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*EX PARTE*

*Electronic Filing via ECFS*

March 11, 2005

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW B-204  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

RE: *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*

Dear Ms. Dortch:

Enclosed with this letter is the *Ex Parte* Presentation of Qwest. Please include this submission in each of the records of the above-captioned proceedings.

In accordance with FCC rule 1.49(f), this *ex parte* submission is being filed electronically *via* the Electronic Comment Filing System pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/ Cronan O'Connell

Enclosure

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## ***EX PARTE PRESENTATION***

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**RE:** *In the Matter of Petition of Level 3 Communications LLC for  
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The purpose of this presentation is to address several recent *ex parte* filings made by Level 3 Communications LLC (“Level 3”) in support of its Petition for Forbearance from the legal requirement that interstate and intrastate feature group access charges be assessed and paid on certain carrier traffic that makes use of local exchange switching facilities to originate and terminate calls carrying “IP voice” communications. As Qwest has pointed out in the past, all of the legitimate concerns raised by Level 3 are already dealt with effectively by proper application of the so-called “ESP exemption.” Level 3’s Petition would expand the scope of the rules flowing from the ESP exemption into areas where they are unnecessary and would be harmful. Given the language of the new Level 3 *ex parte* presentations, it is now likely that grant of the Petition would also act to dramatically undermine the existing interstate access structure, a disruption that would be particularly egregious today now that the FCC is acting to rationalize the entire structure in a fair and neutral manner. The Level 3 Petition should be denied, and the relief that Level 3 seeks should not be resurrected through some other means (such as “interim rules” effectively granting the Petition).

In this regard, Chairman Powell’s parting comment, as quoted in the telecommunications trade press, that the ILEC and the IP voice communities should “‘find the common ground somewhere in the middle . . . Right now we’re stuck with binary choices’ between high access charges and ‘free’ [IP voice access]”<sup>1</sup> resonates with considerable force with Qwest. By suggesting that the proper treatment of IP voice pending long term resolution of the intercarrier compensation proceeding should be based on a current and consistent application of the ESP exemption, Qwest has in fact proposed exactly the “middle ground” that the Chairman has suggested. This *ex parte* presentation deals with several aspects of the Level 3 Petition that are contrary to law and reason. The solution that Qwest has proposed presents a far superior solution to the issues that Level 3 raises.

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<sup>1</sup> TRDaily, March 8, 2005 (second article entitled “Powell Proud of FCC’s VoIP Approach”).

## I. Introduction.

The Level 3 Forbearance Petition<sup>2</sup> requests that the FCC “forbear” from various provisions of the Act and the FCC’s rules relating to the application of tariffed feature group access charges to carriers handling “Voice-embedded IP traffic that originates or terminates on the PSTN . . .”<sup>3</sup> It has never been exactly clear just what rules Level 3 was seeking forbearance from, or what the regulatory structure it sought would ultimately look like.<sup>4</sup> However, it has been clear from the outset that Level 3 seeks a regulatory structure whereby CLECs who carry IP Voice traffic, either acting as their own ISP or for unaffiliated VoIP providers, are entitled to entirely special treatment outside of the existing regulatory structure. Level 3 has been able to make a facially plausible argument for this position only by misconstruing both the nature of the existing regulatory environment (the ESP exemption that has been in place for over 20 years) and the sweeping and potentially destructive impact which grant of its petition could have on the public interest.

To a large extent Level 3’s position is based on the assumption that, if IP Voice providers are not granted special treatment under today’s access structure not available to any other providers, including providers of all other IP-enabled services, the deployment of IP voice technology and service will be fatally wounded. This is a questionable assumption even if IP voice providers were not currently treated in the same manner as other providers of IP enabled services under the “ESP exemption” and the regulatory structure that is based on that rule.<sup>5</sup> But the ESP exemption does dictate how ISP access (including IP voice access) to the local exchange is handled, and Level 3’s position borders on the ridiculous when the Level 3 Petition is compared to the actual regulatory structure from which Level 3 seeks forbearance. The current rules actually provide Level 3 with all the protection that it (and other providers of IP voice applications, including Qwest Communications Corporation, the long distance affiliate of Qwest Corporation), are entitled to and realistically need. They provide the common ground somewhere in the middle, that the Chairman said was necessary. This is especially true while the FCC develops a long-term intercarrier compensation plan that takes IP voice and other IP-enabled services into account. It is the disjunction between the Level 3 relief and its proclaimed flaws in the existing

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<sup>2</sup> In the Matter of Level 3 Communications LLC’s Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission’s Rules from Enforcement of Section 251 (g), Rule 51.701(b)(i), and Rule 69.5(b), WC Docket No. 03-266, filed Dec. 23, 2003.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> Compare the actual Petition with the Level 3 *ex parte* presentation of December 22, 2004 (claiming that its Petition did not apply to carriers who actually purchased tariffed feature group access services) (“December 22 *ex parte*”).

