

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF LEVEL 3
COMMUNICATIONS, LLC'S
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION

Docket No. UT-053039

QWEST CORPORATION'S ANSWER
TO LEVEL 3 COMMUNICATIONS'
PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT
AND COUNTERCLAIMS

1 Pursuant to WAC 480-07-650(2), respondent Qwest Corporation ("Qwest") hereby responds to and answers the petition to enforce its interconnection agreement that complainant Level 3 Communications, LLC ("Level 3") filed on June 21, 2005, and further, files its counterclaims against Level 3.

I. INTRODUCTION

A. Intercarrier Compensation

2 This petition involves the complex question of intercarrier compensation. There are two general traffic types to which intercarrier compensation applies. Interexchange (toll) traffic is compensated through switched access charges, while local traffic may be compensated either through a "bill and keep" mechanism or a reciprocal compensation arrangement between local

carriers.

- 3 Local traffic is telecommunications traffic that originates and terminates in a geographically-defined area that is approved by the Commission. These areas are called “local calling areas” or “extended area service” (“EAS”) areas. See e.g., WAC 480-120-021. These geographically-defined areas allow for an end-user customer’s unlimited calling within these areas for a Commission-approved flat rate.
- 4 With the introduction of competitive local services, the FCC allowed for intercarrier compensation for the exchange of this local traffic. This provided both incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) the opportunity to recover the costs associated with interconnection for the exchange of local traffic through a per minute charge. “Bill and keep,” on the other hand, allows for each carrier to bill their end-user customers and keep the revenue, thereby eliminating the need for recording traffic and billing for reciprocal compensation. The concept behind bill and keep is to recover interconnection costs from the end-user customers of the telecommunications network to which those end-user customers are connected. When the traffic that is exchanged between local carriers is in balance, there is a presumption that each network will incur similar costs.
- 5 Interexchange (toll) traffic is traffic that originates and terminates between exchanges located in *different local calling areas*/EAS areas. Toll traffic is measured in minutes of use, and is charged to the end-user customer by the end user customer’s selected interexchange carrier (“IXC”). The IXC must pay originating access charges to the originating carrier for the use of its network, and terminating access charges to the terminating carrier for the use of its network to complete the call.

6 As described above, the type of traffic, either local or toll, is determined by the geographic location of the end points of the calls. Based on these physical end points, the telecommunications industry has developed a method of determining the general location (i.e., local calling area/EAS area) for intercarrier compensation purposes based on the telephone numbers of the originating and terminating end users. Telephone numbers are displayed in the NPA/NXX format (in which the NPA is the area code and the NXX is the central office code). The central office code is then followed by a four-digit number which together constitute the telephone number of the end-user customer's telephone line. Based on this format, which identifies the geographic location of the calling and called parties, and the known geographic local calling area/EAS boundaries, a call is determined to be either local or long distance.

B. The Level 3 Petition

7 This petition presents an important issue to this Commission. Has the FCC changed the definition of a long distance call? In other words, when a person places a *long distance* call to a computer, or Internet Service Provider ("ISP") server ("ISP Server"),¹ may the carrier connecting the call to the ISP Server treat the call as a local call for compensation and access charge purposes?² Doing so would allow the carrier who serves the ISP to charge other carriers intercarrier compensation for that call, even though the call is a long distance call. The answer is clearly no, the carrier cannot treat a long distance call as local. However, Level 3 claims that any call to an ISP Server, at least when the ISP Server is used to connect to the Internet, is, according to the *ISP Remand Order*, to be treated under the process described in

¹ Level 3 has used the term "ISP equipment," which is functionally the same thing as a computer that connects to the Internet. The more common term is "ISP Server," which will be used through the remainder of this answer.

² See *In the Matter of 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, 9163-9181, ¶¶ 23-65, 9186-9190, ¶¶ 77-84 (2001), *remanded sub nom, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied* (D.C. Cir., Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003).

that order, *no matter where the ISP Server is physically located.*

8 Level 3's position is that for a call originated from Olympia, the called ISP Server could be physically located in Seattle, Portland, San Francisco or Anchorage, and all calls to the ISP Server (and through the ISP Server to the Internet) would be treated for compensation purposes precisely in the same fashion as if both the caller and the ISP Server were physically located in Olympia. This is clearly not the law, and the FCC has made it clear for more than 20 years that a call to an ISP Server, used to provide information or enhanced services, is to be rated based on the *physical location* of the ISP Server itself, and not the location of any further end point with which the ISP Server may communicate, or to which the ISP Server may direct the call. Nor is it to be rated based on assigned telephone numbers, without regard to the physical location of the customers. Level 3's argument is that the FCC somehow accidentally reversed this consistent precedent, and thus that the FCC has ruled that *all* calls to an ISP Server are to be treated according to the scheme in the *ISP Remand Order*, no matter where the ISP Server is physically located.

9 This issue is important to Level 3 because, if its position were to be accepted, Level 3 would be able to reap significant financial advantages at the expense of Qwest and the public. Not only would customers calling Level 3's ISP customers avoid paying toll charges for such calls,³ but Qwest also would be required (after an amendment to the parties' interconnection agreement) to compensate Level 3 for "terminating" the calls at the intercarrier compensation rate (\$0.0007 per minute) for "ISP-bound traffic" set forth in the FCC's *ISP Remand Order*.

