EXHIBIT A

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT BETWEEN **LEVEL 3 COMMUNICATIONS, LLC**, and **QWEST CORPORATION** PURSUANT TO 47 U.S.C. § 252	DOCKET NO. UT-023042 **LEVEL 3 COMMUNICATIONS, LLC., POST-HEARING BRIEF**

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Level 3 Communications, LLC, ("Level 3"), through its undersigned counsel, submits this Post-hearing Brief in support of its proposed resolution of the issue in its interconnection arbitration with Qwest Corporation ("Qwest").

I. SUMMARY OF FACTS AND LEVEL 3'S POSITION

Level 3 establishes a point of interconnection ("POI") with Qwest in each LATA. Tr. at 40-1, 85. Because the volume of traffic exchanged between carriers may frequently justify dedicated transport facilities, Qwest typically requires (as it has under this Agreement) the deployment of "direct trunk transport" facilities ("DTTs") from certain Qwest end offices directly to the POI it establishes with a competitive local exchange carrier such as Level 3.[1] Tr. at 41. These facilities sit entirely on the Qwest network, on Qwest's side of the POI.[2] WPH-5T at 9. Because the DTTs are dedicated to traffic between Qwest and Level 3, they are configured so that traffic to the Level 3 network, as well as traffic from the Level 3 network, if any, travel over these facilities. Both carriers benefit from the establishment of these facilities. Tr. at 48-9, 91-2, 95. The "relative use" factor apportions the financial obligations for these facilities based upon the relative percentage of calls each party's customers originate. WPH-1T at 4-5.

Level 3 established local interconnection to provide direct inward dialing capability to its Internet Service Provider ("ISP") customers in Washington and presently serves no customers that originate traffic. Tr. at 46-7. Today, all traffic that travels over the DTT facilities on Qwest's network is originated by Qwest customers and is terminated to Level 3's ISP customers. Tr. at 41. Further, Qwest has ISP customers of its own who may purchase services from local and/or intrastate tariffs, Qwest rates locally dialed calls from its end users to ISPs as local, and Qwest reports revenue from ISPs as intrastate revenue for separations purposes. WPH-5T at 11, Tr. at 98-101, Level 3 Cr. Exh. 19. Qwest also offers a product called "Wholesale Dial" which is

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[1] The parties have agreed to establish DTTs only once a threshold of one DS1's worth of traffic for three consecutive months from the originating party's end office to its tandem is reached. *See* Section 7.2.2.1.3 of the Agreement.

[2] Although Level 3 has made a significant investment to build its own network, Qwest does not compensate Level 3 for the facilities Level 3 deploys on its side of the POI. Tr. at 42, 62.

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a wholesale dial-up Internet access service sold to ISPs much like Level 3's service. Level 3 Cr. Exh. 19.

The issue before this Commission is simple—who is responsible for the costs of bringing a call placed by a Qwest customer over the Qwest network to the POI. These costs can be divided into three categories; Non-recurring Charges, Recurring charges, and "True-up" Charges, if any. WPH-1T at 9-10. It is Level 3's position that when 100% of the traffic carried over these facilities is originated by Qwest, under binding Federal Communications Commission ("FCC") rules, Level 3's relative use of these facilities would be 0% and Qwest may not charge Level 3 either non-recurring or recurring charges for these facilities. Should the percentage of relative use change in the future, because a true-up mechanism is burdensome and difficult to apply, any new factor should apply prospectively. WPH-1T at 31.

II. SUMMARY OF ARGUMENT

FCC "rules of the road," including 47 C.F.R. § 51.703(b),[3] permit Level 3 to select a single POI per LATA and require both Qwest and Level 3 to deliver their originating traffic to that POI at no charge to the other carrier.[4] In the *ISP Order on Remand*, the FCC explicitly affirmed that these interconnection rules continue to apply to ISP-bound traffic.[5] Nevertheless,

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3 Hereafter, all references to 47 C.F.R. will be cited as "FCC Rule xx" or "Rule xx."

4 *See* 47 C.F.R. § 51.703(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1042, 1062 (1996) (subsequent history omitted) ("*Local Competition Order*"); *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) ("*Texas 271*"); *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al*., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) (*"TSR Wireless"*), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM")*; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 52 (Wireline Comp. Bureau, rel. July 17, 2002) ("*Federal Arbitration Order*").

5 *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, n.149 (2001) ("*ISP Order on Remand*"), *remanded WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied.*

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Qwest attempts to avoid these rules because it asserts that they do not apply to Internet-related traffic (Qwest's term for ISP-bound traffic). Although Qwest relies on the *ISP Order on Remand* and FCC Rules to support its position, Qwest misapplies and misreads both and ignores the important impact of the D.C. Circuit's decision in *WorldCom v. FCC.*

Qwest argues that Internet-related traffic is excluded from the rules of the road by the exception in FCC Rule 51.701(b)(1) for "interstate or intrastate exchange access." Qwest, however, does not even claim that Internet-related traffic is "interstate… exchange access," but asserts that Internet-related traffic must be excluded because it is jurisdictionally "interstate" or "interstate access" traffic. This sleight-of-hand ignores the fact that "exchange access" is a statutorily defined term and that the FCC has not concluded that Internet-related traffic is "exchange access." Qwest's argument based on the definition of "telecommunications traffic" must therefore fail.

Moreover, Qwest's reliance on FCC Rule 51.709(b) is inapposite. In the first instance, 51.709(b) is focused primarily upon terminating compensation—not the originating responsibilities at issue here. By its express terms, the rule makes clear that Level 3 must pay for two-way facilities only to the extent that Qwest uses the facilities to *terminate* traffic that is originated by Level 3's customers. Nothing indicates that FCC Rule 51.709(b) was intended to override FCC Rule 51.703(b)'s prohibition on charges for facilities Qwest uses to carry traffic originated by its customers.

Even if, as Qwest argues, FCC Rule 51.709(b) governs pricing for facilities used to originate traffic from Qwest's end offices to its POI with Level 3, it does not require that Internet-related traffic be excluded from a relative use calculation. First, it refers to "traffic," not "telecommunications traffic," so the scope of traffic to be included in 51.709(b)'s relative use calculation is not limited by the exceptions to the definition of "telecommunications traffic." However, even if "traffic" were equated with "telecommunications traffic," after *WorldCom v.*

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FCC there is no longer any basis for excluding Internet-related traffic from "telecommunications traffic." Because all of the traffic (or telecommunications traffic) at issue in this case is being generated by Qwest's customers when they make local calls to connect to ISPs, this rule, when applied correctly, does not support Qwest's position. The only circumstance under which Level 3 could be required to pay for a portion of these facilities would be if a Level 3 local customer was initiating the calls and Qwest used the facilities to *terminate* Level 3's traffic. The Commission should adopt Level 3's position and find that Internet-related traffic must be included in the relative use calculation.

III. ARGUMENT

A. THE COMMISSION'S PRIOR RULING CAN BE DISTINGUISHED

Under the Act, this Commission has jurisdiction to arbitrate the interconnection dispute between Qwest and Level 3.[6] It is also charged with resolving the issues set forth in Level 3's Petition and Qwest's Response based on the evidence presented in this arbitration.[7] Level 3 is entitled to negotiate and arbitrate its own individual interconnection arrangements, based on its business plan, priorities, and the business compromises it is willing to make as part of the negotiation process. If the Commission were to resolve every arbitration issue by adopting Qwest's Statement of Generally Available Terms ("SGAT") language, that would make the negotiation and arbitration provisions superfluous. Congress could not have intended such a result.

Although the Commission previously adopted Qwest's position on relative use, Level 3 was not a party to that proceeding.[8] And, as the Commission recognized,[9] it will revisit this

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6 47 U.S.C. § 252(b).

7 47 U.S.C. § 252(b)(4).

8 *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirty-Second Supplemental Order, etc., (Wa. UTC June 21, 2002) ("*UNE Rates Decision*").

9 *Id.* at ¶ 113.

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decision as further judicial and federal regulatory review occurs. At most, the prior decision is a form of precedent to be reversed or distinguished here.

In this proceeding, Level 3 has presented factual evidence and substantive legal arguments that support Level 3's position and that the Commission did not consider previously. First, the Commission's earlier analysis did not consider binding FCC *interconnection* rules, such as FCC Rule 51.703(b), which require Qwest to deliver its originating telecommunications traffic to the POI at no charge to Level 3. Second, the Commission improperly applied a *terminating* compensation rule, FCC Rule 51.709, to require the sharing of costs for *interconnection* facilities according to the relative *local* traffic flow over that facility. As discussed herein, 51.709 relates *only* to the amount of compensation that an interconnecting carrier owes a providing carrier for using dedicated transport facilities to transport traffic that the paying carrier originates. Moreover, the local/non-local distinction is no longer recognized under FCC rules. Third, other arbitration decisions not considered by the Commission, including the *Federal Arbitration Order* and decisions by the Arizona and New York commissions and the Minnesota arbitrator, support Level 3's position.

B. FCC "Rules of the Road" Require Carriers to Pay for Interconnection Facilities Used to Bring Their Customers' Calls to the POI

Section 251 of the Communications Act of 1934, as amended ("Act"), imposes duties on all telecommunications carriers in order to facilitate competition in telecommunications markets. The parties' positions relate to two different obligations arising under the Act: (1) the obligation to *interconnect* with other carriers under Section 251(c)(2); and (2) the obligation to pay *reciprocal compensation* under Section 251(b)(5) for the transport and termination of calls that originate on one carrier's network and terminate on another carrier's network. The *Minnesota*

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Recommended Decision specifically distinguished this Commission's precedent for failing to recognize this important distinction between interconnection and reciprocal compensation.[10]

In order to understand the distinction between these interconnection and reciprocal compensation obligations, it is helpful to envision the network over which the call passes when a Qwest customer calls a Level 3 customer. By way of example, assume that the Level 3 customer is a local law firm. When the Qwest customer wishes to contact her lawyer, she will initiate the call by dialing a local number from her home or business telephone. The locally dialed call will be routed over Qwest's local network to the Qwest central office that serves the Qwest customer. From there, the call will be switched over Qwest's network (either common facilities or facilities that are dedicated to carrying traffic between Qwest and Level 3) to the POI. From the POI, the call will be routed over Level 3's network until the call is delivered by Level 3 to its customer.

As a second example, assume that the same Qwest customer wishes to place a local call to her ISP so that she can "surf the net." The call will be routed in the same fashion as the call to the Qwest customer's lawyer. The only difference is that, in the case of the ISP-bound call, the customer will place the call from her computer instead of her telephone. As explained below, regardless of whether the law firm or the ISP is the called party, the rules regarding Qwest's *interconnection* obligation—including bearing the costs of Qwest's facilities used to deliver its originating traffic to the POI—remain the same.