<sup>5</sup> In fact, any claim that IP Voice providers are languishing is contradicted by all evidence, not the least of which is provided by IP Voice providers themselves. *See* Ben Charny, Cable Raises its Voice, *c/net news.com*, [http://news.com.com/Cable+raises+its+voice/2100-7352\\_3-5579111.html](http://news.com.com/Cable+raises+its+voice/2100-7352_3-5579111.html), March 3, 2005; Steven Lawson, SPRING Von: VOIP players gear up fast for fast-growing market, *IT World.com Site Network*, [www.itworld.com/Net/3303/050307von/pfindex.html](http://www.itworld.com/Net/3303/050307von/pfindex.html), March 7, 2005.

structure that have made it so difficult to actually determine just what Level 3 is asking for in its Petition and, more significantly, to fully grasp the dangers inherent in a grant of the Petition.

In two recent *ex parte* presentations,<sup>6</sup> Level 3 has elaborated on its position in a manner that highlights both the fatal flaws in the Level 3 position and the problems inherent in any approach to IP voice access issues, even on an interim basis, which is not part of and consistent with a comprehensive approach to the intercarrier compensation regulatory structure. Pending development of an intercarrier compensation structure, clarification and continued application of the existing rules, as embedded in the so-called “ESP exemption,” provides a logical and reasonably fair method of treating all IP-enabled services.<sup>7</sup> Qwest’s position is simple. True IP voice services<sup>8</sup> are “enhanced services<sup>9</sup> under the Commission’s rules. They are customarily used by customers and ISP providers alike in conjunction with a multitude of other IP-enabled services. There is no logical reason to treat IP voice applications any different than other IP-enabled services for purposes of determining the correct access charge or intercarrier compensation mechanism. Namely, for “true IP voice” services when a call originating in IP terminates on the PSTN, the ISP POP<sup>10</sup> is treated as an end user for both access charge application and determination of whether, when multiple LECs are involved, a call is subject to the access charge regime or Section 251(b)(5) of the Act.

Appended hereto as Attachment A is a brief description of the background of the ESP exemption as it applies to IP-enabled services today. This attachment provides the backdrop for the analysis that follows.

## **II. Level 3 Now Effectively Concedes That The Relief It Seeks Would Potentially Undercut The Existing Access Charge Structure By Allowing Carriers To Utilize Local Exchange Switching Facilities To Originate And Terminate Interstate Interexchange Telecommunications Outside Of The Carrier Access Charge Structure.**

The legal treatment of an ISP POP as an end-user premise for access charge (and reciprocal compensation) purposes enabled the carrier access charge system to remain intact even while ISPs were able to purchase local access for interstate service. The analysis is simple: end users

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<sup>6</sup> Letter from John T. Nakahata to Marlene H. Dortch, March 2, 2005 (March 2 *ex parte*); Letter from John T. Nakahata to Marlene H. Dortch, February 23, 2005 (February 23 *ex parte*).

<sup>7</sup> True IP voice services are voice applications originating in the Internet protocol over a broadband connection.

<sup>8</sup> See Reply Comments of Qwest Communications International Inc., WC Docket No. 04-36, filed July 14, 2004 at 5.

<sup>9</sup> See 47 C.F.R. § 64.702(a).

<sup>10</sup> POP is short for “point of presence.” In the context of an ISP or an interexchange carrier, the term POP is used to designate the location of the place or places where an ISP or IXC receives traffic from or delivers traffic to a local exchange carrier. In the case of a CLEC, that point is customarily referred to as a “point of interconnection.”

are entitled to purchase retail local access services to interconnect with local exchanges for services within a properly designated local calling area, while carriers are not (and must purchase feature group services for such access).<sup>11</sup> Because an ISP POP is treated as an end user premise for access charge purposes, when an ISP POP is connected to a local exchange, it may do so through the purchase of the same retail (business) services as are available to other end users, and thereby receive the same access to a local calling area as an end user receives. If the ISP makes or receives a call from another end user within the same LATA but within a different local calling area, the call is deemed to be an interexchange call and proper toll charges are assessed. The same analysis applies when interconnection by an ISP to a local exchange is through another carrier even when that carrier is interconnected via a single point of interconnection within the LATA: if the call is from an end user NOT in the same local calling area as the ISP POP, it would be rated as a toll call,<sup>12</sup> and the call treated under the access charge rules (as jointly provided access generally)<sup>13</sup> rather than under the reciprocal compensation rules that dictate the exchange of non-toll traffic.<sup>14</sup>