10 Level 3's position is directly contrary to FCC precedent, which requires that an ISP Server be treated exactly the same as other end-user customers in determining whether a call to the

³ The avoidance of toll charges referenced here would result in reduced toll or originating switched revenue to the ILEC.

computer is treated as a toll call or a local call. In other words, a call originated from one local calling area to an ISP Server physically located in another local calling area is treated as a toll call. This is the basis for the so-called “ESP Exemption,” which requires exactly that.

11 The federal ESP Exemption prevents a local exchange carrier from charging switched access charges for a call made to a local ISP Server on the basis that the server ultimately directs the call to an end point (e.g., another server) or to another station located in another state. This is part of the same rule that held that calls to or from local Private Branch Exchanges (“PBXs”) would not be required to pay switched access charges, even if the calls were connected to another line and ultimately transferred to a distant location. However, the ESP Exemption never said, explicitly or implicitly, that calls to or from computers (or PBXs) were “local calls,” no matter where the computers (or PBXs) were physically located. Level 3, however, argues that the FCC, without analysis or even intent, has accidentally changed the entire landscape of access charges, and thus issued a blanket exemption for all calls to and from all computers, no matter where physically located (as long as they ultimately send the call to the Internet). Level 3’s position that the FCC has made such a major policy shift is completely unsupported. Further, any suggestion that in the *ISP Remand Order*, the FCC intended for VNXX calls to ISPs to be “local”, is tantamount to claiming that the FCC has claimed regulatory authority over that part of intrastate long distance, and thus intended that 1+ calls to ISPs be deemed “local,” which is completely without merit. This Commission retains regulatory authority over intrastate calling; the FCC’s *ISP Remand Order* did nothing to change that.

12 Level 3’s claims also ignore applicable Washington administrative rules and definitions (as discussed *infra* at paragraphs 30-33), as well as this Commission’s recent ruling in the AT&T/Qwest arbitration proceeding (Docket No. UT-033035). In the AT&T/Qwest

arbitration, there was a dispute about the definition of a “local” call. The Commission ruled that the definition of local exchange service would remain limited to traffic that originates and terminates within the *same* Commission-determined local calling area, (rejecting AT&T’s request for a definition based on “the calling and called NPA/NXXs” (i.e., Virtual NXX (or VNXX)).⁴ The Arbitrator in that proceeding had also ruled that reciprocal compensation⁵ for calls that terminate outside the local calling area in which they originate is inappropriate, and thus that such traffic should be compensated on a bill and keep basis, and the Commission adopted the Arbitrator’s Report.⁶ Thus, a CLEC’s VNXX offerings that do not provide for toll payments, or an appropriate substitute, or that seek reciprocal compensation or any other intercarrier compensation, are improper.

13 Level 3 also ignores the plain language of the parties’ interconnection agreement (“ICA”) regarding the types of traffic that the parties have agreed to exchange. The traffic types that the parties have agreed to exchange over the local interconnection trunks are very specifically delineated in the ICA. As is discussed below, the traffic for which Qwest disputes payment does not match the traffic types that the parties agreed to exchange under the ICA. Due to Level 3’s misassignment of telephone numbers, the traffic that Level 3 delivers to Qwest does not match any of the specifically-defined traffic types in the ICA, and therefore is not traffic

⁴ “Virtual NXX” or “VNXX,” the subject of this case, is a vehicle by which a carrier obtains a telephone number for one local calling area and uses that telephone number in another geographic area. Using a VNXX scheme thereby makes it appear, based on the *telephone number*, that a call is a local call when, in fact, it is an interexchange or toll (long distance) call (often being transported very long distances).

⁵ “Reciprocal compensation” refers to the intercarrier compensation mechanism mandated by section 251(b)(5) of the 1996 Telecommunications Act. This is an arrangement between two carriers in which each carrier receives compensation from the other carrier “for the transport and termination” on each carrier’s network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

⁶ Level 3’s interconnection agreement has a very similar definition of “Exchange Service” as that which is in the AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows: “‘Exchange Service’ or ‘Extended Area Service (EAS)/Local Traffic’ means traffic that is *originated and terminated within the same Local Calling Area as determined for Qwest by the Commission.*” (Emphasis added.) The definition in Level 3’s agreement (§ 4.24) is as follows: “‘Exchange Service’ or ‘Extended Area Service (EAS)/Local Traffic’ means traffic that is *originated and terminated within the local calling area determined by the Commission.*” (Emphasis added.)

that the parties have agreed to exchange under the ICA.

14 Indeed, Level 3's assignment of telephone numbers is not consistent with the telecommunications industry's numbering resource guidelines. For example, the Alliance for Telecommunications Industry Solutions (ATIS) Central Office Code (NXX) Assignment Guidelines (COCAG) (section 3.9) states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned." (Emphasis added.) Although exceptions exist, such as for tariffed services like foreign exchange services, VNXX is not such an exception. In addition, section 4.2.6 of the COCAG provides that "[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested.*" (Emphasis added.) Finally, "geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP [North American Numbering Plan]," while "non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800." COCAG, § 13.0.

15 The solution to this dispute is quite simple. If Level 3 assigns telephone numbers based on the actual physical location of the ISP Server, then the traffic will be properly routed consistent with the definitions in the ICA.

16 Thus, this case raises an important issue from a policy and financial perspective. Ultimately, this Commission should rule in favor of Qwest and thus determine that Level 3 is not entitled to unilaterally change the ICA.