Under the Act, each carrier has different responsibilities for the costs associated with carrying these calls, depending on whether the carrier is originating or terminating the call. The first set of rules concerns the obligation of the originating carrier (*i.e*. Qwest) to carry the call to the POI between the two carriers' networks. FCC Rule 51.703(b) incorporates the general principle applicable to financial responsibility for originating traffic: "A LEC may not assess

[10] *Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC P5733,421/IC-02-1372, Arbitrator's Recommended Decision, 9 (Minn. PUC Nov. 1, 2002) ("*Minnesota RD*"). (Attached as **EXHIBIT 1**.)

charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." Under Rule 51.703(b), Qwest is responsible for routing the call from the Qwest customer to the POI and must absorb all costs associated with the origination of traffic on Qwest's side of the network. Although Qwest recognizes its obligation under this rule for locally dialed voice traffic, it refuses to recognize the same obligation for locally dialed ISP-bound traffic.[11] Tr. at 87-9.

There is nothing in FCC Rules that relieves Qwest of its obligation to deliver its originating traffic to the POI based on the *type* of interconnection (facilities-based or UNE) chosen by Level 3. Whether Level 3 establishes a meet point interconnection arrangement or a UNE interconnection arrangement has no impact whatsoever on the facilities Qwest must provide. Qwest's willingness to bear the cost of these facilities under a facilities-based, meet-point interconnection arrangement but not a UNE-based interconnection arrangement (using DTT UNEs Level 3 purchases from Qwest) is inconsistent with its duty to provide interconnection on rates, terms and conditions that are nondiscriminatory under Section 251(c)(2)(D). Tr. at 49-50, 62-3.

In *TSR Wireless*, the FCC found that ILECs were bound by FCC Rule 51.703(b) to absorb the costs of delivering their customers' traffic to the POI between the ILEC network and the network serving the "exclusively one-way" paging companies.[12] While paging calls may be locally dialed, as the FCC acknowledged, the paging traffic at issue in *TSR Wireless* often crosses state boundaries.[13] Thus, the "interstate" (and one-way) traffic at issue in *TSR Wireless* was analogous to the "interstate" ISP-bound traffic that is at issue in this case. Nevertheless, the FCC found that under FCC Rule 51.703, "the cost of the facilities used to deliver this traffic is

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11 Qwest also implicitly recognizes the applicability of this rule for locally dialed ISP-bound traffic that is carried on Qwest's common network capacity. Before the threshold for establishing DTT is reached, Qwest carries ISP-bound traffic across its network to its POI with Level 3 at no cost to Level 3.

12 *TSR Wireless* at ¶ 7.

13 *Id.* at ¶ 31.

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the originating carrier's responsibility…" and the originating carrier "recovers the costs of these facilities through the rates it charges its own customers for making calls."[14] Further, the FCC clarified beyond doubt the relationship between Rules 51.703(b) and 51.709(b): "Section 51.709(b) applies the general principle of section 51.703(b)…to the specific case of dedicated facilities."[15] Thus, "the [Local Competition] Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates."[16] Contrary to Qwest's argument, this statement shows that *TSR Wireless* is relevant to this dispute because it addressed application of FCC Rule 51.709(b) for two-way dedicated facilities.

Because dedicated facilities are used both to originate traffic (which is not compensable under Section 251(b)(5)) and terminate traffic (which may be compensable under Section 251(b)(5)), the FCC devised a system to take that distinction into account. Reciprocal compensation obligations for dedicated transport facilities are owed only for that portion of traffic that is headed toward the providing carrier:

> The rate of a carrier providing transmission facilities to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[17]

As the Minnesota Arbitrator found:

> [w]hen the interconnecting carrier [Level 3] sends no traffic back to Qwest, there is no FCC regulation that would obligate the interconnecting carrier to pay anything for the interconnection facilities. Rather, that cost would be considered, under § 51.703(b), to be the originating carrier's responsibility.[18]

The Arizona commission also recognized the crucial distinction between originating interconnection obligations and terminating compensation obligations and found that ISP-bound

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14 *Id.* at ¶ 34.
15 *Id.* at ¶ 26.
16 *Id.* at ¶ 25.
17 47 C.F.R. § 51.709(b).
18 *Minnesota RD* at 6.

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traffic between Level 3 and Qwest should be included in the relative use calculation.[19] Both correctly rejected Qwest's attempt to blur the important distinction between, on the one hand, reciprocal compensation obligations for terminating another party's traffic and, on the other hand, interconnection obligations for delivering a party's own traffic to the POI—both of which are recognized and incorporated in the FCC regulations concerning the relative use principle.

In applying FCC Rule 51.709(b), the *Federal Arbitration Order* addressed the difference between a carrier's originating interconnection obligations and its terminating compensation obligations for two-way trunks. That *Order* found that requiring a CLEC to bear all of the recurring costs, and even one-half of the non-recurring costs, for two-way trunks on the ILEC's side of the POI used to carry the ILEC's originating traffic, in addition to 100% of such costs on the CLEC's side of the POI, improperly allocates costs between interconnecting carriers in violation of FCC rules.[20] This illegal cost allocation is precisely the result that Qwest seeks to achieve in this arbitration.

The important distinction between interconnection responsibilities and terminating compensation rights is also recognized in the FCC's Section 271 orders that separately evaluate an RBOC's compliance with interconnection obligations (under checklist item one) and its compliance with reciprocal compensation obligations (under checklist item 13).[21] While the FCC has affirmed that RBOC's need not *pay* reciprocal compensation for ISP-bound traffic to satisfy the reciprocal compensation checklist item, its Section 271 orders do not recognize a similar ISP-bound exemption from an RBOC's interconnection obligations. Moreover, if as Qwest argues, FCC rules implementing Section 251(b)(5) exclude ISP-bound traffic from

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[19] Opinion and Order, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rules, Terms and Conditions for Interconnection*, Dkt. Nos. T-03654A-00-0882 and T-01051-B-00-0882, Decision No. 63550, 10 (Ariz. Corp. Com., April 10, 2001).

[20] *Federal Arbitration Order* at ¶¶ 148-49.

[21] *See e.g. Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, 17 FCC Rcd 12,275 (2002) ("*New Jersey 271 Order*").

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reciprocal compensation payments, then Qwest may not rely on these same rules to require Level 3 to pay Qwest for carrying ISP-bound traffic either.

As the FCC has found, requiring Qwest to bear the costs of delivering its traffic to the POI is not a "taking" of its property without just compensation because "the originating carrier recovers the cost of these facilities through the rates it charges its own customers for making calls."[22] Qwest is providing interconnection facilities to carry to the POI traffic that its customers originate for its own benefit (or at least its own customers' benefit). Tr. at 41. Qwest receives revenue from its customers from providing them services that let them place both voice and dial-up ISP-bound calls. Tr. at 98; Level 3 Cr. Exh. 13-15. The Act and FCC rules simply do not permit Qwest to impose on Level 3 the costs of originating calls placed by Qwest's customers.

C. THE *ISP ORDER ON REMAND* DOES NOT ALTER QWEST'S INTERCONNECTION OBLIGATIONS

Qwest contends that the *ISP Order on Remand* requires a departure, in the case of ISP-bound traffic, from the FCC's rules regarding cost allocation for interconnection obligations. The linchpin of Qwest's argument in this case is the proposition that the FCC characterized ISP-bound traffic as "interstate." Based upon this characterization, Qwest concludes that traffic originated by Qwest customers bound for Level 3's ISP customers should be excluded when determining the relative use of facilities used to carry this Qwest-originated traffic to the POI. In so arguing, Qwest urges an expansion of the FCC's order that the FCC explicitly prohibited.

In adopting its interim compensation regime for transport and termination of ISP-bound traffic, the FCC explicitly stated:

> This interim regime affects **only** the **intercarrier compensation** (*i.e.,* the rates) applicable to the delivery of ISP-bound traffic. It does not alter carrier' other obligations under Part 51 rules, 47 C.F.R. Part 51, or existing interconnection

22 *TSR Wireless* at ¶ 34.

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agreements, **such as obligations to transport traffic to points of interconnection**.[23]

With this footnote, the FCC conclusively countered any suggestion that interconnection obligations with respect to ISP-bound traffic would be affected in any respect by its order. There is no reasonable interpretation of this language that could support Qwest's position.[24] As the *Minnesota Recommended Decision* found, "[n]othing in the text of the *ISP Remand Order* suggests that it applies to any functions other than transport and termination on the *terminating* side of the point of interconnection."[25] Because the issue in this proceeding is not a matter of intercarrier compensation for terminating traffic, the primary authority relied upon by Qwest is irrelevant.

And even if the *ISP Order on Remand's* classification of ISP-bound traffic for purposes of terminating compensation is relevant, it still does not support Qwest's position. In the *ISP Order on Remand*, the FCC also stated that "we . . .are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic."[26] Contrary to this directive, Qwest's position does just that. For ISP-bound traffic carried over dedicated facilities, Qwest ignores FCC Rule 51.703(b) and attempts to shifts to Level 3 100% of the costs of carrying Qwest's originating traffic over Qwest's network to the POI. Tr. at 111. For voice or "interstate" paging traffic, however, Qwest follows FCC Rule 51.703(b) and bears 100% of the costs of transporting traffic originating on its network to the POI, even if all traffic is "interstate" and flows only one way (as it does with paging). Tr. at 112; *TSR Wireless* at ¶¶ 19-21. The Commission therefore cannot adopt Qwest's

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23 *ISP Order on Remand* at ¶ 78, fn. 149 (emphasis added).

24 It is for this reason that Qwest's Hobbs Act argument has no merit. Qwest has insisted that Level 3 is collaterally attacking the FCC precedent mandating that ISP-bound traffic be considered interstate for the purposes of Rule 51.703(b). This argument is based upon Qwest's mistaken position that the FCC has found that ISP-bound traffic is interstate for all regulatory purposes. As discussed above, the FCC has not found ISP-bound traffic to be interstate for all regulatory purposes. Therefore, Qwest's Hobbs Act argument, along with its other arguments, fails.

25 *Minnesota RD* at 7 (emphasis added).

26 *ISP Order on Remand* at ¶ 90.

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position when doing so would take precisely the action that the FCC, in the *ISP Order on Remand*, expressly stated it was unwilling to take.