The ESP exemption does not exempt a carrier transporting ISP traffic from payment of a tariffed rate for services that it orders to originate or terminate that traffic, nor does it permit a carrier to purchase local service when terminating a call from or originating a call to an ISP POP in a different local calling area. It simply permits the ISP to purchase local services as if it were an end user -- something that a carrier cannot do. It similarly permits a CLEC to treat local ISP traffic (*i.e.*, traffic where the ISP POP is located within the same local calling area as the called or calling party) as subject to the compensation provisions of Section 251(b)(5) rather than the access charge structure (*i.e.*, jointly provided switched access).

Level 3 has been somewhat evasive on this critical issue -- whether its Petition includes a request for a ruling that a carrier carrying an intraLATA toll call to or from an ISP POP in a different local calling area would be “exempt” from the access structure. In December, Level 3 came very close to agreeing, at least with regard to traffic originating on the PSTN, that, even if its forbearance petition were to be granted, the POPs of IP-enabled service providers would nevertheless be rated as end user premises and carriers transporting ISP calls to or from an ISP POP in another local calling area would have that call rated as an interexchange call. Most significantly, Level 3 seemed to indicate in its December *ex parte* that the originating end of a 1+ call destined to an IP Voice provider would be subject to the tariffed rate for access:

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<sup>11</sup> Feature group access customarily covers an entire LATA, not just a local calling area.

<sup>12</sup> We note here that the phrase “toll” and “interexchange” are used interchangeably in this paper. Common usage often refers to interLATA calls as “interexchange calls” and intraLATA toll calls as “toll calls.” For purposes of our analysis, the terms are identical. The provision in 47 U.S.C. Section 153(48) that “telephone toll service” includes a “separate charge not included in contracts with subscribers for exchange service” is not relevant to the issues raised in the Level 3 Petition.

<sup>13</sup> In the case of jointly provided access, each carrier bills the customer -- in this case the ISP.

<sup>14</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC 05-33, *Further Notice of Proposed Rulemaking*, CC Docket No. 01-92 ¶¶ 141-43 (“*Intercarrier Compensation FNPRM*”).

Level 3 is not seeking forbearance from the applicability of originating interstate and intrastate access charges with respect to traffic that reaches Level 3 or any other carrier serving a VoIP provider via the calling party's pre-subscribed or dial-around interexchange carrier ("IXC"). When such "1+" traffic or "10-XXX" traffic is exchanged between the originating LEC and the intermediary IXC (such as for an intraLATA toll call placed to a VoIP number), originating access charges would continue to apply as between the originating LEC and the IXC[.]<sup>15</sup>

In its March 2 *ex parte*, Level 3 withdrew from this position, and now claims that a carrier carrying an IP voice call could claim that a call was local for access charge and reciprocal compensation purposes solely on the basis that the call was "VoIP traffic," without regard to the actual location of the ISP POP, the configuration of the traffic, or rating of the NPA/NXXs. And Level 3 now also includes interexchange carriers within the ambit of those brought within the reciprocal compensation structure of the rules:

If the Commission were to grant forbearance, any telecommunications carrier -- including but not limited to CLECs -- would be able to exchange traffic with LECs pursuant to interconnection agreements under which reciprocal compensation would govern the exchange of VoIP traffic. Section 251(b)(5) is not limited to traffic exchanges between LECs or LECs and CMRS carriers. Nor is Level 3's Petition -- rather, it expressly applies to Level 3 and "*any other telecommunications carrier* handling [IP-enabled services] traffic that originates or terminates on the PSTN."<sup>16</sup>

This, of course, puts Level 3 back in its original position -- that IP voice traffic should simply be "exempted" from paying the proper rate for access no matter what services a carrier carrying traffic for an IP voice provider purchases or is required to purchase from an ILEC or CLEC. This would apparently include allowing a carrier interconnecting with an ILEC in a manner governed by the rules regarding access and jointly provided switched access to treat even 1+ dialed access traffic as local. It is not a responsible position. It is on its face also quite opposed to Level 3's December 22 position.

But the difficulty is not so much that Level 3 has been unable to articulate its position with consistency. Rather, the problem is that the current broad and destructive sweep of the Level 3 Petition is the natural consequence that would result from any effort to "exempt" IP-enabled services from access charges instead of keeping them in harmony with the structure growing from the ESP exemption. The complexity of the undertaking suggested by Level 3 is breathtaking and doomed to failure -- at least if failure is defined as bringing about results that have no relationship to those that were intended. For all of its flaws, the ESP exemption is at

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<sup>15</sup> See December 22 *ex parte* at ¶ 2.

