BEFORE THE WASHINGTON UTILITIES AND TRANSPORATION COMMISSION

In the Matter of the Petition of the WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION For Declaratory Ruling on the Use of Virtual NPA/NXX Calling Patterns	))))))	DOCKET NO. UT-020667

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC ("Level 3"), pursuant to the June 7, 2002 Notice issued in the above-captioned docket, files these comments on the Washington Independent Telephone Association ("WITA") Petition for Declaratory Order. For the reasons specified herein, the Washington Utilities and Transportation Commission ("Commission") should decline to issue the declaratory order requested by WITA.

I. The WITA Petition Does Not Satisfy the Requirements for a Declaratory Order and Level 3 Objects to Determination of This Matter Through a Declaratory Order Proceeding

Washington law, RCW 34.05.240, provides that any person may petition the Commission for a declaratory order with respect to "the applicability to specified circumstances of a rule, order, or statute enforceable by the [Commission]." WITA has invoked its right to request such a ruling. However, it has failed to specify the "rule, order, or statute" it wishes the Commission to interpret. Therefore, WITA's petition fails to meet the minimum requirements of RCW 34.05.240 and must be dismissed.

Even if WITA corrects this deficiency, the law also provides that a declaratory order may not be appropriate in certain circumstances:

> An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.[1]

As WITA's petition makes clear, because Level 3 seeks interconnection with WITA member companies and because Level 3 intends to provide foreign exchange-type ("FX-type") or virtual NXX-like ("VNXX-like") service in the State of Washington,[2] the declarations WITA seeks would affect the exchange of traffic and intercarrier compensation arrangements between Level 3 and WITA's member companies. Therefore, Level 3 is a "necessary party" within the meaning of RCW 34.05.240. Any determination that the Commission makes in this proceeding concerning intercarrier compensation for VNXX-like traffic could prejudice Level 3 by altering the intercarrier compensation arrangements for VNXX-like traffic. Level 3 therefore objects to the use of a declaratory order proceeding to determine its rights in this matter. As such, the Commission must dismiss WITA's petition.[3]

In addition, the broad and expansive declarations WITA seeks would have a profound impact on the entire telecommunications industry. For instance, WITA seeks a broad declaration concerning the assignment of numbering resources that could affect all LECs applying for numbers in Washington. Therefore, all local exchange carriers ("LECs") (both incumbent and competitive) are necessary parties to this proceeding, and the Commission may not issue a

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1 RCW 34.05.240(7).

2 *See* WITA Petition at 6.

3 *See, e.g., AT&T Communications of the Pacific Northwest, Inc.*, Docket No. UT-961012, Memorandum (Oct. 30, 1996) (dismissing AT&T petition for declaratory order that Ellensburg could route intraLATA toll traffic as directed by its CENTREX subscriber to any toll provider because US WEST "stated its role as a necessary party whose rights would be substantially prejudiced by entry of a declaratory order" and US WEST refused to consent to determination of the matter by declaratory order).

declaratory order without written consent from all such carriers.[4] The Commission should therefore determine that it will not issue the declaratory order that WITA seeks.

II. A Declaratory Order Is Not the Appropriate Method of Resolving the Issues WITA Raises

Even if the Commission were to determine that Level 3 is not a necessary party, it should refuse to issue a declaratory order. WAC 480-09-230 provides that the Commission may notify the petitioner that no declaratory order will be issued, either before or after a hearing is held. The Commission has discretion to refuse WITA's request, and it should exercise that discretion here. For the reasons specified herein, Level 3 urges the Commission to notify WITA that it will not issue a declaratory order to resolve the issues raised by WITA.