Qwest is correct that the FCC *tried* to exclude ISP-bound traffic from the definition of "telecommunications traffic." The FCC ruled in the *ISP Order on Remand* that *all* telecommunications are subject to the requirements of Section 251(b)(5). It then ruled that Section 251(g) excludes certain types of traffic from Section 251(b)(5), including ISP-bound traffic. Consequently, the FCC rewrote the definition of "telecommunications traffic" in connection with reciprocal compensation requirements by doing two things: First, it eliminated the restriction that reciprocal compensation applies only to "local" traffic; Second, it added language taken from Section 251(g) to identify types of traffic that were excluded from reciprocal compensation obligations: "interstate or intrastate exchange access, information access, and exchange services for such access."

However, the D.C. Circuit in *WorldCom* rejected the FCC's second step. It ruled that Section 251(g) does not provide the FCC with the authority to exclude ISP-bound traffic from Section 251(b)(5). Therefore, the court remanded the case for further proceedings, making clear that the classification of ISP-bound traffic is open:

> [W]e do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of "telecommunications" covered by § 251(b)(5)…[27]

Level 3 anticipates that Qwest will contend that there is no meaningful distinction between "interstate access" and "interstate exchange access." Qwest is wrong. "Exchange access" is defined by the Act, while "interstate access" is not. Further, no part of any of the FCC rules at issue here refers to "interstate access." They refer to "exchange access." Traffic to ISPs cannot be "exchange access" because it is not used "for the purpose of the origination or

[27] *WorldCom v. FCC*, 288 F.3d at 434.

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termination of telephone toll services."[28] It is used to provide "information service,"[29] which is defined differently than "telephone toll service."[30] While Qwest may have used the terms "interstate access" and "interstate exchange access" interchangeably for services to interexchange carriers ("IXCs"), the terms are not interchangeable for services to ISPs. Even if ISP-bound traffic were somehow "information access"—another term not defined by the Act—the D.C. Circuit has ruled that the FCC cannot say that "information access" to ISPs is excluded from reciprocal compensation obligations. Moreover, the FCC has repudiated the "local/non-local/interstate" distinction for reciprocal compensation obligations.

Thus, even as limited (to reciprocal compensation) as the FCC sought to render its *ISP Order on Remand,* the FCC's reasoning for excluding ISP-bound traffic from Section 251(b)(5) and the reach of the Order remain in doubt. This was confirmed by the *Federal Arbitration Order*:

> We disagree with Verizon's assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation. In remanding the [*ISP Order on Remand*] to the Commission, the D.C. Circuit recently rejected the Commission's earlier conclusion that section 251(g) supports the exclusion of ISP-bound traffic from section 251(b)(5)'s reciprocal compensation obligations. Accordingly, we decline to adopt Verizon's contract proposals that appear to build on logic that the court has now rejected.[31]

In sum, the *WorldCom* decision means that references to "telecommunications traffic" in the FCC's rules include ISP-bound traffic. As a result, under FCC Rule 51.703(b), Qwest is still required to bring ISP-bound traffic to the POI with Level 3 and may not charge Level 3 for the facilities used to do so.[32]

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[28] 47 U.S.C. § 153(16).

[29] 47 U.S.C § 153(20).

[30] 47 U.S.C. § 153(48).

[31] *Federal Arbitration Order* at ¶ 261 (footnotes omitted).

[32] Contrary to Mr. Brotherson's testimony, Tr. at 96, 114, the FCC's Section 271 orders do not affirm that ISP-bound traffic is "interstate access." Rather, they find that the RBOC's refusal to pay reciprocal compensation for Internet-bound traffic is not a failure to satisfy the reciprocal compensation checklist item. *See e.g. New Jersey 271 Order* at ¶ 160. If the RBOCs may refuse to pay compensation to CLECs for ISP-bound traffic under Section 251(b)(5), it necessary follows that Level 3 may

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If the *ISP Order on Remand* could be read to leave any doubt as to the continued applicability of Rule 51.703(b) to ISP traffic, recent decisions leave no such doubt. As the New York Public Service Commission found, whether or not the requesting carrier provides service to ISPs or traditional local voice services has no impact whatsoever on its rights to interconnection under federal law and the ILEC's obligation to deliver its originating traffic to the POI at no cost to the CLEC.[33] Similarly, the *Federal Arbitration Order* rejected Verizon's attempts to "relieve Verizon of its obligation to deliver its originating traffic to the network of a co-carrier, and shift[] to the co-carrier Verizon's cost of facilities used to deliver its originating calls."[34] It also found that where an ILEC and CLEC jointly provide exchange access, the ILEC should assess any charges for its exchange access services on the relevant IXC, not the CLEC.[35] The FCC approached the carriers' interconnection responsibilities generally, and said nothing about excepting ISP-bound traffic from its rulings.

D. QWEST'S ARGUMENT IGNORES THE PLAIN LANGUAGE OF THE FCC RULES

In order to support its position, Qwest must also rewrite FCC Rules 51.709(b) and 51.701(b). FCC Rule 51.709(b) provides that:

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

In his testimony, Mr. Brotherson inexplicably modified the plain language of the rule by replacing the word "traffic" with the phrase "telecommunications traffic." LBB-T1 at 10. Although the FCC used the phrase "telecommunications traffic" in Rule 51.709(a), it did not use

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similarly refuse to pay Qwest compensation for ISP-bound traffic under Rule 51.709(b) (one of the rules that implements Section 251(b)(5)).

[33] *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006, Order Resolving Arbitration Issues, 5-10 (N.Y. P.S.C. May 24, 2002). (Attached as **EXHIBIT 2**.)

[34] *Federal Arbitration Order* at ¶ 46.

[35] *Federal Arbitration Order* at ¶ 177.

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that phrase in Rule 51.709(b). Tr. 80-81. As the Minnesota arbitrator found,[36] basic principles of statutory construction therefore provide that Qwest may not substitute the phrase "telecommunications traffic" for the word "traffic."[37]

Qwest engages in similar sleight-of-hand in its reading of Rule 51.701(b). Under the plain language of 51.701(b), the only traffic excluded from the definition of "telecommunications traffic" is "interstate or intrastate exchange access, information access, or exchange services for such access." Although claiming in a general fashion that ISP-bound traffic is "interstate," Qwest nowhere demonstrates that this traffic is "exchange access" or "exchange services for such access," and the FCC did not make any such conclusion in the *ISP Order on Remand*.[38] Indeed, it would be improper to treat ISP-bound traffic as exchange access given that the FCC has excluded ISP-bound traffic from payment of access charges.[39]

In the *ISP Order on Remand*, the FCC also deleted the word "local" from its reciprocal compensation rules in 51.701 *et seq*, repudiating what it had previously interpreted as a non-interstate/interstate distinction.[40] Thus, the character of traffic as "local" or "interstate" is no longer relevant to relative use calculations under 51.709(b), even under Qwest's construction of that Rule.[41] As explained above, following *WorldCom*, "telecommunications traffic" necessarily includes ISP-bound traffic. Therefore, even under Qwest's construction of applicable FCC rules, there is no basis to exclude ISP-bound traffic from the relative use calculation.

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36 *Minnesota RD* at 8 (*citing Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)).

37 *See also Russello v. United States*, 464 U.S. 16, 23 (1983).

38 *ISP Order on Remand* at ¶ 42, n.76. As explained above, traffic to ISPs cannot be "exchange access," and "information access" to ISPs is not excluded from reciprocal compensation obligations.

39 *See MTS and WATS Market Structure*, CC Docket 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988).

40 *ISP Order on Remand* at ¶ 34.

41 Nor can Qwest rely on the FCC's conclusion in the *ISP Order on Remand* that ISP-bound traffic is excluded from reciprocal compensation because it is "information access." That particular FCC conclusion was overturned by the D.C. Circuit in *WorldCom*, and thus is no longer good law. *WorldCom v FCC*, 288 F.3d at 434.

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E. EXCLUDING ISP-BOUND TRAFFIC FROM THE RELATIVE USE CALCULATION PERMITS QWEST TO ENGAGE IN IMPROPER ARBITRAGE

The FCC made it clear that the same policy concerns that led it to adopt a new intercarrier compensation regime to address claims of arbitrage do not alter carriers' interconnection obligations. First, as discussed above, the FCC explicitly stated that its ruling regarding reciprocal compensation for transport and termination of ISP-bound traffic does not alter other obligations under FCC rules "such as obligations to transport traffic to points of interconnection."[42]

Furthermore, Qwest's argument about the possibility for arbitrage is illogical. Because LECs were paying reciprocal compensation on a **per-minute** basis, the FCC was concerned that carriers had an incentive to seek out customers with high volumes of incoming traffic (such as ISPs) in order to increase those per-minute revenues.[43] However, the costs of the dedicated interconnection facilities that are at the core of the dispute here are not volume sensitive, either on a per minute or per call basis. WPH-1T at 21. Including ISP-bound traffic in the relative use calculation does not generate more revenue for Level 3—thus there is no "reciprocal compensation windfall." To the contrary, it creates a revenue windfall for Qwest.

Where Qwest delivers a voice call to its POI with Level 3, under Qwest's proposal, Qwest would collect only its end user's local service rate. But when it delivers an ISP-bound call to that same POI, despite the fact that Qwest holds out its local services as providing customers the capability to make both voice and dial-up ISP calls, Qwest would collect both its local service rate from its end user and DTT charges from Level 3. Thus Qwest's relative use calculation generates a revenue windfall for Qwest. Moreover, if, as Qwest alleges, it is permitted to make this distinction because it is providing "interstate access," and assuming that "interstate access" is no different than "interstate exchange access,"[44] the *Federal Arbitration*

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42 *ISP Order on Remand* at ¶ 78, fn. 149.
43 *Id*.
44 As explained above, such an assumption would be incorrect.

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Order makes clear that Qwest must charge the IXC (in this case the ISP) for such services, not Level 3.[45] Yet under its proposal, Qwest would be permitted to impose originating access charges on Level 3 (on a flat rate basis) that Qwest is prohibited from imposing on ISPs. WPH-5T at 11.

Further, Qwest's proposal effectively requires Level 3 to interconnect with Qwest at each end office in violation of FCC rules. As Mr. Brotherson stated, it is Qwest's position that Qwest has no obligation to establish a single POI per LATA for the exchange of ISP-bound traffic. Tr. at 85-8. Thus, Qwest seeks to prevent the economic efficiencies arising from a single POI per LATA by requiring Level 3 to bear additional costs on Qwest's side of the network for interconnection. There is no legal basis for such a position.