<sup>16</sup> March 2 *ex parte* at 6 [italics and brackets in original; footnote omitted]. It is possible to read the Level 3 *ex parte* as limited to terminating traffic, but, even if Level 3 meant to bring only terminating IXC access traffic into the sphere of reciprocal compensation, the fact that it could not say so plainly emphasizes the serious problems that would be raised by a grant of its Petition.

least comprehensible. Creating an “exemption” from access charges, no matter how styled, is bound to go far beyond any legitimate application of the already extensive rights enjoyed by IP-enabled services providers and carriers to which they connect. This is particularly true in the case of the Level 3 Petition, because it appears to apply to calls that are not “true VoIP” -- that is, calls that originate on the PSTN, using 1+, 10XXX and even VNXX calls, and are terminated to a VoIP customer.

An example of the application of how the ESP exemption works with regard to traffic originating and terminating on the PSTN can be seen in Attachment B.<sup>17</sup> In Attachment B-1, an IP voice customer in Denver, CO calls a PSTN customer in Washington, DC. The call travels over the Internet and other facilities to the ISP POP located within the local calling area of the called customer. As the ISP POP is treated as an end user premise for access purposes, the connection between the ISP POP and the end user is treated as a local call whenever the two are located in the same local calling area, whether the call is routed directly to the called party by local connection to the terminating ILEC, or through a CLEC. If the ISP POP were located in a different local calling area than the called party, the call between those two locations would not be treated as local.

In Attachment B-2, a PSTN end user in Denver calls an IP voice customer in DC by dialing the standard 1+ dialing code. This call travels from the customer in Denver to a long distance carrier, which then carries the call to Washington, DC where the number resides.<sup>18</sup> The LEC in Denver charges the IXC for originating access, and the two LECs in DC charge the IXC for terminating access. The IXC then normally recovers its costs from the end user in Denver. In other words, the call is treated like any other call from a PSTN end user in Denver to the IP voice provider’s ISP POP.

If the Level 3 arguments are accepted, this call, which today is a normal long distance call subject to assessment of carrier access charges, could be converted to a different compensation scheme based solely on the fact that it terminates to an ISP POP for further delivery to an IP voice customer. The network components have not changed, the carriers involved have not changed, the services passing over the network have not changed, and the location of the ISP POP (end user) has not changed, and the dialing pattern has not changed. In fact, given the technological reality of 1+ dialing, it appears that the IXC would have been required to order FGD from the originating LEC in Denver and from the terminating LEC in DC in order for the originating and terminating parts of the call to be routed properly. While this scenario would not arise under the December 22 *ex parte*, it seems inescapable under the March 2 *ex parte*. Under these circumstances Level 3’s Petition would create a special class of long distance carriers that

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<sup>17</sup> Attachment B-1, appended hereto, and entitled “True-VoIP-Originated Call to PSTN End User; Attachment B-2, appended hereto, and entitled “PSTN-originated Call to VoIP End User in Different Local Calling Area (LCA).”

<sup>18</sup> We recognize that the number of an IP voice customer may not be in the same area code as the location of the customer. However, in such an event an ISP facility would be required in the geographic location to which the number is assigned, and the same analysis would apply to delivery of the call to that location. The routing shown on Attachment B-2 would also not be possible if the IP voice customer’s number were assigned to a different area code.

were “exempt” from payment of proper switched access charges based solely on the content (*i.e.*, IP voice content) of the messages that they were carrying. There is simply neither justification nor reason to allow this scenario to develop.

### **III. Level 3 Misstates The Current Treatment Of Local Calls Under Existing Rules.**

In its February 23 *ex parte*, Level 3 distorts the manner in which compensation for local and non-local traffic is currently calculated and assessed among carriers, the apparent import of which is to claim that the existing rules do not adequately protect providers of IP-enabled services from arbitrary assessment of unwarranted charges for access. The ESP exemption, properly interpreted, provides a reasonable way to treat IP-enabled services, including IP voice applications, while final intercarrier compensation rules are developed. But it must be properly interpreted and uniformly applied.

Level 3 starts with the proposition that the differentiation between local calls and non-local calls for purposes of access and reciprocal compensation currently specified in the Commission’s rules is “absurd.”<sup>19</sup> Level 3’s support for this claim is the fact that, under the current rules, a call between two parties in the same local calling area is a local call, and a call between two parties in different local calling areas is an interexchange or toll call. But local calls and interexchange calls are always evaluated based on the end points of the call, and it is absurd not to continue to do so in the context of the ESP exemption. It is just that, in the case of an ISP call, for access charge purposes, the ISP POP is one of the call’s two end points, and must be evaluated as such. If a local call traverses a CLEC switch, the location of the CLEC switch (assuming that it is in the same LATA as the ILEC) does not determine whether the call is local, and calls within a LATA are treated either as access (*i.e.*, they are interexchange or toll calls) or reciprocal compensation based on the location of the end points.<sup>20</sup> This is exactly the same whether the end users are traditional end users or ISP POPs. This principle is neither complicated nor absurd.