The WITA petition seeks sweeping Commission declarations that would affect (1) foreign exchange, foreign exchange-like and VNXX-like services being provided today by both incumbent LECs ("ILECs") and competitive LECs ("CLECs"); (2) intercarrier compensation for VNXX-like voice traffic; (3) intercarrier compensation for VNXX-like ISP-bound traffic (over which the Commission lacks jurisdiction); (4) number assignment practices (over which the Commission lacks jurisdiction except to the extent such authority may have been expressly delegated by the Federal Communications Commission); and (5) number portability technical standards (over which the Commission lacks jurisdiction). As the Commission has recognized, a declaratory order proceeding "is not the most opportune vehicle for obtaining a complete record, resolving issues or creating solutions for vexing problems."[5] To the extent that the Commission

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[4] *See, e.g., Cascade Natural Gas Corporation*, Docket No. UG-001119, 1st Suppl. Order (Jan. 19, 2001) ("Under RCW 34.05.240(7), before entering a declaratory order that would substantially prejudice the rights of any person who would be a necessary party, the Commission would need to receive that person's written consent.").

[5] *US West Communications, Inc.*, Docket No. UT-910785, Order (Oct. 17, 1991) (granting request for declaratory order on the limited issue and limited facts presented concerning interpretation of a tariff).

has jurisdiction over the issues raised by WITA, the appropriate forum to determine whether changes in Commission rules or policies are necessary is a rulemaking or interconnection arbitration, not a declaratory order or certification proceeding.

In the alternative, if the Commission believes that a declaratory order may be appropriate to resolve some of the issues raised by WITA, Level 3 urges the Commission to schedule a hearing on the WITA petition. Any such hearing should include a prehearing conference that gives all interested parties the opportunity to frame the issues that will be presented at the hearing. WITA's petition presents a one-sided view of VNXX-like service issues and may not raise all of the issues that the Commission should consider. Further, factual issues such as interconnection methods, the costs of delivering VNXX-like traffic to other carriers, the billing system changes that would need to be implemented to re-rate calls to VNXX-like customers, and the technical feasibility of number portability when VNXX-like numbers are assigned to customers should be presented at a hearing with the opportunity for cross examination.

The declarations WITA requests could have far-reaching effects on ILECs, CLECs, and customers of VNXX-like services – including many of the Internet Service Providers ("ISPs") upon whom Washington consumers rely to reach the Internet today. The Commission should examine these issues in a careful and considered manner. The best way to examine these issues is through a rulemaking. Absent a rulemaking, the Commission must, at a minimum, hold a hearing on WITA's petition.

III. The Commission Should Deny WITA's Request for Declaratory Relief Concerning VNXX-like Service and Intercarrier Compensation for Such Services

If, notwithstanding the arguments set forth above, the Commission were to consider the merits of the WITA petition, it should find that the declarations sought by WITA are not consistent with the law. WITA asks the Commission to find that VNXX-like services are not in

the public interest and to prohibit their use. As Level 3 shows below, VNXX-like services are in the public interest and if the Commission were to prohibit their use, it would also have to prohibit the use of ILEC FX services. Implicitly recognizing this fact, WITA asks for alternative relief, requesting that the Commission classify VNXX-like services as interexchange services subject to access charges. The Commission should also deny this request. First, to the extent calls to customers of VNXX-like services are ISPs, the Commission does not have jurisdiction to set intercarrier compensation for these ISP-bound calls. Second, to the extent calls to VNXX customers are voice calls, there are many practical and policy reasons to treat such traffic as local traffic for intercarrier compensation purposes.

A. VNXX-Like Services Are In Use in the State of Washington and Their Continued Use Furthers the Public Interest

As WITA alleges (without factual support),[6] Level 3 proposes to assign NXX codes to customers who wish to establish a virtual local presence apart from their physical presence. This service offering is the functional equivalent of the ILECs' FX service. Washington law does not prohibit this practice. To the contrary, other local exchange carriers' tariffs on file with the Commission demonstrate that, through Foreign Exchange services, the assignment of NXX codes to customers who have no physical presence in the local calling area associated with the NXX code is a common practice that is permitted under Washington law.[7]

The Commission should not limit the ability of new entrants to provide a service that competes with an ILEC service historically offered on a monopoly basis. Nor should the Commission limit the new entrant's ability to compete by dictating the details of how a particular

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[6] WITA did not attach any of the Level 3 materials provided to WITA members to support its allegations.

