, as explained in the body of this order. The arbitration order issued in this docket on December 16, 2005, is affirmed as modified by the discussion in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 19th day of July, 2006.

CERTIFICATE OF SERVICE VIA E-MAIL

I do hereby certify that a true and correct copy of the foregoing QWEST CORPORATION'S POST-HEARING OPENING BRIEF was served on the 10th day of October, 2006 via e-mail electronic transmission upon the following individuals:

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DATED this 10th day of October, 2006.

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