Level 3 next compounds this error by claiming that treating IP voice providers as end users violates the rights of CLECs to demand interconnection with an ILEC at a single point of interface within a LATA.<sup>21</sup> The problem with Level 3’s position here is that Level 3 totally misconstrues the right of a CLEC to a single point of interconnection, and the cases it relies on stand for exactly the opposite proposition than that for which they are cited by Level 3. Level 3 contends that it has a right to interconnect at a single point of interface within a LATA (which Qwest does not contest under the current rules). But rather than recognizing that this single point of interface does not transform interexchange calls between end users into local calls, Level 3 argues that the right to a single point of interconnection now should be dramatically expanded to require treatment of all traffic within a LATA as local traffic. This is simply not true. Under all of Qwest’s interconnection agreements, when toll traffic is exchanged between two LECs, it is exchanged on an access basis, not a reciprocal compensation basis. Toll traffic is measured based on the locations of the two end points of the call.

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<sup>19</sup> February 23 *ex parte* at 2-3.

<sup>20</sup> *See id.* at Exhibit A.

<sup>21</sup> *Id.* at 3-5.



Attachment C, appended hereto, demonstrates how this scenario is played out in real life based on Qwest's actual network configurations and Qwest's actual interconnection agreements. Attachment C-1 shows a local call when the ISP POP is in the same local calling area as the other party to the call, compared to the same result (in Attachment C-3) when a traditional called party or PBX is in the same local calling area. Attachment C-2 and Attachment C-4 show the converse—with an ISP POP, a PBX or a traditional end user in a local calling area that is different from the local calling area of the other party. The treatment is identical, and clearly consistent with the right of a CLEC to a single point of interconnection within a LATA. Level 3's support for the proposition that relying on state designated local calling areas to determine the status of a call between two end points is unlawful is predicated on the decision of the Fourth Circuit Court of Appeals in *MCIMetro Transmission Services Inc. v. BellSouth Telecommunications, Inc.*<sup>22</sup> Level 3 contends that this case, in which an effort by BellSouth to charge a CLEC for the cost of delivering traffic to the CLEC's single point of interconnection was rebuffed by the Court based on the existing rules of the Commission,<sup>23</sup> somehow implicates the definitions of local and toll traffic in terms of determining whether the reciprocal compensation or the jointly provided switched access rules apply. It appears that Level 3 contends that these decisions somehow grant to ISPs (rather than CLECs) the right to maintain a single POP within a LATA and to use this single POP to avoid toll charges. The right to maintain a single point of interconnection within a LATA is a right reserved to carriers. In fact, the proper application of the ESP exemption to ISP POPs does not implicate the right of a CLEC to a single point of interconnection within a LATA at all, and Level 3 has simply misconstrued a CLEC's interconnection rights and improperly sought to apply them to an ISP.

The *MCIMetro* decision does not hold to the contrary. That case dealt with whether an ILEC could, under the FCC's current rules, charge a CLEC to deliver traffic to a remote CLEC single point of interconnection. The case actually focused on calls where both end points were within a single local calling area, but the CLEC switch was in a different local calling area, and had nothing to do with the principle for which Level 3 cites the case.<sup>24</sup> This point was emphasized even more strongly in the D.C. Circuit case of *Mountain Communications, Inc. v. FCC*,<sup>25</sup> in which the Court repeatedly noted that the calls in question, while delivered to a CLEC single point of interconnection in a local calling area other than the location of the originating caller, were ultimately between end points in "the same local calling area." Whether an ILEC can charge a CLEC for delivering traffic to a remote CLEC single point of interconnection is a very

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<sup>22</sup> *MCIMetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4<sup>th</sup> Cir. 2003).

<sup>23</sup> The Commission is currently studying under what circumstances an ILEC may lawfully charge a CLEC for delivery of traffic to a remote single point of interconnection, especially when the single point of interconnection is located in another calling area. *Intercarrier Compensation FNPRM* ¶¶ 91-7.

<sup>24</sup> See *MCIMetro*, 352 F.3d at 877, describing the calls at issue in the case as being between "neighbors."

<sup>25</sup> *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 646, 647 (D.C. Cir. 2004).

important issue. But it has nothing to do with whether a call between two end points in two different local calling areas is a local call or a toll (interexchange) call.