[7] *See, e.g.*, Qwest Corporation, *Exchange and Network Services Tariff*, Section 5.1.4, Original Sheet 21 – Original Sheet 27 (May 20, 2002); Verizon NorthWest, Inc., *General and Local Exchange Tariff*, Section 10, First Revised Sheet 20 – First Revised Sheet 28.10 (Dec. 19, 2001).

service is offered. Foreign Exchange service has always provided a customer with a telephone number for a rate center outside the rate center in which the customer's premises are physically located. Level 3's service is the functional equivalent of this traditional ILEC service.

Although the Washington Commission has not had the opportunity to determine that VNXX-like traffic and FX services are equivalent services, this issue has been litigated in other states. As the Kentucky Commission recently noted during an interconnection arbitration:

> Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service.[8]

Similarly, neither the Michigan Public Service Commission nor the North Carolina Utilities Commission even refer to "virtual NXX" in their interconnection decisions, but instead identify the service provided by the ILEC and the equivalent service provided by the CLEC as "FX service."[9] In Florida, Public Service Commission Staff reported to the Commission as follows:

> [CLEC] witness Selwyn [states] that the practice of terminating a call in an exchange that is different than the exchange to which the NPA/NXX is assigned is nothing new. He contends that ILECs have been providing this service for decades through their [Foreign Exchange] service. Staff agrees. Staff believes that virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years.[10]

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[8] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC March 14, 2001) at 7.

[9] *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sep. 7, 2001); *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. P-474, Sub 10, Order Ruling on Objections and Requiring the Filing of the Composite Agreement (NCUC, Aug. 2, 2001).

[10] Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Analysis (Fl. P.S.C. Nov. 21, 2001)

Business customers prefer FX and VNXX-like service provided by ILECs and CLECs because it permits them to serve more of their customers without establishing a physical presence in every local calling area. By making FX and VNXX-like traffic subject to access charges, WITA may encourage inefficient network deployment or drive CLECs away from serving these businesses altogether.

Under a VNXX arrangement, the terminating carrier routes the call to the customer's single physical location. There are a number of reasons why a single location may be used by the customer. For example, a single central location is easier for both the LEC and the customer to maintain and reduces the requirement to locate, prepare and maintain numerous remote locations. By implementing this more efficient operation on behalf of customers, under WITA's proposal, a CLEC would not be compensated for the termination function it provides for the ILEC, and instead would be required to compensate the ILEC for originating the call. At the same time, however, if the customer established a physical presence in that local calling area, and the CLEC transported the call from its point of interconnection ("POI") with the ILEC back to the local calling area of the ILEC customer initiating the call, the CLEC would be entitled to reciprocal compensation for that call. By being less efficient in providing service to consumers, and by requiring consumers to incur greater costs, the CLEC would receive compensation from the ILEC. In other words, rather than risk having to compensate the ILEC for the CLEC's termination of VNXX traffic originated by the ILEC's customers, a CLEC and its customer may deploy facilities to a local calling area to convert a virtual presence into a physical presence. Such facilities would be deployed solely to satisfy a physical presence requirement, would generate greater costs for the customer, and would serve no useful network function. This arrangement would only make economic sense for the serving carrier if the cost of deploying

transport and establishing remote customer locations is less than the cost of the CLEC switching that would otherwise go uncompensated and access charges that would be paid to the ILEC. (The arrangement would likely make no economic sense from the customer's perspective, except to the extent that the customer was certain it could generate enough business from a local presence to justify the investment of renting office space and/or placing equipment to receive calls in every local calling area.) Alternatively, if the cost of deploying facilities in order to establish physical presences was prohibitive, carriers would be deterred from taking the steps needed to serve these business customers, and the customers would in turn be able to serve fewer locations where end users could reach them by making a local call.

If carriers are not compensated for the terminating switching function they provide to other LECs through VNXX-like arrangements, some carriers may steer clear of providing services to VNXX customers and be forced to discontinue VNXX service altogether. As a result, customers in Washington that connect to businesses that subscribe to VNXX service may no longer be able to make a local call to reach those business. This problem would be compounded if the Commission prohibited CLEC VNXX service but not ILEC FX service. Any such finding would permit ILECs to drive CLECs out of the market for such customers, by increasing CLECs' costs, while at the same time permitting ILECs to retain their monopoly by providing the functionally equivalent service to the CLECs' former customers. These consequences are contrary to public policy: either the ILEC will be able to monopolize the market for VNXX-like service through its products, or businesses' customers will have to make toll calls to reach businesses served by other carriers. The Commission should avoid this anticompetitive and unlawful result by denying WITA's request for declaratory ruling.