CONCLUSION

For the foregoing reasons, Level 3 urges the Commission to adopt the Interconnection Agreement language proposed by Level 3 for the determination of the parties' relative use of facilities on Qwest's side of the POI. ISP-bound traffic should be included in the relative use calculation, the relative use factor should be applied to apportion both recurring and non-recurring charges, and the factor should be applied prospectively only. Qwest's argument that ISP-bound traffic should be ignored for purposes of determining relative use of facilities on Qwest's network, on Qwest's side of the POI, relies on a misreading of applicable federal law and should be rejected. Requiring Qwest to pay for the cost of carrying calls, including ISP-bound calls, originated by Qwest customers is the only result that is supported by the FCC's rules and orders regarding the interconnection obligations of carriers.

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45 *Federal Arbitration Order* at ¶ 177.

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RESPECTFULLY SUBMITTED this 8th day of November, 2002.

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ATTORNEYS FOR LEVEL 3 COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing LEVEL 3 COMMUNICATIONS, LLC POST-HEARING BRIEF in WUTC Docket No. UT-023042, including diskette of same in Word and Adobe format, was sent via electronic, facsimile and ABC Legal Messenger on this 8th day of November, 2002, addressed to the following:

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And that a true and correct copy of same has been served via electronic, legal messenger and/or FedEx Priority Overnight on this 8th day of November, 2002, properly addressed to the following:

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DATED at Seattle, Washington this 8th day of November, 2002.

____
GRETCHEN ELIZABETH EOFF
INDUSTRY SPECIALIST, ATER WYNNE LLP

EXHIBIT 1

3-2500-15076-2
MPUC P5733,421/IC-02-1372

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications

ARBITRATOR'S RECOMMENDED DECISION

Administrative Law Judge Kathleen D. Sheehy arbitrated this matter on October 10, 2002. The record closed on October 21, 2002, upon receipt of the briefs.

The following persons appeared for the evidentiary hearing:

Mary Rose Hughes, Esq., Perkins Coie, 607 14th Street NW, Washington, DC 20005, and Joan C. Peterson, Esq., Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402, appeared for Qwest Corporation (Qwest).

Gregory Merz, Esq., Gray, Plant, Mooty, Mooty & Bennett, 33 South Sixth Street, Suite 3400, Minneapolis, Minnesota 55402, and Gregory Rogers, Esq., Level 3 Communications, LLC, 1025 El Dorado Boulevard, Broomfield, Colorado 80021, appeared for Level 3 Communications (Level 3).

Linda Jensen, Esq., Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared for the Department of Commerce (the Department).

Kevin O'Grady appeared for the staff of the Minnesota Public Utilities Commission (the Commission).

PROCEDURAL HISTORY

Level 3 is a local exchange carrier[1] under the Telecommunications Act of 1996 and is authorized by the Commission to provide local exchange service in

[1] The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. *See* 47 U.S.C. § 153(44).

Minnesota.[2] On March 6, 2002, Level 3 served Qwest with a request to negotiate an interconnection agreement. Having reached agreement on all but one issue, Level 3 requested arbitration of the remaining issue on August 13, 2002, the 160th day of negotiations. Qwest filed its response on September 9, 2002. On September 10, 2002, the Commission referred the matter to the Office of Administrative Hearings for arbitration by an Administrative Law Judge. The prehearing conference took place on September 13, 2002, and the evidentiary hearing took place on October 10, 2002.

Pursuant to the Commission's Order Assigning Arbitrator[3] and the Prehearing Order[4] in this case, the Arbitrator's Recommended Decision is due November 1, 2002; exceptions to the Arbitrator's Recommended Decision are due by November 11, 2002; and the final Commission decision is due December 6, 2002.

ISSUE

Should Level 3 be required to pay for trunks and facilities on the Qwest network used by Qwest to handle calls placed by its end users?

The arbitrator concludes that Level 3 is not responsible for the recurring costs of originating traffic on Qwest's side of the network, and that traffic originating on Qwest's network that is bound for Internet Service Providers (ISPs) should not be excluded from the relative-use calculation agreed to by the parties to determine the appropriate charges for interconnection facilities (direct trunk transport and entrance facilities). The language proposed by Level 3 should be incorporated into the parties' interconnection agreement.

Background and Positions of the Negotiating Parties

Under the proposed interconnection agreement, all traffic to be exchanged between Level 3 and Qwest is ISP-bound traffic.[5] This traffic is originated on Qwest's network by Qwest end users who call ISPs served by Level 3, and it travels over Qwest's local facilities, in the same manner as other local calls placed by Qwest customers, to the point of interconnection at Qwest's tandem switch in Minneapolis.[6] From there, Level 3 transports the traffic to its ISP customers. Qwest agrees that it is obligated to interconnect with Level 3 under the Telecommunications Act of 1996, even though all traffic sent to Level 3 from Qwest's network is bound for an ISP.[7]

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[2] *In the Matter of the Application of Level 3 Communications, LLC to Provide Local Exchange Telecommunications Services in the State of Minnesota*, MPUC Docket No. P-5733/NA-98-1905 (authority granted June 9, 1999).
[3] Order Assigning Arbitrator, September 10, 2002.
[4] Prehearing Order, September 16, 2002.
[5] Tr. at 38.
[6] Tr. at 24-25.
[7] Tr. at 27-28.

Level 3 and Qwest have agreed that the financial responsibility for interconnection facilities should be based upon each party's relative use of the facilities, and they have agreed that relative use will be determined by the amount of traffic that each party originates over those facilities.[8] Under the proposed interconnection agreement, Level 3 would order LIS trunks to various communities, and Level 3 would pay the nonrecurring charge necessary to "turn up" the trunks.[9] The relative use calculation would be applied to the monthly recurring charges billed to Level 3, against which Qwest would apply a credit for any traffic originated by Qwest that is terminated to Level 3.[10]

Qwest and Level 3 disagree about whether ISP-bound traffic should be included in this calculation of relative use. Qwest wishes to exclude it from the relative use calculation; Level 3 wishes to include it. Because Level 3 provides local exchange service exclusively to ISPs and will originate no traffic on its side of the network to be terminated on Qwest's side of the network, *exclusion* of ISP-bound traffic from the relative use calculation would mean that Qwest would apply no credit to the monthly bills and that Level 3 would be solely responsible for the recurring costs of the interconnection facilities that allow Qwest's customers to reach Level 3's network; conversely, *inclusion* of ISP-bound traffic in the calculation would mean that Qwest would be solely responsible for those recurring costs.

In support of its position, Qwest relies on 47 C.F.R. § 51.709(b), the FCC regulation concerning rate structure for transport and termination of telecommunications traffic, and the FCC's *ISP Remand Order,*[11] concerning reciprocal compensation for ISP-bound traffic. Because the FCC has excluded ISP-bound traffic from the reciprocal compensation obligations of 47 U.S.C. § 251(b)(5), Qwest contends that this traffic must also be excluded from relative use calculations that determine compensation for interconnection facilities.

Level 3 contends that § 51.709(b) is not applicable to this issue because it addresses only the financial responsibility for traffic originated by the interconnecting carrier and sent back to be terminated on Qwest's network (as opposed to responsibility for traffic that Qwest originates); it further contends that the reciprocal compensation issues addressed in the *ISP Remand Order* concern the rates for transport and termination of traffic that has passed the point of interconnection (as opposed to the costs of interconnection facilities on

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[8] The facilities at issue are interconnection trunks (which Qwest calls LIS trunks) that bring traffic from Qwest end users to Qwest's access tandem, and the entrance facility that connects Level 3 to the access tandem.
[9] Level 3 does not dispute the payment of this nonrecurring charge.
[10] Tr. at 23, 39-41; *see also* Ex. 2 at 9.
[11] 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*, CC Dkt. Nos. 96-98 & 99-68, FCC-01-131 (rel. Apr. 27, 2001), *remanded sub nom.*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (*ISP Remand Order*).

Qwest's side of the network). In support of its position that Qwest is responsible for the facilities on Qwest's side of the network, Level 3 relies on 47 C.F.R. § 51.703(b), which prohibits LECs from charging other carriers for traffic that originates on the LEC's network, and the FCC's order in *TSR Wireless.*[12]

Decision and Rationale

The positions advanced by the parties relate to two different obligations under the Telecommunications Act of 1996: (1) the obligation to interconnect with other carriers; and (2) the obligation to pay reciprocal compensation for the transport and termination of calls that originate on one carrier's network and terminate on another carrier's network.[13] Pursuant to 47 U.S.C. § 251(a)(1), a carrier has an obligation to interconnect directly or indirectly with the facilities of other telecommunications carriers. It is this obligation that ensures that the customers of one carrier will be able to make calls to, and receive calls from, the customers of another carrier. Pursuant to 47 U.S.C. § 251(b)(5), a carrier has an obligation to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." This obligation arises when the originating party and the terminating party are served by different carriers.

Under the Act, each carrier has different responsibilities for the costs associated with carrying these calls, depending on whether the carrier is originating or terminating the call. The originating carrier, which (as between these parties) is always Qwest, is obligated to carry the call to the point of interconnection between the two carriers' networks. Until relatively recently, it was very clear that 47 C.F.R. § 51.703(b) provided the general principle applicable to financial responsibility for originating traffic:

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

Thus, as a general rule, Qwest would be responsible for routing traffic from its customer to the point of interconnection with Level 3.

In *TSR Wireless v. U S WEST*, the FCC addressed the issue of responsibility for interconnection facilities in resolving a dispute between several incumbent LECs and five different one-way paging companies. In that case, the ILECs made the same argument that Qwest makes here, that because the traffic is one-way from ILEC end users to the paging companies, the paging companies

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[12] Memorandum Opinion and Order, *In the Matter of TSR Wireless, LLC, v. U S West Communications, Inc., 15 FCC Rcd at 1116 (June 21, 2000), aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (*TSR Wireless).*

[13] "Interconnection" is the linking of two networks for the mutual exchange of traffic. The FCC has determined that this term does not include the transport and termination of traffic. *See* 47 C.F.R. § 51.5.

should be solely responsible for the costs of interconnection. The FCC rejected this argument, determining first that § 51.703(b) prohibits not only charges for traffic itself, but also prohibits charges for the facilities used to deliver LEC-originated traffic:

> Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, [the *First Local Competition Order*] requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates.[14]

In addition, the FCC made clear that any costs an ILEC incurs to bring traffic to the point of interconnection are to be absorbed by the ILEC:

> The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. **Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.** This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[15]

The source of the relative use calculation contained in the proposed interconnection agreement between Qwest and Level 3 is 47 C.F.R. § 51.709(b). The regulation provides, in relevant part, as follows:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[16]

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[14] *TSR Wireless* at ¶ 25.
[15] *Id.* at ¶ 34 (emphasis added).
[16] 47 C.F.R. § 51.709(b).