There is no reason in law or logic why these principles should apply any differently when one of the end points of a call is an ISP POP (designated as an end user under the ESP exemption) than is the case when both end points are more traditional end users.

#### **IV. Conclusion.**

It is true, as Chairman Powell has noted, that the issues raised by access charges as applied to IP-enabled services, including IP voice applications, are often polarized and are always controversial. But the Level 3 Petition serves to create controversy where there is no need for it. While Qwest completely agrees that it is vital that the Commission act promptly and decisively to devise a comprehensive intercarrier compensation regime that includes the IP-enabled services discussed by Level 3, it is not necessary, and indeed would be affirmatively harmful, to take action along the lines requested by Level 3. There is neither need nor reason for a special status for IP voice applications that is different from that afforded to other IP-enabled services through the ESP exemption. In fact, granting such a status to providers of IP voice services (even assuming that this could be accomplished without dragging the entirety of other IP-enabled services with them) would dramatically undercut the existing access structure and undermine the Commission's ultimate efforts to rationalize the access infrastructure in the intercarrier compensation docket.

The Level 3 Petition should be denied, and the temptation to grant some of Level 3's relief through "interim rules" should be resisted. On the other hand, the Commission should eliminate any uncertainty as to the proper application of the ESP exemption in the context of IP-enabled services through an appropriate clarifying order.

# ATTACHMENT A

## The ESP Exemption

### I. BACKGROUND

The Commission has been wrestling with the issue of how providers of “enhanced services” should pay for interstate use of local exchange switching facilities and services since the very beginning of the access charge regime.<sup>1</sup> The “interim” solution to enhanced services access was the so-called “ESP exemption,” whereby enhanced service providers were entitled to connect their “POPs” to local exchanges via local exchange services (as opposed to the tariffed feature group services that carriers were required to purchase), even though they used the local exchange facilities for interstate access.<sup>2</sup> The ESP exemption was never really an “exemption” at all -- it was simply a regulatory decision that, for a variety of policy reasons, interstate access by ESPs located within the local calling area of a customer would be treated as local for the purpose of assessing the correct access charge, at least if local service were ordered. The same status was accorded to private networks that accessed local exchanges for interstate origination and termination of interstate calls -- these private networks were likewise treated as end users for access charge purposes based on the location of the PBX or other terminating device (including Centrex) through which the traffic was delivered into a local exchange.<sup>3</sup> In both cases, interstate cost recovery was designed to be achieved through assessment of a special access surcharge on ILEC interstate special access lines used by ESPs or “leaky PBXs”.<sup>4</sup>

This “local” designation of an ESP POP carried over into the telecommunications environment established in the 1996 Telecommunications Act. Information service providers (ISPs), the heirs of the old enhanced service provider moniker, are entitled to have their ISP POPs treated as end-user premises under the ESP exemption. Thus, ISPs can order local service to ISP POPs in the same manner as such service can be ordered to other end user premises. When the ISP is served by a CLEC and matters of reciprocal compensation under Section 251(b)(5) of the Act arise, the

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<sup>1</sup> See *In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 254-55 ¶ 39 and n.15, 320 ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) (“*First Order on Reconsideration*”), *further modified on 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).

<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> See *First Order on Reconsideration*, 97 FCC 2d at 714-15 ¶ 82, 743 ¶ 151; *Order on Further Reconsideration*, 97 FCC 2d at 867-78 ¶¶ 107-39.

ESP exemption analysis carries over into the current realm under Section 251(g) of the Act. Subject to modification by the FCC and the interim ISP reciprocal compensation rules,<sup>5</sup> the end-user designation of an ISP POP also allows for reasoned analysis of the rights and obligations of local exchange carriers when exchanging ISP traffic with each other. In such an event the ISP POP is treated as an end user for analytical purposes. Based on the location of the ISP POP, whatever mechanism is used to treat calls between traditional end users (reciprocal compensation, tariffed access, *i.e.*, jointly provided switched access paid by the ISP to both carriers, or some other approach) is applied to this traffic and used by the respective carriers to recover the costs incurred in exchanging the ISP traffic.