B. Interconnection and Intercarrier Compensation for VNXX Traffic Should Be Determined Through the Interconnection Negotiation, Mediation, and Arbitration Procedures Established by the Act and This Commission

VNXX issues have been addressed in the context of interconnection negotiations, arbitrations or generic interconnection and intercarrier compensation proceedings, rather than in declaratory rulings, in a number of states. Unlike WITA, most ILECs generally do not object to a CLEC's right or ability to provide VNXX service. When they do, however, it is apparent that their true objections are based on interconnection and intercarrier compensation issues.[11] Such issues should not be addressed in a declaratory ruling, in part because the federal Communications Act of 1934, as amended ("Act") and other Commission procedures[12] provide the proper forum for resolving interconnection disputes. However, because WITA raises interconnection and intercarrier compensation issues in its petition, Level 3 will briefly address these issues to show the importance of adjudicating them in the appropriate forum.

Level 3 proposes to provide a telecommunications service to ISPs so that they will be able to offer subscribers in independent telephone company ("ITC") service territories a local telephone number to access the Internet. Level 3 plans to deploy facilities to a POI with the ITC. From that point, Level 3 will transport the traffic to its switching facilities and terminate the calls to its ISP customers.

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[11] In fact, the FCC is currently considering those issues in a new rulemaking proceeding relating to *intercarrier compensation*. In an April 2001 Notice of Proposed Rulemaking, the FCC asked for comment "on the use of virtual central office codes (NXXs), and their effect on the reciprocal compensation and transport obligations of interconnected LECs." *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) at ¶ 115. Thus, these issues will be resolved by the FCC.

[12] *See Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements under the Telecommunications Act of 1996 (June 1996).

Other than originating the calls and delivering them to the POI with Level 3, under Level 3's interconnection proposal, an ITC would have no further obligation to handle this traffic. Level 3 would incur all transport and termination costs from the POI with the ITC. Thus, the ITC has no more responsibility to originate a call to a customer using an FX or VNXX-like service than it does to any other kind of customer – the POI to which it must transport its originating calls is always the same, regardless of called party location. Moreover, under the state of federal law governing delivery of traffic to ISPs, Level 3 would not seek reciprocal compensation from the ITC – and likewise would not expect to be charged originating access by the ITC.

The ITCs may complain that the service Level 3 proposes to provide would deprive them of toll or access revenues. That argument is without merit for at least two reasons. First, the Federal Communications Commission ("FCC") has established rules governing intercarrier compensation for the exchange of ISP-bound traffic, and those rules do not support an ITC's claim for toll or access revenues. Second, even if toll charges would have been applicable to this ISP-bound traffic—and they are not—there are no toll revenues to be lost because if these calls were rated as toll, they likely would not be made at all. As long as a customer has the ability to reach some ISP through a local call, it would not make sense for any rational ISP subscriber to incur toll charges for a sustained Internet connection. In fact, WITA's members likely have ISP subsidiaries or affiliates that offer Internet access to their customers on a local basis. Furthermore, it is likely that all end users of these ITCs currently have a local-access alternative.[13]

[13] Even if a ILEC's customers had no local-access alternative, and all calls to reach an ISP were toll calls, the Commission ought to be skeptical whether, as a policy matter, it is in the public interest to require end users to incur toll charges to dial into the Internet when, under Level 3's proposal, the ILEC can handle this traffic as local traffic and deliver it to Level 3 at a POI in the ILEC's serving area.

The problem is that the ITC's ISP may be the **only** local-access alternative. In that case, the ITC has a monopoly over local access to the Internet, in addition to a monopoly over local telephone service. The service that Level 3's customers would provide introduces competition to the ITC's ISP and additional choices to the ITC's end users. It is clear that the "cost" to the ITC is actually nothing more than having to face competition in the unregulated ISP market.