II. STATEMENT OF FACTS

A. Background of Dispute

- 17 This dispute arises because Level 3 has engaged in a practice of providing a service to its ISP customers which enables the ISP's customers who are physically located in a particular local calling area to dial a "local" telephone number to reach the ISP even though the ISP is actually physically located in a different local calling area, or possibly even a different state. Level 3 does this by assigning telephone numbers to Level 3's ISP customers that are local numbers based on the originating calling area (not based on where the ISP is located), thus allowing those calls to terminate in a different local calling area.
- 18 For example, if the ISP server is located in Seattle, Level 3 could assign an Olympia number to that ISP, an Everett number, and a Yakima number. These numbers would allow Qwest and Verizon subscribers in Olympia, Everett, and Yakima to place calls to that ISP server without incurring toll charges. Level 3 then knowingly misuses Qwest's Local Interconnection Service ("LIS") so that Qwest will believe it is obligated to route and transport calls to Level 3 disguised as "local" calls (or, as Level 3 would try to define them, "ISP-Bound" calls) when, in fact, the calls should be treated as *toll* calls. While Level 3 seeks this treatment of ISP calls, other carriers may seek the same treatment of intercity calls not destined for the Internet. For example, some carriers' VNXX calls might be destined for an inbound telemarketing center, a "help desk," or a voice messaging system.
- 19 This practice has widespread and significant implications for the entire access compensation system established in Washington and elsewhere. Level 3 seeks to benefit not once, but twice. Level 3 not only wants to allow its ISP customer and the ISP's customers to avoid paying toll charges for long distance calls, but it also seeks to force ILECs like Qwest to pay Level 3 for the privilege of routing and transporting toll calls for Level 3. Such an approach would lead to

severe financial repercussions for the industry, would erode the financial support that toll and/or originating switched access charges provide to local rates, and would further distort the compensation scheme (including universal service funding) underlying the public switched telephone network.

20 Level 3's practices raise a wide variety of policy issues. Those issues are being addressed and litigated vociferously before the FCC and the courts. Nonetheless, while those proceedings are pending, Level 3 seeks to sidestep them by charging Qwest without satisfying the change of law process provided for in the ICA. Level 3's effort is not supported by state law, federal law or the parties' ICA, and thus the Commission should order that Level 3 cease such practices while the issues are sorted out. Because of the status of the law, Qwest has refused to pay Level 3's improper and inaccurate intercarrier compensation bills for VNXX traffic.

21 Thus, the primary issue raised here is whether or not a call destined for the ISP Server should be subject to the FCC's *ISP Remand Order* rate of \$0.0007 per minute, regardless of the physical location of the person placing the call compared to the physical location of the ISP Server. The FCC has addressed this issue. This Commission has also recently issued a decision regarding the definition of a local call. All of this precedent dictates that Level 3 is wrong.

B. Treatment of Calls Destined for ISPs

1. Federal authority

22 The FCC has a long history of determining the appropriate compensation treatment of traffic destined for "enhanced service providers" or "ESPs" (i.e., providers of communications that modify content). In 1983, the FCC issued an order creating the so-called "ESP Exemption."⁷

⁷ See *In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 254-255, ¶ 9 and fn. 15, 320, ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("*First Order on Reconsideration*"), *further modified on*

The ESP Exemption was not really an exemption, but rather a decision, based on a number of policy considerations, that enhanced service providers were entitled to connect their points of presence through tariffed local retail services (rather than through tariffed feature group access services that interexchange carriers were required to purchase), even though the facilities were really being used for services classified as interstate.⁸ The FCC assigned the same status to private telecommunications networks or systems (e.g., PBX systems) that accessed local exchange systems for connecting interstate calls.⁹ In other words, the FCC treated the point of presence of an enhanced service provider as if that point of presence were the location of a retail customer.

23 The FCC applied the same approach under the 1996 Telecommunications Act when it addressed traffic routed to the Internet. The FCC determined that ISPs, the heirs to the old “enhanced service provider” designation, were entitled to the same treatment for compensation purposes. Thus, when an ISP is served by a CLEC, the same analysis applies under section 251(g) of the Act. The ISP Server is treated as an end-user location for purposes of compensation, but the call does not terminate at this location. The ISP may purchase services from its telecommunications provider for the purpose of getting its incoming calls to the ISP Server. Compensation between the ISP’s provider (Level 3) and the LEC (Qwest) that serves the customer who originated the call is based on the geographic location of the two ends of the call.¹⁰

recon., 97 FCC 2d 834 (1984) (“*Order on Further Reconsideration*”), *aff’d in principal part and remanded in part sub nom.*, *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

⁸ See, e.g., *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16131-34, ¶¶ 341-48 (1997); see also, generally, *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

⁹ See *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission’s Rules*, Memorandum Opinion and Order, 2 FCC Rcd 7424, 7425, ¶¶ 13-15 (1987).