By its express terms, this regulation applies to traffic that is originated by the interconnecting carrier and is sent back to the providing carrier, in this case Qwest, to be terminated on the providing carrier's network. It makes clear that an interconnecting carrier must pay proportionately for interconnection trunks *to the extent that it uses them to send traffic that it originates back to Qwest's side of the network*. When the interconnecting carrier sends no traffic back to Qwest, there is no FCC regulation that would obligate the interconnecting carrier to pay anything for the interconnection facilities. Rather, that cost would be considered, under § 51.703(b), to be the originating carrier's responsibility.

Once traffic is handed over from an ILEC to the interconnecting carrier at the point of interconnection, or from the interconnecting carrier to the ILEC, the rules concerning reciprocal compensation come into play. Reciprocal compensation is an arrangement between two carriers in which each carrier receives compensation from the other "for the transport and termination on each carrier's network facilities" of telecommunications traffic that originates on the network facilities of the other carrier.[17] These functions take place on the terminating, as opposed to the originating, side of the point of interconnection. Rates for transport and termination generally must be based on cost per minute of use, or may be handled by bill-and-keep arrangements (in which neither of the interconnecting carriers charges the other for the termination of traffic that originates on the other carrier's network).[18]

Qwest contends that the relative use rule, as amended by the FCC in its most recent decision concerning ISP-bound traffic, requires that ISP-bound traffic be excluded from the relative use calculation to determine financial responsibility for interconnection facilities. The FCC has struggled mightily with the issue of reciprocal compensation for ISP-bound traffic. Initially, the FCC excluded ISP calls from the reach of § 251(b)(5) on the theory that they were not "local." It reached this conclusion by applying its "end-to-end" jurisdictional analysis, traditionally employed in determining whether a call is jurisdictionally interstate or not. On appeal, the D.C. Circuit Court of Appeals held that the FCC had failed to explain why the jurisdictional analysis was relevant to deciding whether reciprocal compensation rules apply to ISP traffic under the 1996 Act. The D.C. Circuit vacated and remanded the order.[19]

[17] 47 C.F.R. § 51.701(e). "Transport" is the transmission and any necessary tandem switching of telecommunications traffic "from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party. *Id.* § 51.701(c). "Termination" is the switching of telecommunications traffic "at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." *Id.* § 51.701(d).

[18] *See generally* 47 C.F. R. § 51.705-711; § 51.713(a).

[19] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (*ISP Order*), *vacated and remanded sub. nom., Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5, 8 (D.C. Cir. 2000).

On remand, the FCC again reached the conclusion that the compensation between two LECs involved in delivering ISP-bound traffic should not be governed by the reciprocal compensation provisions of § 251(b)(5). This decision rested on its conclusion that ISP-bound traffic is "information access" under 47 U.S.C. § 251(g), which the FCC interpreted as a "carve-out" provision exempting this traffic from reciprocal compensation obligations under § 251(b).[20] Because the FCC determined that it had jurisdictional authority to regulate the interstate access services that LECs provide to connect callers with interstate carriers or ISPs, the FCC fashioned an interim compensation regime, involving rate caps and bill-and-keep, until further rulemaking was completed. In so doing, the Commission concluded that because it was now exercising its § 201 authority to determine intercarrier compensation for ISP-bound traffic, "state commissions will no longer have authority to address this issue."[21] The FCC then amended its definition of "telecommunications traffic" for purposes of the reciprocal compensation rules to eliminate the references to "local" traffic and to expressly exclude the interstate or intrastate exchange access, information access, or exchange services referenced in § 251(g).[22]

On appeal the D.C. Circuit held that § 251(g) provides no basis for the Commission's action, and remanded the case to the Commission for further proceedings.[23] In the Court's view, "[b]ecause we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures." The Court did not vacate the order because many of the petitioners favored the bill-and-keep regime set forth therein and because of the likelihood that the Commission would have authority to elect such a system, "(perhaps under §§ 251(b)(5) and 252(d)(B)(i))."[24] So although state commissions can no longer rely on the legal rationale that ISP traffic is "information access" that is exempt from the reciprocal compensation rules, they are left with the amended rules, including § 51.703(b), which now exclude "information access" from the definition of "telecommunications traffic."

Qwest argues that because the FCC has exempted ISP-bound traffic from reciprocal compensation obligations, the *ISP Remand Order* must also be read to require that this traffic be excluded from the relative use calculation to apportion costs of interconnection. The arbitrator cannot accept this conclusion. Nothing in the text of the *ISP Remand Order* suggests that it applies to any functions other than transport and termination on the terminating side of the point of interconnection. Furthermore, although § 709(a) uses the term "telecommunications traffic," the relative use rule (§ 709(b)) does not; it uses only

[20] *ISP Remand Order* at ¶¶ 33-34.
[21] *Id.* at ¶ 82. Qwest has not disputed the MPUC's jurisdiction to resolve this dispute over the costs of interconnection, although it maintains that the reciprocal compensation rules control the result.
[22] *See* 47 C.F.R. § 51.701(b).
[23] *WorldCom, Inc. v. FCC*, 288 F.3d 429.
[24] *Id.*

the term "traffic." Qwest contends that the term "traffic" in 709(b) should be read as "telecommunications traffic," which by definition excludes ISP-bound traffic. Based on basic principles of statutory construction, the ALJ does not believe the regulation should be read this way.[25]

Even if the word "telecommunications" were to be read into § 709(b), however, it does not mean that it requires the exclusion of ISP-bound traffic from the relative use calculation as proposed by Qwest. First, as noted above, the rule apportions the cost of interconnection trunking based on the amount of traffic originated by the interconnecting carrier, not based on the amount of traffic originated by the providing carrier. Qwest essentially wants to apply the relative use rule in reverse. Second, even if the word "telecommunications" were to be read into the section, it would simply mean that § 709(b) is inapplicable to transmission facilities dedicated to ISP-bound traffic, and in the absence of some sort of interim compensation regime comparable to that developed for reciprocal compensation the regulations would provide no answer to the question of how the recurring costs of interconnection facilities should be apportioned, if at all.

Qwest also contends that, even if § 709(b) does not control the issue, the policy reasons supporting the FCC's *ISP Remand Order* support the same result. The FCC was concerned about preventing regulatory arbitrage, meaning that interconnecting carriers should not have an economic incentive to seek out customers with high volumes of incoming traffic that will generate high reciprocal compensation payments from an ILEC.[26] Reciprocal compensation is paid on a per-minute basis; the costs of interconnection trunking and entrance facilities are charged on a flat-rated basis.[27] A carrier serving an ISP cannot generate more revenue from an ILEC by increasing traffic volume. Accordingly, the policy considerations applicable to reciprocal compensation have no place in apportioning the costs of interconnection.

Level 3 correctly maintains that the *ISP Remand Order* concerned what a terminating carrier might charge an originating carrier for transport and termination, and that it was not concerned with the originating carrier's obligation to take traffic over its own network to a point of interconnection. Specifically, Level 3 points to a footnote in the Order providing as follows:

> This interim regime affects only the intercarrier compensation (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under Part 51 rules, 47 C.F.R. Part

[25] With respect to defined terms, when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (citations omitted).
[26] *ISP Remand Order* at ¶¶ 68-70.
[27] Tr. at 76.

> 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.[28]

This footnote supports Level 3's argument that, despite the change in the rates for reciprocal compensation for ISP-bound traffic, the *ISP Remand Order* does not alter an ILEC's obligation under § 51.703(b) to transport this traffic to the point of interconnection.

Before the *ISP Remand Order*, the law was clear that Level 3's position on apportioning the costs of interconnection is correct. It is certainly not accurate to assert, as Qwest does, that the FCC "conclusively determined" in the *ISP Remand Order* that ISP-bound traffic is not properly included in the relative use calculation.[29] The Order does not refer to § 709(b) at all. Given the uncertainty in the application of § 703(b) as a result of the *ISP Remand Order's* amendment of the definition of telecommunications traffic, and the subsequent remand by the D.C. Circuit, it is not so clear that there is at this time any controlling authority on this issue.

The Arbitrator recommends that Level 3's contract language be accepted for several reasons. First, there is no suggestion in the text or the rationale of the *ISP Remand Order* that the FCC intended to change the rules concerning costs of interconnection, as opposed to reciprocal compensation for ISP-bound traffic. In addition, as agreed by the parties and as required by the *ISP Remand Order,* bill-and-keep applies to call termination and delivery costs, because Qwest and Level 3 exchanged no traffic before the date of the Order.[30] It is consistent with the *ISP Remand Order*, the D.C. Circuit's decision to remand in *WorldCom v. FCC*, and the *TSR Wireless Order* to apply what is essentially bill-and-keep to the costs of interconnection for ISP-bound traffic.[31] Furthermore, the Administrative Law Judge is not persuaded by the reasoning of other state commissions in Colorado, Washington, and Oregon that have accepted Qwest's arguments. The Arizona Commission's decision in favor of Level 3 is the only one cited that recognizes the distinction between interconnection and reciprocal compensation.

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[28] *ISP Remand Order* at ¶ 82 n. 149.

[29] Qwest's Post-hearing Brief at 3. Qwest further contends that the Hobbs Act precludes any challenge to or deviation from the FCC's requirements concerning relative use and ISP-bound traffic. *Id.* at 11-12. Level 3 is not challenging either the validity of or recommending any deviation from the FCC's regulations and orders on these issues in an "impermissible collateral attack."

[30] *ISP Remand Order* at ¶ 81.

[31] Both the FCC and Qwest have advocated moving toward bill-and-keep for all traffic exchanged by telecommunications carriers. *See, e.g., ISP Remand Order* at ¶ 83 (there is a strong possibility that the FCC's rulemaking proceeding may result in the adoption of a "full bill and keep regime" for ISP-bound traffic); Ex. 4 at Ex. 2 (Qwest has proposed to the FCC that originating carriers should be responsible for paying the cost of facilities to transport traffic to other carriers).

Finally, as illustrated by the Department during the hearing, an ISP served by Qwest that is connected to an end office in the Minneapolis-St. Paul local calling area has access to each of the end offices, and each of the Qwest customers served by each of those end offices, without bearing the cost of facilities that connect the end offices.[32] According to Qwest, the cost of those facilities is included in the local calling rate. In contrast, Level 3 would be required to bear the recurring cost of trunking to each end office in order for its ISP customers to provide service to end users served by those end offices.[33] Qwest's proposal would have an adverse competitive effect on Level 3 and potentially other CLECs, because it would make it more expensive for them to serve ISP customers than it would be for Qwest to serve ISP customers. There is nothing in the statute, the FCC's regulations, or the *ISP Remand Order* that would support this result.