C. The Commission Does Not Have Jurisdiction Over Intercarrier Compensation for VNXX Traffic That Is Also ISP-bound Traffic

Although a Court of Appeals has remanded the FCC rules concerning intercarrier compensation for ISP-bound traffic for further consideration by the FCC, they remain in effect and binding on the parties. Under those rules, where parties did not have an agreement for the exchange of ISP-bound traffic during the first quarter of 2001, the proper intercarrier compensation for ISP-bound traffic is "bill and keep." The FCC has defined "bill and keep" as an arrangement under which "each network recovers from its own end-users the cost of both *originating traffic that it delivers to the other network* and terminating traffic that it receives from the other network."[14] Under this compensation regime, a ILEC may not charge Level 3 for the origination of a call to an ISP, and Level 3 may not charge the ILEC for terminating that traffic.

The Washington Commission has not yet had the opportunity to address this issue. However, the Public Utilities Commission of Ohio has applied the FCC's compensation rules to FX/virtual NXX ISP-bound traffic: "The Commission agrees with Allegiance that all calls to FX/virtual NXX [numbers] that are also ISP-bound are subject to the inter-carrier compensation

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[14] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Order on Remand, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Report and Order (rel. Apr. 27, 2001) ("*ISP Order on Remand*"), at n.6 (emphasis added), *remanded sub nom. WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002). Footnote 149 of the FCC's order also makes clear that it *only* addresses intercarrier compensation for ISP-bound traffic; all other provisions of law governing interconnection of networks (including the fact that state commissions have primary responsibility over the arbitration of interconnection disputes) are not modified by the order.

regime set forth in the ISP Remand Order."[15] Likewise, the Connecticut Department of Public Utility Control has ruled, also in the context of VNXX traffic to ISPs, "that intercarrier compensation for ISP-bound traffic is within the jurisdiction of the FCC and that on a going forward basis, the Department has been preempted from addressing the issue beyond the effective date of the ISP Order [June 14, 2001]."[16] Similarly, the Public Service Commission of Michigan ruled in an arbitration proceeding between TDS Metrocom, Inc. and Ameritech that, with respect to virtual NXX traffic, the *ISP Order on Remand* "takes care of ISP traffic."[17] Other state commissions, through their staffs, have also reached the preliminary conclusion that the FCC *ISP Order on Remand* governs intercarrier compensation arrangements between carriers for the transport and termination of ISP-bound traffic.[18] Because Level 3 is willing to limit the scope of its interconnection agreements with the ITCs to ISP-bound traffic, the intercarrier compensation

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[15] *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9. The Ohio Commission recently reached the same result in the arbitration proceeding between Global NAPs, Inc. and Verizon and Sprint. *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002).

[16] *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2.

[17] *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. P.S.C. Sep. 7, 2001).

[18] *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-11-045, A.01-12-026, Final Arbitrator's Report (Cal. PUC May 15, 2002); *Essex Telcom, Inc. v. Gallatin River Communications, L.L.C. Complaint and Request for Dispute Resolution of Essex Telcom, Inc. against Gallatin River Communications, L.L.C. pursuant to Section 13-514 and Section 13-515 of the Public Utilities Act*, Docket No. 01-0427, Proposed Order (Ill. C. C. May 17, 2002); Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Analysis (Fl. P.S.C. Nov. 21, 2001); *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, PUC Docket No. 241015, Arbitration Award (Tex. PUC No. 28, 2001).

arrangements related to traffic terminated by Level 3, including the payment of access charges to or by Level 3, are therefore governed by the FCC *ISP Order on Remand.*

D. Voice VNXX Traffic Should Also Be Treated As Local Traffic for Intercarrier Compensation Purposes

As WITA asserts, the issue of the proper regulatory treatment for VNXX traffic has been litigated in other states. (Again, however, it is noteworthy for the purposes of this proceeding that these issues have been addressed in the context of *interconnection* arbitrations or generic *interconnection and intercarrier compensation* proceedings rather than in a declaratory ruling.) WITA refers to, among others, cases from South Carolina and Maine. While both were decided well prior to the FCC's *ISP Order on Remand* that now governs this issue for ISP-bound traffic, several states have taken the opposite approach and have ruled that VNXX traffic should be treated as local traffic, including being subject to reciprocal compensation obligations.