¹⁰ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,

24 In late 2003, Level 3 brought a petition before the FCC that requested forbearance from the FCC's ESP Exemption and its application to calls bound for the Internet.¹¹ While that petition was pending, the FCC issued its Notice of Further Proposed Rulemaking in its *Intercarrier Compensation* docket to consider these issues as a part of an overall examination of intercarrier compensation.¹² Level 3 later withdrew its petition. As of today, the applicable law has not changed. The ISP's Server should be considered a retail location for the purposes of appropriate number assignment and determining intercarrier compensation.¹³

25 Level 3 ignores this regulatory history by attempting to charge Qwest at the *ISP Remand Order* \$0.0007 per minute rate for intercarrier compensation. However, this rate only applies to local ISP-bound traffic, and does not apply to VNXX traffic. Level 3 has argued in other jurisdictions that the FCC's *ISP Remand Order* and a recent FCC decision related to a forbearance petition by Core Communications fundamentally change this analysis.¹⁴ Level 3 argues that *all* traffic destined for the Internet must be treated as subject to the FCC *ISP Remand Order* \$0.0007 per minute rate, regardless of whether such traffic originated from next door, across the state, or even across the country. Its position is simply wrong, and is in violation of the FCC's rules (i.e., the ESP Exemption rule), and has the effect of asserting that the FCC somehow intended to preempt states on the regulation of intrastate traffic.

Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9163-81 ¶¶ 23-65, 9186-90, ¶¶ 77-84 (2001), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g, en banc, denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003).

¹¹ *In the Matter of Petition of Level 3 Communications LLC for Forbearance under 47 U.S.C. Section 160(c)*, WC Docket No. 03-266; *In the Matter of IP-Enabled Services*, WC Docket No. 04-36.

¹² *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (rel. Mar. 3, 2005) ("Further Notice").

¹³ For a more detailed analysis of these legal issues, see the *Ex Parte* that Qwest filed with the FCC on March 11, 2005 in Level 3's forbearance petition proceeding, which is attached as Exhibit A to this Answer and Counterclaim.

¹⁴ See *Petition of Core Communications for Forbearance under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241, WC Docket No. 03-171 (rel. October 18, 2004) ("*Core Forbearance Order*").

- 26 If Level 3 delivered traffic to its ISP customer's server physically located in the *same local calling area* as where the call originated, Level 3 would be correct that under existing rules, the call would be treated as subject to the *ISP Remand Order* \$0.0007 per minute rate.¹⁵ However, Level 3's ISP customer's equipment is *not* physically located in the same local calling area as the individual and business customers that call Level 3's ISP customers. Thus, Level 3 seeks to collect compensation to which it is not entitled.
- 27 Level 3's approach ignores long-standing FCC precedent, as well as the guidance of a recent Commission decision on these issues. In describing ISP-bound traffic in the background section of the *ISP Remand Order*, the FCC states that "an ISP's end-user customers typically access the Internet through an ISP Server *located in the same local calling area*," and that the end users pay the local exchange carrier for connections to the "*local ISP*." *ISP Remand Order*, ¶ 10. The FCC defines ISPs as "one set of enhanced service providers." *Id.*, ¶ 11. (Emphasis added.) The FCC specifically identified the issue that it was addressing as "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area* that is served by a competing LEC." *Id.*, ¶ 13. (Emphasis added.) Thus, in examining ISP traffic, the *ISP Remand Order* is limited to *local* ISP traffic. It did not address the situation where a CLEC customer's ISP server is physically located *outside* of the local calling area of both its assigned telephone number(s) and the originating caller.
- 28 Similarly, the *Core Forbearance Order* addressed only the application of the *ISP Remand Order*. It addressed whether certain provisions in the *ISP Remand Order* should continue to apply to CLECs serving ISPs. Because the *ISP Remand Order* did not address the treatment of calls from one local calling area to an ISP with equipment in *another* local calling area, the

¹⁵ Such a change would still require an ICA amendment.

Core Forbearance Order did not address the issue either.

29 Qwest's position regarding the FCC's actions gains support from the appeal of the *ISP Remand Order*. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en banc denied* (D.C. Cir., Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). In *WorldCom*, the court unequivocally stated that the FCC's *ISP Remand Order* addressed calls made to ISPs physically located *within* the *same* local calling area as the originating caller. *WorldCom*, 288 F.3d at 430. Thus, there is a lack of support for Level 3's interpretation that the FCC, in the *ISP Remand Order*, somehow summarily changed the long history of determining the appropriate treatment of traffic destined for enhanced service providers.

C. State Authority

30 The Commission has provided strong guidance on this issue in that it recently addressed a dispute about how to define a "local call." The Commission further ruled that compensation for calls that terminate outside the local calling area in which they originate (i.e., VNXX traffic) is inappropriate, and thus that such VNXX traffic should be compensated on a bill and keep basis.

31 Specifically, in the AT&T/Qwest arbitration, Qwest and AT&T disputed the appropriate definition of a local call under Washington law. The Arbitrator and Commission agreed with Qwest's position that a "local call" is one "that is originated and terminated within the same local calling area as determined for Qwest by the Commission." The Commission rejected AT&T's proposal to define a local call by reference to "the calling and called NPA/NXXs" (i.e., VNXX). Indeed, the Arbitrator found that although the CLEC must be allowed to offer VNXX services, reciprocal compensation for calls terminating to the CLEC's customers physically located outside the local calling area in which they originate was inappropriate, and

thus that such traffic should be compensated on a bill and keep basis. See Order No. 04, Arbitrator's Report, Docket No. UT-033035 (December 1, 2003), ¶¶ 25-38; Order No. 05, Final Order Affirming Arbitrator's Report and Decision, Docket No. UT-033035 (February 6, 2004), ¶¶ 12-16.