RECOMMENDATION

The Arbitrator respectfully recommends that the Minnesota Public Utilities Commission order that the interconnection agreement between Qwest and Level 3 contain the terms recommended by Level 3 in this proceeding.

Dated this __ day of November, 2002

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KATHLEEN D. SHEEHY
Administrative Law Judge

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Shaddix & Associates

[32] Tr. at 61-62, 72; Ex. 3. Qwest calls these trunks "interoffice trunks within the local calling area," whereas it calls the trunks that Level 3 would use "LIS trunks."
[33] Tr. at 73.

EXHIBIT 2

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on May 22, 2002

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 02-C-0006 - Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.

ORDER RESOLVING ARBITRATION ISSUES

(Issued and Effective May 24, 2002)

BY THE COMMISSION:

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INTRODUCTION

Global NAPs, Inc. (Global or GNAPs) filed this petition for arbitration of interconnection rates, terms and conditions on January 3, 2002. Verizon New York Inc. (Verizon) filed its response on January 28, 2002. Parties have stipulated that the formal request for negotiation took place on July 28, 2001 and, therefore, this arbitration award must be issued no later than May 27, 2002, pursuant to §252(b)(4)(C) of the Telecommunications Act of 1996 (the 1996 Act). Following the exchange of discovery requests and responses, an on-the-record technical conference was held on April 4, 2002. Witnesses were heard and both cross examination and an exchange of subject matter expertise took place. A stenographic transcript of 196 pages was created and seven exhibits were placed in evidence. Following the technical conference, both parties stipulated to a briefing schedule and filed briefs.

PROCEDURAL MATTERS

Two threshold procedural matters are presented in this proceeding: motions to strike portions of the record, and an underlying controversy between the parties concerning exactly what issues have been formally placed in arbitration by petitioner Global, and are therefore properly before this Commission for arbitration. We will discuss and resolve these threshold issues before addressing the parties’ substantive concerns.

The Motions to Strike

Two motions to strike portions of the record were proffered by Global. The first concerned portions of the direct testimony of Verizon’s Witness Jonathan B. Smith, filed by Global on April 2, 2002. The second motion was made on the record during the Technical Conference, and concerned one and a half pages of Verizon testimony as to what is the definition of a true carrier.

1. The Parties' Positions

GNAPs seeks to strike Direct Testimony of Verizon’s witness Smith, which concerns GNAPs’ past conduct. In GNAPs’ view, this testimony is highly prejudicial. The testimony details a prior dispute between the parties concerning GNAPs billing of Verizon. In GNAPs view, this testimony is entirely irrelevant to the issues in this arbitration proceeding and, in addition, is prejudicial to its interests as the testimony introduces past charges of fraud and racketeering as evidence that an independent audit provision is essential in the interconnection agreement.

GNAPs’ oral motion to strike portions of the Direct Testimony of Verizon witness Terry Haynes, made at the Technical Conference, is also intended to avoid prejudice in this proceeding. Mr. Haynes’ testimony concerned the definition of a “true carrier,” and included his view that a data-only carrier, such as Global currently appears to be, is not a “true” carrier.

Verizon opposes both motions. As to the motion to strike Mr. Smith’s audit testimony, it argues that this Commission has long recognized that parties should include audit provisions in their interconnection agreements because they “afford each party reasonable assurances that the other will fulfill its obligations.”[1] The disputed portion of Mr. Smith’s

[1] Verizon relies upon our decision in Case No. 99-C-1389, Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Bell Atlantic-New York, Order Resolving Arbitration Issues (issued January 28, 2000) retaining mutual audit and examination terms, contained in the parties’ prior interconnection agreement.

testimony, Verizon argues, explains why such audit provisions are especially necessary in this case given what Verizon characterizes as the "troubled history" of GNAPs. Mr. Smith's testimony concerns this history, which includes pleadings in the discontinued litigation between the parties in several federal courts and is proffered as the basis for Verizon's position that the intercarrier agreement needs audit provisions.

As to the Haynes testimony, Verizon protests it is relevant and in no way prejudicial, noting that absent a jury the question of prejudice is, as a legal matter, academic.

2. Discussion and Conclusion

The GNAPs motions to strike are denied. The disputed Smith testimony contains background information concerning the previous financial relationships between the parties. This testimony may not be directly material to today's issues in this arbitration, but evidence of the existence of a past course of dealing between these parties may be relevant and should be admitted to compile a complete record. GNAPs' concerns as to the import of the testimony bear on the weight it should be accorded and will be considered to that extent.

The disputed Haynes testimony, while of limited probative value, is simply a statement of opinion and not particularly prejudicial to GNAPs.

The Definition of Issues Properly in Arbitration

The Global petition identified 11 enumerated unresolved issues in arbitration pursuant to the requirements of §252(b)(2).[2] Supplementing the petition on January 7, 2002 Global filed a redline draft of the intercarrier agreement containing language embodying its positions on the identified

[2] Petition, p. 9.

unresolved issues following negotiations between the parties and also copious other edits. Verizon added six new issues in its response, bringing the number of unresolved issues to 17. Of these two, issues six (dark fiber) and nine (performance standards), have been withdrawn and resolved, respectively. Not all issues have been argued or briefed by petitioner. Global requests the Commission not only resolve the disputed issues, but also affirmatively order the parties to implement the concomitant contract language it offers.

As a threshold matter, purported issues identified only by redlining in a draft contract will not be considered issues properly placed in arbitration pursuant to §252(b)(2) of the 1996 Act. To meet that standard, a party petitioning for arbitration must provide the State commission all relevant documentation concerning the unresolved issues, including the position of each of the parties with respect to those issues.[3] Accordingly, only issues briefed or argued on the record will be addressed in this order.

SPECIFIC ARBITRATION ISSUES

After considerable discussion, parties reached agreement or withdrew two of the issues initially proposed for arbitration. Accordingly, of the 17 issues, 15 remain for determination in this arbitration award. These have been consolidated below as appropriate. Unless indicated otherwise, where we adopt the position of one party, we also adopt the contract language proffered by that party.

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[3] 47 U.S.C. §252(b)(2)(A).

The first issue concerns whether Global may be required to physically interconnect with Verizon at more than one point on Verizon's existing network. Parties are in agreement that Global is entitled to establish a single point of interconnection within a LATA. However, parties disagree as to which party is responsible for the costs associated with transporting telecommunications traffic to the single point of interconnection.

1. The Parties' Positions

Global asserts each carrier should be responsible for transport on its own side of the point of interconnection because imposing costs only on the competitive local exchange carrier is contrary to federal law. Global argues that requiring a terminating carrier to pay for transport that is beyond the originating caller's local calling area, but still on the originating carrier's side of the point of interconnection, violates FCC policy on interconnection obligations.[4] In GNAPs' view, each party must transport traffic on its side of the point of interconnection, while the originating party must pay reciprocal compensation to the terminating party on local traffic.

Further, Global asserts, scale and network architecture differences between CLECs and the ILEC result in CLECs having higher average costs. The difference should be absorbed by Verizon, Global asserts, based upon the asymmetry in

[4] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (released August 6, 1996)(Local Competition Order), ¶1062.

interconnection obligations stemming from the 1996 Act.[5] Moreover, GNAPs views transport costs as de minimis, contending that distance is no longer a significant factor in transport costs.

In response to discussion at the Technical Conference as to the advisability of extending the FCC and PSC 3:1 inbound/outbound reciprocal compensation ratio to the allocation of transport costs, GNAPs urged that there should be no policy distinction between traffic directed to a carrier engaged in internet-related business and traffic directed to a carrier providing a mix of services. Such a distinction, GNAPs asserted, would prevent the development of niche markets, an important avenue for market entry.[6]

Verizon, in contrast, proposes contract language reflecting its view that, consistent with applicable law, Global may choose where to interconnect with the incumbent's existing network but that, because Global's network design choices affect Verizon's network, Global is responsible for costs resulting from these network design choices.

Verizon proffers a "virtual geographically relevant interconnection proposal," or VGRIP, which would allow GNAPs the flexibility to interconnect physically at only one point in a LATA. However, the Verizon proposal differentiates between the physical point of interconnection and the point on the network defining financial responsibility. Verizon views its proposal as a significant compromise, for parties would share additional incremental costs resulting from transport beyond the local calling area. GNAPS would bear responsibility for delivery of

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[5] Selwyn Testimony, pp. 17-39.

[6] Tr. 76-80.

this traffic from the financial interconnection point to its switch.

Verizon contends that GNAPs is solely responsible for its own network architecture and that the traffic transport costs are a function of that design. Transport costs are not de minimis, Verizon responds, otherwise GNAPs would not be trying to avoid them.

As an alternative to VGRIP, Verizon suggests the end office serving a customer could be appointed a virtual interconnection point, after which GNAPs must pay for traffic transport costs. In Verizon's view, these proposals promote efficient interconnection.

Another alternative supported by Verizon, one it considers more consistent with its tariffs on interconnection and reciprocal compensation than the GNAPs position, is to apply the 3:1 usage ratio to facilities that provide the usage. Verizon asserts the applicable data were available: a study in New York showed that the ratio of GNAPs inbound to outbound traffic is 1620:1.[7] Further, Verizon maintains, it is possible to measure traffic to determine if it is going to an internet service provider.

In contrast to the framework for transport cost allocation in the voice network, Verizon asserts that internet traffic is distinguishable from other local traffic as holding times are higher, raising the cost to carry a call. Global responds that its traffic sensitive costs are lower because an internet service provider has a more efficient trunk side connection.

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[7] Tr. 95, 163.

2. Discussion and Conclusions

The 1996 Act requires the incumbent to provide for interconnection "at any technically feasible point within the carrier's network"; that is "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection"; and "on rates, terms and conditions that are just, reasonable, and nondiscriminatory." [8]

As the parties agree, GNAPs clearly is entitled to choose a single point of interconnection in each LATA at any technically feasible point. Verizon concurs with this view. Accordingly, GNAPs is entitled to a single point of interconnection as technically feasible.[9]

As to the allocation of transport costs, we have previously considered and rejected proposals resembling VGRIP. Verizon has provided no convincing basis to treat cost allocation at this time and under these circumstances differently here than we have with respect to carriers offering voice as well as data service. As there is no legal[10] or

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[8] 47 U.S.C. §251(c)(2).