The North Carolina Utilities Commission ("NCUC"), for example, has ruled that VNXX services should be treated as local traffic subject to reciprocal compensation.[19] The NCUC considered the decisions relied on by WITA in this proceeding, particularly the decision of the Maine Public Utilities Commission regarding VNXX. Nevertheless, the NCUC found the case inapplicable.

> The Commission believes that the question which the Commission needs to decide in this issue is whether a telephone call from a BellSouth customer physically located in one rate center to a MCIm customer physically located in a different rate center but who has a NPA/NXX code from the same rate center as the caller placing the call is a local call or a long distance call. The Commission believes that based on the evidence presented in this case, and assuming that MCIm has in place either owned or leased dedicated facilities between the FX customer's premises and the switch, the calls in question to the extent they are within a LATA

[19] *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. P-474, Sub 10, Recommended Arbitration Order (NCUC, adopted April 3, 2001).

> should be classified as local and, therefore, subject to reciprocal compensation. The Commission notes that NPA/NXX codes were developed to rate calls and, therefore, MCIm's assertion that whether a call is local or not depends on the NPA/NXX dialed, not the physical location of the customer, is reasonable and appropriate.[20]

Accordingly, the NCUC concluded "that calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation."[21]

Similarly, the Kentucky Public Service Commission found that CLEC VNXX service should be treated the same as BellSouth's Foreign Exchange service, and both services should be treated as local traffic.

> Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic.
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> Accordingly, the Commission finds that foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA a[s] the calling area with which the telephone number is associated.[22]

Both of these decisions are consistent with the result reached by the Michigan Public Service Commission on a number of occasions. The Michigan Commission has considered this

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[20] *Id.* at 74.

[21] *Id.*

[22] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC March 14, 2001) at 7.

issue several times, and each time has decided not to reclassify foreign exchange service as non-local exchange traffic exempt from reciprocal compensation requirements.[23]

After recognizing that the state commission lacked jurisdiction to determine intercarrier compensation for VNXX-like ISP-bound traffic, the Florida Staff made the following recommendation:

> staff does not recommend that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volume may be relatively small, and the costs of modifying the switching and billing systems may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX traffic be treated the same for intercarrier compensation purposes.[24]

Notably, Florida Staff made this recommendation after an extensive proceeding that include pre-filed testimony, a hearing, and post-hearing briefing by a number of interested parties. Because of the complicated issues involved, the Commission should undertake a similar comprehensive investigation before setting any default intercarrier compensation mechanism for VNXX-like traffic.

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[23] *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sep. 7, 2001), 2001 WL 1335639; *Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation,* Case No. U-12696, Opinion and Order (Mich. PSC Jan. 23, 2001); *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order (Mich. PSC Oct. 24, 2000); *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382, Order Adopting Arbitrated Agreement (Mich. PSC Aug. 17, 2000); *Complaint of Glenda Bierman against CenturyTel of Michigan, Inc. d/b/a CenturyTel,* Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999).

[24] Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Recommendation (Fl. P.S.C. Nov. 21, 2001).

E. The Interconnection Regime Established By The New York Public Service Commission Serves As A Useful Model

In a rulemaking proceeding, the New York Public Service Commission ("PSC") addressed a situation similar to that presented here: in the absence of a negotiated agreement between the parties, what regulations should apply to VNXX traffic originated by a customer of an ITC, and terminated to a customer of a CLEC. The New York PSC ruled that:

- Calls to VNXX codes from ITC customers will be rated as local for end user billing purposes;
- Calls to VNXX codes from ITC customers will be handled on a bill-and-keep basis, and are not entitled to reciprocal compensation;
- CLECs must arrange to transport traffic from the edge of the ITC service area;
- ITCs may not charge CLECs access charges for VNXX traffic; and
- CLECs must establish direct trunking with the ITC when call volumes from the ITC go beyond the DS-1 level.[25]