32 Moreover, the definitions of “exchange,” “extended area service (EAS),” “interexchange” and “local calling area” in Washington in WAC 480-120-021 are as follows:

“Exchange” means a geographic area established by a company for telecommunications service within that area.

“Extended area service (EAS)” means telephone service extending beyond a customer's exchange, for which the customer may pay an additional flat-rate amount per month.

“Interexchange” means telephone calls, traffic, facilities or other items that originate in one exchange and terminate in another.

“Local calling area” means one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges.

These definitions are consistent with the definitions that apply in this case. For example, section 4.24 of the Level 3 ICA provides: “‘Exchange Service’ or ‘Extended Area Service (EAS)/Local Traffic’ means traffic that is originated and terminated *within the local calling area determined by the Commission.*” (Emphasis added.)

33 Although Level 3 may attempt to argue that the traffic at issue is bound for the Internet, and thus that it is somehow exempt from these Washington definitions, the fact is that Washington law makes no such distinction. Nor has the FCC made such a distinction. If VNXX traffic is permitted at all, it should not be treated as “local” traffic under the parties’ ICA.

D. Treatment of ISP Traffic under the ICA

34 Further still, Level 3's conduct violates the parties' ICA. The ICA describes "ISP-Bound traffic" "as that term is used in the FCC ISP [Remand] Order." ICA, § 7.3.4.3. As discussed above, the *ISP Remand Order* did not accidentally include traffic destined for an ISP Server physically located in a different local calling area than the originating caller as part of the "ISP-Bound traffic" addressed in the order. Thus, the traffic is not "ISP-Bound" as discussed or defined in the ICA.

35 Level 3, however, seeks to sweep aside these definitions by assuming that traffic destined for the Internet automatically falls within the definition of "ISP-bound traffic," regardless of where the traffic physically originates and terminates. Indeed, Level 3 ignores the FCC history of defining traffic destined for an ISP as traffic that travels solely *within* a local calling area prior to being delivered to the ISP Server. Level 3 also ignores long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll calls. Level 3 then hides this practice by misassigning local numbers through its VNXX schemes.

E. VNXX Traffic over LIS Trunks

36 Level 3 has argued that the parties have agreed to exchange VNXX traffic over LIS trunks. Qwest disagrees. Section 7.2 of the parties' ICA specifically delineates the types of traffic that are to be exchanged under the ICA. With respect to the traffic and disputes at issue in this matter, there are four relevant types of traffic which are appropriately exchanged under the agreement: (1) EAS/Local Exchange Service (EAS/Local) traffic, (2) IntraLATA Toll Exchange Access (IntraLATA Toll) traffic, (3) ISP-bound traffic and (4) Meet-Point-Billing or Jointly Provided Switched Access traffic. (See e.g., ICA, § 7.2.1.2.)

37 The ICA defines those categories of traffic as follows:

- “Exchange Service” or “Extended Area Service (EAS)/Local Traffic” means traffic that is originated and terminated *within the local calling area determined* by the Commission. (ICA, § 4.24 (emphasis added).)
- “Exchange Access (IntraLATA Toll)” is defined in accordance with Qwest’s current IntraLATA toll serving areas, as determined by Qwest’s state and interstate Tariffs and excludes toll provided using Switched Access purchased by an IXC. (*Id.*, § 4.22.)
- “ISP-bound traffic” is defined “as that term is used in the FCC ISP [Remand] Order.” (ICA, § 7.3.4.3.)
- “Meet-Point Billing” or “MPB” or “Jointly Provided Switched Access” refers to an arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs. (*Id.*, § 4.44.)

38 As stated, the term “ISP-bound traffic” is defined by the ICA (§ 7.3.4.3) “as that term is used in the FCC ISP [Remand] Order.” As already discussed above, Level 3’s contention that the traffic at issue is entitled to treatment and compensation according to the *ISP Remand Order* is incorrect and not an appropriate reading of that order. ISP-bound traffic, as that term is used in the ISP Remand Order, is limited to ISP-bound calls that originate and terminate in the same local calling area. Level 3’s position also conflicts with the definition of local traffic in its own ICA and as interpreted by the Commission in Docket No. UT-033035.

39 Nor does this traffic fit within any of the other defined categories of traffic under the ICA. This traffic is not “Exchange Service” traffic, commonly referred to as “EAS/Local traffic.” EAS/Local traffic is defined in section 4.24 of the ICA as “traffic that is originated and terminated *within the local calling area* which has been defined by the Commission and documented in applicable tariffs.” (Emphasis added.) Even a cursory examination of the traffic at issue, however, shows that it does not meet this definition. Level 3 does not deny that it forces Qwest to exchange traffic that is not terminated at the ISP Server in the same

local calling area as the originating caller (identical to VNXX traffic), but Level 3 has nevertheless claimed that it is “ISP-bound” traffic. Thus, there should be no contention as to whether the VNXX traffic at issue is “Exchange Service” traffic.

40 A traffic type that *may superficially appear* to functionally apply to the VNXX traffic at issue is under the definition of “Exchange Access” traffic, which is defined in section 4.22 of Level 3’s ICA as being “in accordance with the Act and Qwest’s current intraLATA toll serving areas, as determined by Qwest’s state and interstate tariffs and excludes toll provided using Switched Access purchased by an IXC.” While this may appear functionally appropriate, upon closer examination the traffic does not meet this definition either.