[9] *See* D'Amico Testimony, p. 4; Verizon Response, p. 9, Tr. 9-10. The Verizon contract language should be employed, however, as it appears a more accurate reflection of the law and this determination than the GNAPs language.

[10] GNAPs relies upon *MCI Telecommunication Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3rd Cir. 2001) for authority that a state commission may not adopt an incumbent local exchange carrier's requirement that a competitive local exchange carrier must interconnect at any particular point or at more than one point in a LATA. Although the Third Circuit noted that to the extent the competitor's "decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to" the competitor, GNAPs interprets that dicta to refer to the mode, rather than the geography, of interconnection, and our consideration here is to retain the existing allocation.

Id., at 518.

regulatory authority at this time requiring modification of the allocation of costs for transport to the point of interconnection, the GNAPs position is adopted.[11]

Verizon relies upon §252(d)(1) of the 1996 Act as requiring GNAPs to compensate it for additional costs associated with interconnection at points chosen by Global. As we have recently determined, the Verizon VGRIP proposal is a fundamental change, requiring the divergence of the physical point of interconnection from the financial point. Under this plan, GNAPs would pay to have traffic originated by Verizon customers on Verizon's network hauled to the physical point of interconnection. We rejected this Verizon proposal recently, while recognizing Verizon had raised a legitimate concern. We rejected the proposal on the basis that not only would the competitor "pay for the transport of traffic associated with virtual NXX calls, it would also pay for the transport of traffic associated with its facilities-based local exchange business."[12]

At issue in this arbitration is the significance, if any, of the fact that Global appears to be overwhelmingly, if not entirely, a carrier for the provision of internet service rather than a partially facilities-based voice competitor. We see no legal, policy or factual basis to draw such a distinction at this time. As we have recognized, competitor networks do not

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[11] Because GNAPs contract language on this issue is not clearly identified, however, no proffered contract language is adopted and GNAPs will be required to craft appropriate language to embody this decision.

[12] Case 01-C-0095, Arbitration to Establish an Interconnection Agreement between AT&T Communications of New York, Inc., et al., and Verizon New York Inc., Order Resolving Arbitration Issues (issued July 30, 2001), p. 27.

and need not mirror the incumbent's. Verizon has produced insufficient evidence or rationale for revisiting or modifying the policy established in our Competition II proceeding, the assumption that a carrier is responsible for the costs to carry calls on its own network. Moreover, the adoption of the Verizon VGRIP or a similar proposal, involving delineation of one point for physical interconnection and a separate point or point for financial interconnection, runs the risk of undermining the policy of allowing a single point of interconnection between carriers. Verizon has not adduced sufficient evidence for us to find that abandoning that policy is appropriate at this time.[13] Accordingly, we adopt the GNAPs position on this issue. Parties should craft commensurate contract language.[14]

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[13] The FCC is currently considering this issue. In its Notice of Proposed Rulemaking 01-132, it asks: "If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area?" CC Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking (released April 27, 2001), ¶113. In light of pending FCC action, we are disinclined to disturb our existing rule.

[14] In Case 00-C-0789 we required CLECs to pay for the transport of internet traffic on calls originated from the customers of independent telephone companies. However, in that case, Verizon was acting as an intermediate carrier of calls outside the independent local exchange carrier service territory, when the competitive local exchange carrier was not contesting customers with the independent telephone company. In this instance, GNAPs and Verizon do compete for customers' internet traffic.

The Definition of Local Calling Areas

At issue is whether a competitive local exchange carrier may define local calling areas different from Verizon's and, if so, whether the CLEC architecture affects Verizon's obligation to pay reciprocal compensation to the CLEC for terminating traffic. As a general matter, if a call is local, then the originating carrier typically must pay the terminating carrier reciprocal compensation for those calls on a LATA-wide basis.

1. The Parties' Positions

In petitioner's view, CLECs should have the ability to set local calling areas as they see fit.[15] GNAPs argues that the difference between local and toll calls is artificial, and that distance-sensitive pricing, used by Verizon, is outmoded and does not reflect its true costs.

GNAPs relies upon our 1999 adoption of the concept of wide-area rate centers,[16] asserting that geographically large rate centers are a forward-thinking business model that does not merely replicate the ILEC's network design. Moreover, GNAPs asserts, Verizon's contract language is intended to extend retail concepts of toll and local into wholesale services, thus forcing GNAPs into uneconomic and inefficient interconnection architecture choices and prohibiting GNAPs from offering LATA-wide local calling.

Verizon responds that GNAPs is entitled to establish statewide or LATA-wide local calling areas for its customers if it chooses. In Verizon's view, intercarrier compensation should be determined irrespective of the retail calling options GNAPs

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[15] Selwyn Testimony, pp.46-65; Petition, pp. 16-19.

[16] Case 98-C-0689, Omnibus Proceeding to Investigate Telephone Numbering Resources, Order Instituting Wide Area Rate Centers and Number Pooling (issued December 2, 1999).

offers its customers. Verizon also suggests it may be entitled to access charges as a result of GNAPs' architecture choices.

Verizon notes that the traffic between Verizon and GNAPs is almost completely one way (from Verizon customers to GNAPs’ switch). In its view, the Commission established LATA-wide reciprocal compensation between carriers. If GNAPs language is adopted, Verizon could be required to transport all traffic as local, thus losing access charge compensation as well as having to pay reciprocal compensation to GNAPs.

2. <u>Discussion and Conclusion</u>

We see little necessity to arbitrate this conceptual dispute. It has long been the policy that each carrier defines its local calling area and that carrier access charges only apply to interLATA traffic; to all other calls reciprocal compensation applies. Verizon's position most closely mirrors these policies. We adopt Verizon’s position. With the use of a single point of interconnection and virtual NXXs, which we have upheld in the past, Verizon hauls GNAPs traffic long distances. Allowing GNAPs to establish geographically large local dialing areas, which also have the effect of eliminating Verizon’s entitlement to access charges and increase its obligation to pay reciprocal compensation, could amount to a Verizon subsidy of GNAPs operations.

<u>The Use of Virtual NXXs</u>

Virtual NXX is a technology enabling competitors to establish numbers perceived by and billed to customers as local calls, regardless of the actual location of the calling center. This virtual local calling is of particular importance for carriers serving internet providers.

1. The Parties' Positions

GNAPs asserts that linking NXXs to physical location has been superseded by technology. It views the use of virtual NXXs as necessary to allow CLECs to provide competitive offerings. In Global's view, virtual NXXs are analogous to Verizon's foreign exchange or FX product.[17]

GNAPs also asserts that virtual NXXs are equivalent to Verizon's 500 number product which allows local dialing access to Verizon's affiliated internet service provider. As to cost, Global states that the local/toll cost distinctions are not supported by distance-based cost differences. The use of virtual NXXs is innovative and has the potential to allow CLECs to define larger or smaller calling areas to meet consumers' interests.

Verizon asserts that the establishment of virtual NXXs has significant policy ramifications which affect more than the two parties to this arbitration. In its view, the Commission should address these issues in an industry-wide forum where more carriers are participants.[18] Verizon fears that GNAPs proposes NXX arbitrage, entailing several problems: it would eliminate the local/toll distinction; it would render meaningless the Commission's previous decision to defer implementation of wide area rate centers; it would increase number shortages (thus frustrating number conservation); and it would confuse customers.

Verizon rejects the analogy to FX service, asserting that if the use of virtual NXXs is allowed, GNAPs should have to pay Verizon the access charges that would otherwise apply to the

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[17] Petition, pp. 21-23; Tr. 148-152, 192-195.

[18] Moreover, Verizon asserts that the contract revisions GNAPs has proposed do not address GNAPs using NXXs associated with one rate center to direct calls to another location outside the rate center.

calls. Verizon avers the use of virtual NXXs subverts the proper rating of calls, and that this Commission's rates for calls have long been used to support the public policy goal of widespread availability of affordable telephone service. Verizon foresees it will be denied compensation for transporting calls, a windfall for GNAPs, and fears it would be unable to recover these costs.

Verizon's alternative is its offer of hubbing services which allow internet service providers to offer local numbers to end users without requiring Verizon to haul traffic to distant points of interconnection for free. This alternative, according to Verizon, allows multiple internet service providers, not only Verizon's internet affiliate, to offer free local dialing.[19]

Verizon also expresses concern that use of virtual NXXs, if volumes grow, could eliminate interLATA toll, the revenue of which is built into Verizon rates. Finally, Verizon warns about virtual NXX assignment exhausting available numbering resources.

2. Discussion and Conclusion

We adopt the position of Global on this issue. The availability of virtual NXXs at this time appears to be an efficient method to ensure that customers in all localities in the state have competitive choices for access to local calling to the internet. Evidence in this proceeding indicates that, while Verizon maintains a local call capability to its affiliated internet service provider in virtually all parts of New York State, there are many areas, principally rural, where no alternative or competitive option was offered. Allowing GNAPs to adopt virtual NXXs is a reasonable method to address

[19] Tr. 87-90, 161-168, 169-174, 185-191.

this lack of customer competitive opportunities.[20] Finally, in light of the implementation of thousand number block pooling, the Verizon argument as to the impact of virtual NXX assignment on number conservation is not persuasive.[21]

Availability of Two-Way and One-Way Trunking and Definition of Trunk-Side

GNAPs seeks authority to request Verizon to provide two-way trunking at GNAPs' sole discretion. Also, because of GNAPs proposed changes to provisions governing the availability of one-way trunking as well as the term "trunk-side," Verizon requested these two related issues be placed in arbitration.

1. The Parties' Positions

According to GNAPs, competitors should have the ability to employ two-way trunking at their own discretion, and GNAPs should therefore receive two-way trunks from Verizon on request. In contrast, Verizon's contract language states that two-way trunks will be installed only by mutual agreement between parties, and only where feasible. GNAPs also argues, generally, that the other related contract changes it proposes support a more equitable means of offering two-way trunking. GNAPs nowhere addresses the issues identified by Verizon related to one-way trunking and the redefinition of "trunk-side".

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[20] Although we determined with respect to independent local exchange carriers in Case 00-C-0789, Omnibus Proceeding on Interconnection Arrangements, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000), that similar calls were local for the purpose of requiring payment of carrier access charges, our policy remains that with respect to interconnection with the incumbent local exchange carrier a carrier is responsible for traffic transported from the service territory of another carrier to its facilities used to provide customer service.

[21] Case No. 00-C-0689, Number Pooling, Order Instituting State-Wide Number Pooling (issued March 17, 2000).

Verizon asserts that CLECs are indeed entitled to the trunking of their choice, available in Verizon’s tariff No. 8. Verizon reiterates it is not attempting to inappropriately limit access to trunks, but maintains that because two-way trunks carry traffic from both carriers, the parties should jointly determine capacity requirements for initial construction.