In response to petitions for reconsideration of the decision, the New York PSC also made clear how it would rate calls: "The only standard that must be met is that established in the LERG [Local Exchange Routing Guide] which requires calls to be rated based on the NPA-NXX of the called number, not the customer's physical location."[26]

The VNXX service that Level 3 proposes to provide in Washington is consistent with these elements of the regime established in New York. As stated above, Level 3 is not seeking terminating compensation from the ITCs. Level 3 will incur all transport and termination

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[25] *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies,* Order Establishing Requirements For The Exchange Of Local Traffic (NY PSC Dec. 22, 2000).

[26] *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies,* Case 00-C-0789, Order Denying Petitions For Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates (NY PSC Sep. 7, 2001) at 4.

obligations from the ITC service boundary. The ITC need only deliver the traffic to a POI with Level 3, and Level 3 will be responsible for the traffic from that hand-off. In exchange, the ITC will not charge Level 3 originating access charges, and the ITC will rate the calls as local for its end users. As noted above, however, because these interconnection and intercarrier compensation issues are part of the interconnection negotiation process, the Commission should resolve these issues through an interconnection arbitration or rulemaking rather than by issuing a declaratory order.

IV. The Commission Should Deny WITA's Request for Declaratory Relief Concerning Numbering Issues

WITA asks the Commission to determine that VNXX-like service arrangements are an inappropriate use of numbering resources where that service use a new NPA/NXX for each rate center, and prohibit such practice. The Commission should not issue such a declaration for a number of reasons. First, VNXX is a legitimate response to the elaborate requirements applicable to numbering resources, it is not contrary to those requirements. The need to obtain numbering resources in each rate center is due to the structure of the North American Numbering Plan that was designed over a half century ago and has nothing to do with VNXX. Second, to adopt such an order would adversely impact competition in the local exchange telecommunications marketplace in Washington State. Lastly, the Commission would exceed its jurisdiction if it were to adopt such an order.

VNXX is simply a response to the existing need for carriers to obtain numbering resources for each rate center in which they seek to provide service. The need to obtain numbering resources in each rate center is a vestige of the monopoly based number resource

assignment system developed by AT&T in 1947.[27] It is the basic architecture of the North American Numbering Plan that serves to exacerbate the problem of number exhaust, not VNXX any more than any other service that requires numbering resources.[28] Rate centers are geographic locations that are assigned vertical and horizontal coordinates within an area code.[29] The architecture of the North American Numbering Plan was designed to support two historical primary functions of telephone numbers in the public switched telephone network—routing and rating of telephone calls.[30] Rate centers allow carrier billing systems to properly rate calls and rate centers are used to route calls to their proper destination. Rate centers are needed first and foremost to enable the monopoly service providers to designate certain types of calls as toll traffic subject to prices significantly above cost.

In order for facilities-based competitive carriers to provide local exchange service within a particular geographic area, such carriers must obtain numbering resources in each rate center that serves customers in that area. Facilities-based competitive local exchange providers must obtain numbering resources in this manner in order to conform to ILEC rate center configurations that require the assignment of one NXX code per rate center.[31] This is not a function of VNXX, rather it is due to the nature of the telephone network. This network was designed and developed close to 60 years ago before the advent of competition and prior to households and businesses obtaining multiple telephone numbers for the incredible technological innovations that have

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[27] *See Numbering Resource Optimization*, CC Docket No. 99-200, Notice of Proposed Rulemaking (rel. June 2, 1999), at ¶ 1 (hereinafter *Numbering NPRM*).

[28] *See Numbering NPRM* at ¶¶ 111-112.

[29] *See* Newton's Telecom Dictionary, 14th Edition, at 591. *See also*, Local Exchange Routing Guide (LERG), Volume 2, Section 1 at 24 (Mar. 1997).

[30] *See* Where Have all the Numbers Gone? Long-Term Area Code Relief Policies and the Need for Short-Term Reform, Economics and Technology, Inc., (Mar. 1998), at 7.