41 As a threshold matter, only Level 3 knows the exact location of the end-user ISP Server or modem bank for this traffic. Thus, Qwest cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area. Qwest only knows how far it carried the call before handoff to the interconnected carrier, where that carrier’s serving switch is located, and whether traffic is one-way or two-way. In addition, even for that traffic which may functionally appear to match the definition, Level 3’s purposeful misuse and misassignment of telephone numbers makes it difficult to track such traffic. Level 3 clearly does not intend for the traffic to be treated as “Exchange Access” traffic under the ICA, as evidenced by its misuse of telephone numbers. Thus, it is apparent this definition does not match the traffic either.

42 For the reasons set forth here, the term “ISP-bound traffic” does not apply to the VNXX traffic at issue here because that is not traffic that is “ISP-bound traffic” “as that term is used in the ISP [Remand] Order.”

43 Finally, the last possible traffic type, “Meet-Point Billing” or “Jointly Provided Switched

Access,” does not match up at all to the VNXX traffic at issue either. This is so because no IXC is involved, as only Level 3 and Qwest are involved in the carriage of the traffic, which is contrary to the definition of the traffic in section 4.44 of the ICA.

44 Therefore, in reviewing the ICA’s plain language and the VNXX traffic that Level 3 delivers to Qwest, none of the traffic types that the parties specifically agreed to exchange matches this VNXX traffic. Since Level 3 can easily remedy the situation by properly assigning telephone numbers based on the actual location of its end-user customers, it is incumbent upon Level 3 to ensure that the exchange of traffic under the ICA follows the terms and conditions of that agreement. In the end, Level 3 is simply attempting to exchange traffic that the parties never agreed to exchange under the terms of the ICA.

III. RESPONSE TO ALLEGATIONS IN THE PETITION

45 Unless specifically admitted in this section, Qwest denies each and every allegation in the petition. Qwest’s factual assertions and legal argument contained in the preceding sections of this Answer are incorporated into and should be considered a part of these responses to the individual allegations of the petition.

IV. PARTIES

46 Qwest neither admits nor denies the allegations in paragraphs 1 through 3 of the Petition regarding Level 3’s business, its operations in Washington or its contact information. For example, Qwest does not know the extent to which Level 3 has been authorized by the Commission to provide service in Washington.

V. JURISDICTION

47 Qwest admits the allegations in Paragraphs 4 and 5 regarding Qwest’s business and its operations in Washington and information about correspondence to Qwest.

48 Qwest admits the allegations in Paragraph 6 that this Commission has the authority to enforce Qwest's ICA with Level 3. Qwest denies, however, that the Commission has jurisdiction to award equitable or monetary relief to the extent that Level 3's Petition seeks such relief. Qwest further denies that the ICA supports the relief that Level 3 is seeking.

VI. RESPONSE TO STATEMENT OF LAW AND FACTS COMMON TO ALL COUNTS

49 Qwest admits the allegations in Paragraphs 7 through 10 of the Petition and admits that Level 3 has accurately quoted portions of sections 7.1.1 and 7.2.1.2.6 of the ICA.

50 With respect to the allegations in Paragraph 11 of the Petition, Qwest admits that the ICA includes language as stated. Qwest, however, denies that non-local traffic bound for an ISP is "ISP-bound traffic" as that term is defined in the ICA and for which the rate caps for intercarrier compensation in section 7.3.6.2.3 apply. Qwest further alleges that Level 3's misassignment of local telephone numbers assigned to its ISP customers not located within the local calling area assigned for that number is deliberately designed to prevent Qwest from distinguishing between traffic bound for Level 3 that should be appropriately treated as ISP-bound traffic.

51 Qwest states that the averments in Paragraph 12 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest denies Level 3's characterization of the Commission's previous order with respect to the calculation of relative use for network facilities. Qwest further admits that Level 3 has accurately quoted several sentences from the Commission's Final Decision in Docket No. UT-023042, but states that the Commission's order speaks for itself.

- 52 Qwest admits the allegations in Paragraph 13 of the Petition that the ICA has a change of law provision and that Level 3 has accurately quoted a portion of section 2.2 of the ICA.
- 53 Qwest states that the averments in Paragraph 14 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest denies Level 3's characterization of the Commission's previous order in Level 3's arbitration with CenturyTel. Qwest admits that Level 3 has accurately quoted several sentences (or portions thereof) from the Commission's January 2, 2003 and February 28, 2003 orders in Docket No. UT-023043, but states that the Commission's order speaks for itself.
- 54 Qwest states that the averments in Paragraphs 15 through 17 of the Complaint constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest denies Level 3's characterization of the *Core Forbearance Order* or the "FCC's compensation scheme". Qwest further avers that it has offered to enter into an ICA amendment consistent with the *Core Forbearance Order*. That proposed amendment is attached hereto as Exhibit B.
- 55 Qwest states that the averments in Paragraph 18 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that these averments constitute statements of fact, Qwest denies that, as of October 8, 2004, Level 3 is entitled to intercarrier compensation for ISP bound traffic. Moreover, the ICA specifically requires an amendment to the ICA to change its terms if there is a change of law. Furthermore the ICA sets forth a specific process for addressing changes in applicable law, including negotiations of an amendment to reflect changes in law, and if those negotiations are unsuccessful, the parties are to bring the dispute to this Commission for resolution of

appropriate amendment language. Level 3 has ignored this process, billed Qwest without an amendment, and then brought this petition rather than a dispute resolution request as Section 2.2. requires.