The key of course is that an ISP POP is not the same thing as an IXC POP or a CLEC point of interface, because neither an IXC POP nor a CLEC point of interface is treated as an end user for access purposes and neither is entitled to purchase retail services reserved for end users (although CLECs may purchase local services for resale under Section 251(c)(4) of the Act). There must always be an ISP POP in the case of an IP-enabled service, even if that POP is collocated at the same premise with an IXC POP or a CLEC point of interface. When reciprocal compensation is paid by one carrier to another for delivering a call between two end points in a specific local calling area, compensation under Section 251(b)(5) of the Act, as clarified by the interim rules regarding ISP reciprocal compensation, is likewise paid when the end-user premise is an ISP POP. When the call to an end user is interexchange in nature (for calls within a LATA, this is designated as “toll” traffic whether or not a separate toll charge is actually assessed), it is delivered via jointly provided switched access. Jointly-provided switched access is the compensation vehicle when two LECs combine to provide access to an interexchange carrier, and is the proper compensation mechanism whenever the ISP POP is located in a calling area other than the one in which the LEC’s customer is located. The LECs do not bill each other—they bill the IXC. This is important because it is well agreed that, when two LECs collaborate to complete a toll call (*i.e.*, any call between two local calling areas, whether a toll charge is assessed to the end user or not), the reciprocal compensation rules do not apply and instead the call is billed under access principles. In the case of a call where the LEC is often also the toll carrier (a common scenario in the case of intraLATA toll calls), access charges are assessed based on the toll carriage (*i.e.*, which carrier actually provides the toll service to the end user).

Because “true IP voice” service (a voice application originating in Internet Protocol over a broadband line) is an information service, IP voice providers and carriers carrying their traffic operate under the ESP exemption. Thus, while an IP-voice provider can, of course, purchase feature group services to originate or terminate calls to and from their ISP POPs, they are entitled to purchase local service under the ESP exemption, and calls to and from IP-voice providers are treated in the same fashion as calls to other ISP POPs under the principles stated in this memorandum.

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<sup>5</sup> 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, 9163-81 ¶¶ 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).

The appropriate rules can be summarized as follows:

- All IP-enabled traffic, including true VoIP traffic, is currently treated as an information service under the Commission's rules. The principles that guide the pricing of interconnection to a local exchange by a VoIP provider are derived from the ESP exemption.
- The ESP exemption is something of a misnomer. It is not an exemption from the payment of access. Rather it is a regulatory structure that treats ISP POPs as if they were end-user premises for the purpose of assessing access charges. Because of this status, ISPs are entitled to purchase exchange access from ILECs out of ILEC end-user tariffs under the same terms and conditions as other end users. Any special access services they purchase from an ILEC to connect their ISP POPs to an IXC or other carriers of traffic are subject to the "special access surcharge" rules.<sup>6</sup>
- In addition, when an ISP POP is served by a CLEC, the CLEC is entitled to treat that ISP POP as an end-user premise for purposes of determining whether the rules regarding reciprocal compensation (47 U.S.C. § 251(b)(5)) or access (jointly provided switched access) apply. The compensation levels for ISP traffic are treated under the interim rules respecting ISP reciprocal compensation.
- Under these circumstances, unlike the LATA-wide access available through ILEC tariffed switched access services, an end user generally has LATA-wide access only through the purchase of toll service. If an ISP POP is located in a local calling area that is within the same LATA as a terminating caller, but which requires a toll call between the ISP POP and the terminating caller, the ISP POP is still treated as an end user and the proper toll charges to the ISP are assessed. Access charges are then assessed to the toll carrier.
- This is consistent with the right of a CLEC to establish a single point of interconnection within a LATA. The existence of such a single point of interconnection does not affect the basic differentiation between local and toll (intra and interexchange) calls. An ISP POP is entitled to "LATA-wide termination," but the rates are different than the LATA-wide termination provided pursuant to ILEC access tariffs. Specifically, an ISP POP's connections within a LATA are governed by the same rules that govern other end users.<sup>7</sup>
- It is vital to remember that, whenever an ISP orders service from an ILEC access tariff, it must pay the tariffed rate for the service that it ordered. There is a prevalent misconception to the effect that the ESP exemption permits an ISP to order a tariffed feature group service and not pay for it. This is totally wrong. The ESP exemption permits an ISP to order local service under circumstances where a carrier does not have

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<sup>6</sup> 47 C.F.R. § 69.115.

<sup>7</sup> The right of a purchaser of interstate switched access to "LATA wide termination" is of course irrelevant to this analysis. No one doubts the ability of an ISP to purchase access service pursuant to the ILEC feature group services so long as it pays the proper tariffed rate for service.

the same right to order local service. The ESP exemption does not allow an ISP to pay a non-tariffed rate for a tariffed service that it has ordered, and the ISP choosing to order FGD service, for example, must pay the tariffed rate for service. In fact, as an ISP is treated as an end user, the ISP must pay the tariffed rate for services it orders from ILECs -- it has no right to bargain for any different rate.<sup>8</sup>

- When IP voice traffic is delivered to an ILEC, either directly from the ISP POP or through a CLEC, these principles apply. The ISP POP is treated like any other end-user premise. If the IP voice provider is purchasing access service directly from an ILEC, it may do so as an end user subject to the normal rules regarding local and toll service. If the IP-voice provider purchases service from a CLEC and the IP-voice traffic is exchanged with an ILEC, whether the access rules or the intercarrier compensation rules apply depends entirely on the location of the IP voice provider's ISP POP.