[31] *See Numbering NPRM* at ¶ 122, n.173.

occurred since that time including facsimiles, the Internet and wireless phones, to name but a few. Rate center consolidation or intraLATA-wide local calling are far better solutions to numbering resource exhaust than prohibiting any type of pro-competitive service. Rate center consolidation and intraLATA-wide local calling would have the added benefit of making VNXX services less necessary.

Further, banning or placing restrictions on VNXX would frustrate important policy goals. Specifically, if competitive local exchange carriers are not permitted to provide VNXX service arrangements, Washington State consumers will be denied important telecommunications services – assuming that the ILECs' own FX services would also need to be prohibited under this reasoning. VNXX-like service arrangements allow ISPs to offer local dial-up connectivity to the Internet. Prohibiting such arrangements could have a dramatic negative impact on the availability of Internet services in Washington State. If the Commission were to adopt such a prohibition, ISPs will have to install equipment in every small town in Washington State in order to obtain local calling capability for their customers. It is safe to assume that no ISP will do this any time soon due to the inefficiency of such a network and the costs associated with such an undertaking – costs that would ultimately be passed on to the consumer. The Commission should therefore decline to adopt such an order.

Finally, if the Commission were to adopt such an order, it would exceed its jurisdiction in this area. The FCC has plenary authority over numbering issues.[32] Section 251(e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, also allows the FCC to delegate to state commissions all or any portion of its jurisdiction over numbering

[32] *See* 47 U.S.C. § 251(e).

administration.[33] The FCC regulations generally require that numbering administration: (1) facilitate entry into the telecommunications marketplace by making numbering resources available on an efficient and timely basis to telecommunications carriers; (2) not unduly favor or disfavor any particular industry segment or group of telecommunications consumers; and (3) not unduly favor one telecommunications technology over another.[34] Where the FCC does delegate any telecommunications numbering administration functions to any state, the state must perform the functions in a manner consistent with these general requirements.[35]

The FCC did delegate certain numbering authority to the Washington Commission.[36] However, nothing in this delegation order grants authority to the Commission to adopt an absolute ban on VNXX-like services. Further, the grant of delegated authority was interim in nature and subject to national numbering conservation strategies.[37] Since that grant of authority, the FCC has adopted three numbering orders in the same proceeding that establish a comprehensive national number conservation strategy.[38] The new numbering conservation regime requires carriers to regularly report utilization levels, demonstrate both facilities readiness and need for numbering resources and engage in sequential number resource assignment. Thus,

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33 *See* 47 U.S.C. § 251(e)(1).

34 *See* 47 C.F.R. § 52.9(a).

35 *See* 47 C.F.R. § 52.9(b).

36 *See Numbering Resource Optimization, Petition of the Washington Utilities and Transportation Commission's Amended Petition for Additional Delegated Authority to Implement Number Conservation Measures*, Order, CC Docket Nos. 99-200, 96-98; NSD File No. L-99-102 (rel. Jul. 20, 2000).

37 *See id.* at ¶ 6.

38 *See Numbering Resource Optimization*, Third Order on Reconsideration in CC Docket No. 99-200, Third Further Notice of Proposed Rulemaking in CC Docket 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket 95-116 (rel. Mar. 14, 2002); *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200 (rel. Dec. 12, 2001); *Numbering Resource Optimization*, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200 (rel. Dec. 29, 2000).

the FCC is regulating in this area and supercedes state jurisdiction over such matters. Additionally, the *Central Office Code Assignment Guidelines* do not forbid the use of VNXX. These guidelines are used by the North American Numbering Plan Administrator to determine whether to issue a carrier numbering resources. The Commission therefore lacks the authority to ban the use of VNXX.

V. Conclusion

Where, as here, a necessary party objects to the use of a declaratory order proceeding to resolve a matter of controversy, the Commission may not use that avenue and may not issue a declaratory order. Further, even if no necessary party had objected, a declaratory order proceeding is not the appropriate forum to resolve the issues WITA raises in its petition. The Commission should therefore notify WITA that it will not issue the requested declaratory order.

Respectfully submitted,

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