In Verizon’s view, GNAPs wishes to use trunk forecasts to reserve facilities without placing service orders. It asserts GNAPs attempts to require a higher grade of trunking service than that Verizon provides to itself and other CLECs, and to prohibit Verizon from managing its own network resources through the disconnection of underutilized trunks. In addition, Verizon fears GNAPs is attempting to renegotiate—in an inappropriate forum--its compensation to Verizon for both recurring and non-recurring costs associated with trunk provisioning.

2. Discussion and Conclusion

Verizon’s position is adopted. Two-way and one-way trunks are available pursuant to Verizon’s PSC No. 8 tariff. This tariff adequately provides for the needs of competitors without compromising network reliability and efficiency. Should the parties reach an agreement on terms and conditions at variance with the tariff, we would approve such a divergence. However, we are unwilling to compel Verizon to diverge from the terms of its tariff absent good cause. Verizon’s definition of “trunk-side” also is consistent with the tariff and is adopted.

Transmission and Routing of Exchange Access Traffic

At issue is the ordering process to be used by Global for access toll connecting trunk groups. These facilities are provided by Verizon pursuant to its access tariffs.

1. The Parties' Positions

Verizon questions GNAPs' "redlines" in Agreement Sec. 9.2. GNAPs does not address this issue in its petition, testimony, or brief; however, because Verizon in its response requested this issue be arbitrated, we will analyze and decide it here.[22] According to Verizon, GNAPs' contract additions and removals (§§9.2.1, 9.2.2, 9.2.3 and 9.2.) appear to violate the routing and subtending procedures found in the Local Exchange Routing Guide (LERG). In its view, GNAPs should be required to purchase access trunks through Verizon's access tariff.

2. Discussion and Conclusion

We adopt Verizon's position. The import of GNAPs' proposal is unclear; GNAPs' changes may indeed cause severe difficulties for other carriers attempting to route calls, and it appears to undermine LERG guidelines. Verizon's contract language will prevent network problems, including dropped or misdirected calls.

Insurance Levels

At issue is whether the levels of insurance Verizon requires of GNAPs are excessive, so as to constitute an anticompetitive barrier to entry. Verizon seeks $2 million in general liability, $10 million in excess liability, $2 million in commercial motor vehicle, and $2 million workers compensation.

1. The Parties' Positions

GNAPs counters with lower proposed insurance levels: $1 million in general liability; either $1 million or $10 million in excess liability (the amount varied in GNAPs' submissions); statutory requirements for vehicle insurance; and

[22] Verizon Response, pp.99-100.

$1 million workers compensation. In GNAPs' view, these alternative levels are reasonable and adequate. GNAPs argues that higher levels of insurance are a barrier to market entry by CLECs. It points out that Verizon can self-insure, which Global views as an unfair advantage.

GNAPs submitted contract language eliminating language which required Verizon to be named an additional insured.

Verizon responds that GNAPs' proposed levels are inadequate to indemnify it in the event of damage to Verizon's network or other tort liability. It adds that Verizon's proposed levels are equivalent to those required of other CLECs. It notes that Verizon's proposed levels are reasonable under current FCC authority which allows for levels at up to one standard deviation above the industry average (estimated at $21.15 million).[23]

2. Discussion and Conclusion

We adopt Verizon's position. The insurance levels proposed by Verizon are reasonable in light of the potential for network damage or tort liability when network interconnection or physical collocation takes place. These are the same levels of insurance required of other CLECs. Under opt-in provisions of interconnection agreements, if the levels are lowered here, any CLEC could take advantage of the lowered levels. Moreover, listing the other party to a contract as an additional insured is common practice to avoid fingerpointing among insurers in the event of a claim. The fact that Verizon has sufficient assets to self-insure within limits does not in itself create a competitive advantage, in light of Verizon's substantial exposure as the network provider.

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[23] FCC Second Report and Order in the Collocation Docket, (released June 13, 1997), ¶346.

The Audit Provisions of the Agreement

1. The Parties' Positions

GNAPs protests that the audit language proposed by Verizon, allowing either party to audit the other party's records, is overly broad and would allow Verizon access to all GNAPs records. In GNAPs' view, it is unreasonable for Verizon to be able to audit a competitor's records which may contain competitively sensitive information.

GNAPs sees no need for audit language or a process in the contract. In its view, much of the relevant data (call patterns and traffic flow) is already in Verizon's records.

Verizon responds that its general audit language is narrowly tailored to limit auditable material to that relating to billing records. Additional audit language relates to GNAPs' access to and use of Verizon's proprietary OSS information as well as traffic information. Verizon asserts its access to GNAPs data is for specific purposes only, and that competitive harm would be avoided by exclusive disclosure to third party auditors required to protect such information as confidential.

The general terms and conditions for invoking the audit process Verizon proposes limit audits to once a year, unless a previous audit found a discrepancy of greater than $1 million. The auditing party pays audit expenses.

2. Discussion and Conclusion

We adopt the Verizon position. Audit procedures are, of course, standard language in contracts of this type. GNAPs appears to have misconstrued the breadth of the audit provisions; reasonable protections are built in.

Verizon Collocation at GNAPs Facilities

This is a supplemental issue raised by Verizon.[24] Verizon notes that it is required to provide various types of interconnection to GNAPs; it asserts the reverse should also be true. Such a provision would allow Verizon more flexibility to establish efficient interconnection. Verizon asserts that if it is not allowed to collocate on GNAPs' network, a carrier that GNAPs has allowed to collocate must carry the traffic and could charge Verizon exorbitant rates.

GNAPs does not appear to have addressed this issue.

While Verizon should not be able to be use this issue to avoid allowing GNAPs the single point of interconnection, consistent with that requirement it appears reasonable to require GNAPs to allow collocation, subject to the established restrictions as to technical feasibility and space. To that extent, Verizon's position is adopted.

Express Renegotiation on Reciprocal Compensation

GNAPS seeks an express and specific change of law provision concerning reciprocal compensation, in the event that the United States Circuit Court of Appeals for the District of Columbia Circuit modifies the FCC's recent Internet Service Provider Remand Order. In Verizon's view, its boilerplate general change in law language provides for that contingency. Additionally, Verizon has questioned GNAPs' changes to numerous provisions in the contract that Verizon asserts are unrelated to any change of law resulting from any outcome of the appeal of the FCC's order.

GNAPs and Verizon appear to agree that a judicial nullification or revision of the FCC Internet Service Provider

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[24] Verizon Response, pp. 93-94; D'Amico/Albert Testimony, pp. 27-28.

Remand Order may require renegotiation of the affected provisions of their interconnection agreement. In light of the centrality of this issue to GNAPs and the unfolding appellate interventions,[25] we see no reason why the parties should not provide specifically for that eventuality in the interconnection agreement and therefore we adopt GNAPs' position, and leave it to the parties to craft appropriate language, consistent with our award on the general change of law provisions in the agreement.

GNAPs' proposed edits to various definitions, which GNAPs indicates are related to this issue and to which Verizon objects, are either ambiguous or inconsistent with existing definitions of toll service. Thus, these proposed contract changes are not adopted.

Implementation of Changes in Law

GNAPs seeks a provision in the interconnection agreement that would require Verizon to delay the effect of a change in law until all appeals are exhausted, whether or not the change in law is subject to a judicial or regulatory stay. GNAPs' proposal would maintain the status quo regardless of a court mandate. Verizon proposes to give effect to all changes in law.

Whether to maintain the status quo following a judicial, legislative, or regulatory decision is the prerogative of those decisionmakers. While parties may voluntarily agree to a different protocol with respect to changes of law, we see no basis to require a nonconforming contract provision that might produce uncertainty. We see no reason to modify standard change of law provisions and therefore we adopt Verizon's position.

A related issue is whether Verizon may discontinue a service only in accord with federal or state regulations.

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[25] See, e.g., WorldCom v. FCC, _F.3d_ (D.C. Circuit May 3, 2002).

Verizon seeks discontinuation of service contingent on 30 days written notice unless applicable legal provisions require a longer period. GNAPs is silent on this issue.

This issue and related issues will be addressed in our pending proceeding clarifying migration and exit requirements.[26] Accordingly, to the extent Verizon's position is consistent with state and federal law it is adopted, with the proviso that this interconnection agreement will be subject to the outcome of that proceeding.

GNAPs Entitlement to Next Generation Technology

GNAPs proposes that the contract provide it with "nondiscriminatory access to all next generation technology for the purpose of providing telecommunications services." Verizon objects because the term is undefined and inconsistent with applicable law. Verizon also argues that it is required only to provide CLECs with reasonable, nondiscriminatory interconnection to its network and to items that have been determined to be unbundled network elements.

We adopt Verizon's position. The Global provision regarding next generation technology is overly broad. Adoption of GNAPs' proposed language could have the effect of forcing Verizon to deploy new technology that it would otherwise have no intention of incorporating in its network. To the extent next generation technology is deployed by Verizon in its network, under applicable law GNAPs would be entitled access to such technology on the same basis as other CLECs.

Incorporation of Tariffs by Reference

GNAPs asserts the interconnection agreement should contain all terms governing the dealings of the parties and that Verizon's ability to unilaterally amend a tariff will defeat that objective. Verizon points to the language in §1.2, General

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[26] Case 00-C-0188, Migration of Customers between Local Carriers, Notice Clarifying Exit Requirements (issued May 10, 2002).

Terms and Conditions, which provides that the agreement governs in the event there is a conflict with a tariff. In addition, Verizon disputes the unilateral amendment characterization. Verizon also points out that were the agreement to be amended every time a tariff price changed, the process would be multiplied by all CLECs opting into the GNAPs/Verizon interconnection agreement.

The interplay between tariffs and interconnection agreements, while without guarantees, establishes nondiscriminatory pricing consistent with §251 of the 1996 Act. Accordingly, Verizon's position is adopted.

CONCLUSION

The GNAPs motions to strike are denied as discussed herein. The issues properly presented for arbitration in the GNAPs petition and the Verizon response are decided as discussed herein.

The Commission orders:

1. The issues contained in the GNAPs petition for arbitration and the Verizon New York Inc. response are resolved as stated in this Order.

2. The parties are expected to complete the preparation of an interconnection agreement employing language adopted herein or language consistent with the determinations herein.

3. The parties are expected to file a completed and executed interconnection agreement, in compliance with the terms of this Arbitration Award, within 30 days of the issuance of this Order.

4. This proceeding is continued.

By the Commission,

JANET HAND DEIXLER
Secretary