56 Qwest states that the averments in Paragraph 19 of the Petition regarding “governing federal law” constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that the remaining averments constitute statements of fact, Qwest admits that Level 3 has invoiced Qwest for intercarrier compensation for what Level 3 deems “ISP-bound traffic,” and that Level 3 has done so under claims that such invoices are due under the *Core Forbearance Order*, and further admits that Qwest’s position is that only calls originated and terminated within the same local calling area are compensable calls. Qwest denies, however, that Qwest has in effect refused to comply with the *Core Forbearance Order*.

57 With respect to the allegations in Paragraphs 20 through 23 of the Petition, Qwest admits that Level 3 wrote a letter to Steve Hansen on January 17, 2005. Qwest denies, however, that the letter addressed the *Core Forbearance Order*, but rather, Qwest states that Level 3’s letter addressed VNXX language in the ICA. Qwest further admits that Level 3 sent a proposed amendment on March 31, 2005 that related to the *Core Forbearance Order* (although it did not send it to the correct Qwest representative as the ICA requires). Qwest further states that it participated in those negotiations in good faith and that it proposed language consistent with its interpretation of that order.

58 With respect to the allegations in Paragraph 24 of the Petition, Qwest denies Level 3’s characterization regarding Qwest’s actions and positions, and further, Qwest states that the parties have a different interpretation of the *Core Forbearance Order* and regarding the issue whether Level 3 is entitled to compensation for VNXX-based traffic originating in one local

calling area and terminating to an ISP physically located in a different local calling area. From Qwest's perspective, the request by Level 3 to amend the ICA for the *Core Forebearance Order* is a request to amend some of the basic terms related to the compensation for ISP bound traffic. It is equally within Qwest's rights to request changes to the ICA as it sees appropriate, as is the case with its position on VNXX. Qwest is simply trying to address both ISP related issues at the same time, rather than to have two separate changes to the ICA.

59 Qwest states that the averments in Paragraph 25 of the Petition constitute conclusions of law, and as such do not contain allegations which Qwest must admit or deny. To the extent that the remaining averments constitute statements of fact, Qwest denies the allegations in Paragraph 22 of the Petition. Further, Qwest states that to interpret paragraph 44 of the *ISP Remand Order* as Level 3 does would logically result in an interpretation that the FCC intended to reverse the long history of determining the appropriate treatment of traffic bound for enhanced service providers. Such an interpretation would then result in the FCC violating the Administrative Procedures Act in promulgating the *ISP Remand Order*. Qwest does not interpret the FCC to be promulgating rules in contravention of the Administrative Procedures Act, nor did the court in the *WorldCom* decision when it examined the FCC's decision. Qwest further states that the FCC also makes it very clear that its *ISP Remand Order* did not alter any of this history in the footnote to the very sentence in paragraph 44 that Level 3 seeks to use as support for its position. See *ISP Remand Order*, fn. 81. As the discussion in the introduction explains, Level 3's analysis of the FCC's decisions is simply wrong. ISP-bound traffic, as the FCC applies it, is limited to local traffic. Furthermore, this Commission's decisions in the AT&T arbitration did not modify this precedent.

60 With respect to the allegations in Paragraph 26 of the Petition, Qwest denies that this Commission has already rejected Qwest's "physical location" argument in Level 3's

arbitration with CenturyTel, or that this Commission found that all calls bound to ISPs (no matter where they originated and where they terminated) are to be treated as local calls for purposes of reciprocal compensation. Moreover, the Commission did not rule in that arbitration that Level 3 was entitled to the *ISP Remand Order* rate of \$0.0007 per minute, or any other type of intercarrier compensation, as Level 3 contends in its petition. Rather, the Commission acknowledged that “[t]here is ample room for confusion on this point,” and ruled that such traffic was subject to *bill and keep* compensation. See *Seventh Supplemental Order: Affirming Arbitrator’s Report and Decision*, Docket No. UT-023043 (February 28, 2003), ¶ 8, and ¶¶ 7-10 generally. Finally, the Level 3/CenturyTel decision was issued prior to the issues that Qwest raised in the AT&T arbitration, and thus the issues here have evolved, and the Commission has more recently clearly defined what constitutes local traffic in the context of a CLEC seeking intercarrier compensation for terminating VNXX traffic.

VII. RESPONSE TO SUMMARY OF DISPUTED ISSUES

61 With respect to the allegations in Paragraphs 27 through 32 of the Petition, Qwest does not dispute that Level 3 makes such claims, but Qwest denies the allegations contained therein.

VIII. RESPONSE TO LEVEL 3’S COUNTS

62 Qwest denies the allegations in Count I (Paragraphs 33 through 39) of the Petition, except that it admits it sent traffic to Level 3, that Level 3 has improperly attempted to bill Qwest, and that Qwest has refused to pay such bills, thus invoking the ICA dispute resolution procedures.

63 Qwest denies the allegations in Count II (Paragraphs 40 through 45) of the Petition, although it admits it has an obligation to negotiate amendments to ICAs, and avers that it has fully complied with that obligation.

IX. COUNTERCLAIMS

64 Qwest brings these Counterclaims against Level 3 as a result of Level 3's violation of federal law, violations of state law, and breach of the terms and conditions of the parties' interconnection agreement. This Counterclaim consists of five counts, as follows:

COUNT 1 ***Violation of Federal Law***

65 Qwest has set forth the applicable federal law regarding calls made to the Internet.

66 Level 3's attempts to bill Qwest the *ISP Remand Order* rate for its VNXX traffic are violations of federal law. The Commission should order Level 3 to cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, and cease charging Qwest for such traffic, and further, should require that Level 3 properly assign telephone numbers based on the actual physical location of its end-user or ISP customer.

COUNT 2 ***Violation of State Law***

67 Qwest has set forth the applicable state law regarding the definition of a local call and the proper compensation for calls made to the Internet using VNXX schemes, including the Commission's recent order in Docket No. UT-033035.

68 Level 3's attempts to bill Qwest the *ISP Remand Order* rate for its VNXX traffic are violations of Washington law. The Commission should order Level 3 to cease assigning NPA/NXXs in local calling areas other than the local calling area where its customer's ISP Server is physically located, and cease charging Qwest for such traffic, and further, should require that Level 3 properly assign telephone numbers based on the actual physical location of its end-

user or ISP customer.

COUNT 3
Violation of the Change in Law Provisions of the ICA

69 Level 3 has sent or will bill Qwest approximately \$2,146,480.67 from December 2004 (based on November 2004 MOUs and true ups for previous months) through May 2005, based on the FCC's *Core Forbearance Order* decision. Of this amount, Qwest believes that approximately \$1,373,360.96 is from VNXX traffic.

70 The parties have not reached agreement on an ICA amendment pursuant to that order. Specifically, Qwest has offered to amend the ICA to comply with the order, but Level 3 has rejected Qwest's proposed language.

71 Pursuant to Section 2.2 of the ICA, Level 3 is required to bring this dispute to this Commission to resolve the dispute in appropriate language:

. . . .To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

Level 3, however, has attempted to subvert this process by instead billing Qwest for traffic that Qwest contends is not covered by the *Core Forbearance Order*.

72 Level 3's actions amount to a willful and intentional violation of its obligations under Section 2.2. The Commission should issue an order finding Level 3 in breach of its contractual obligations, in violation of Washington law, and further, should invalidate Level 3's bills.

COUNT 4
Violation of Section 13.4 of the ICA

73 Level 3 is misassigning local telephone numbers to ISP Servers which are physically located outside the local area to which the telephone number is assigned.

74 Section 13.4 of the ICA provides that “[e]ach Party is responsible for administering NXX codes assigned to it.” Further, it requires that each party “shall provide through an authorized LERG input agent, all required information regarding its network for maintaining the LERG in a timely manner.” Through its actions described above, Level 3 is violating these obligations. This Commission should issue an order finding Level 3 in breach of its contractual obligations and further, should invalidate Level 3’s bills.

COUNT 5
Improper Routing of Traffic over LIS Trunks

75 Section 7.2.1.2 of the ICA authorizes the parties to exchange the following categories of traffic over LIS Trunks: (1) Exchange Access (intraLATA Toll non IXC) traffic, (2) Exchange Service EAS/Local Traffic, (3) ISP-bound traffic and (4) Meet-Point Billing or Jointly Provided Switched Access traffic.

76 The ICA defines those categories of traffic as follows:

- “Exchange Service” or “Extended Area Service (EAS)/Local Traffic” means traffic that is originated and terminated within the local calling area determined by the Commission. (ICA, § 4.24 (emphasis added).)
- “Exchange Access (IntraLATA Toll)” is defined in accordance with Qwest’s current IntraLATA toll serving areas, as determined by Qwest’s state and interstate Tariffs and excludes toll provided using Switched Access purchased by an IXC. (*Id.*, § 4.22.)
- “ISP-bound traffic” is defined “as that term is used in the FCC ISP [Remand] Order.” (ICA, § 7.3.4.3.)
- “Meet-Point Billing” or “MPB” or “Jointly Provided Switched Access” refers to an

arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs. (*Id.*, § 4.44.)

77 As stated, the term “ISP-bound traffic” is defined by the ICA (§ 7.3.4.3) “as that term is used in the FCC ISP [Remand] Order.” VNXX traffic, even if it is destined for an ISP, does not fit in any of these categories.

78 Accordingly, Level 3 is violating its ICA by attempting to obligate Qwest to send non-local ISP traffic over LIS trunks. The Commission should order Level 3 to discontinue the practice of misassigning the telephone numbers and cease routing VNXX traffic over LIS trunks to Qwest, and further, should invalidate Level 3’s bills to Qwest.

X. RELIEF REQUESTED

79 WHEREFORE, Qwest respectfully requests the Commission provide the following relief:

- A. Deny all of the relief requested by Level 3 in its petition;
- B. Issue an order (1) prohibiting Level 3 from assigning NPA/NXXs in local calling areas other than the local calling area where the ISP Server is physically located, (2) requiring that Level 3 cease its misuse of such telephone numbering resources, and (3) requiring that Level 3 properly assign telephone numbers based on the actual physical location of its customer’s ISP Server;
- C. Issue an order that the parties’ ICA does not require any compensation for Level 3’s VNXX traffic;
- D. Direct Level 3 to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*;

E. Invalidate all Level 3 bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic described above;

F. Issue an order prohibiting Qwest from routing VNXX traffic to Level 3 utilizing LIS facilities; and

G. Any and all other equitable relief that the Commission deems appropriate.

DATED this 28th day of June, 2005.

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