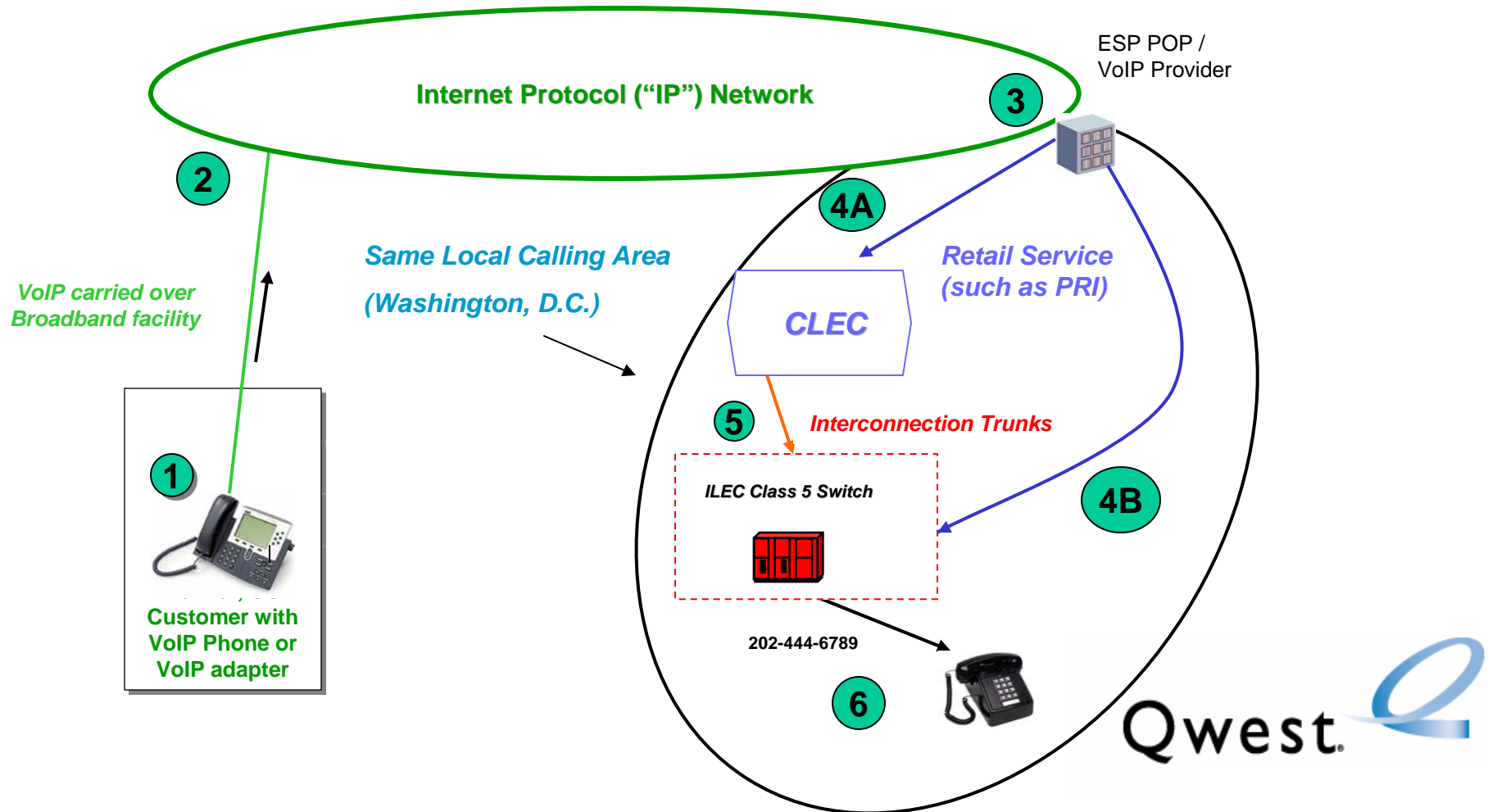
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<sup>8</sup> Unlike carriers, end users generally do not have the statutory ability to contract with dominant carriers for tariffed services at other than the tariffed rates. *See American Broadcasting Companies, Inc. v. FCC*, 643 F.2d 818, 822-24 (D.C. Cir. 1980).

# True-VoIP-Originated Call to PSTN End User Attachment B-1

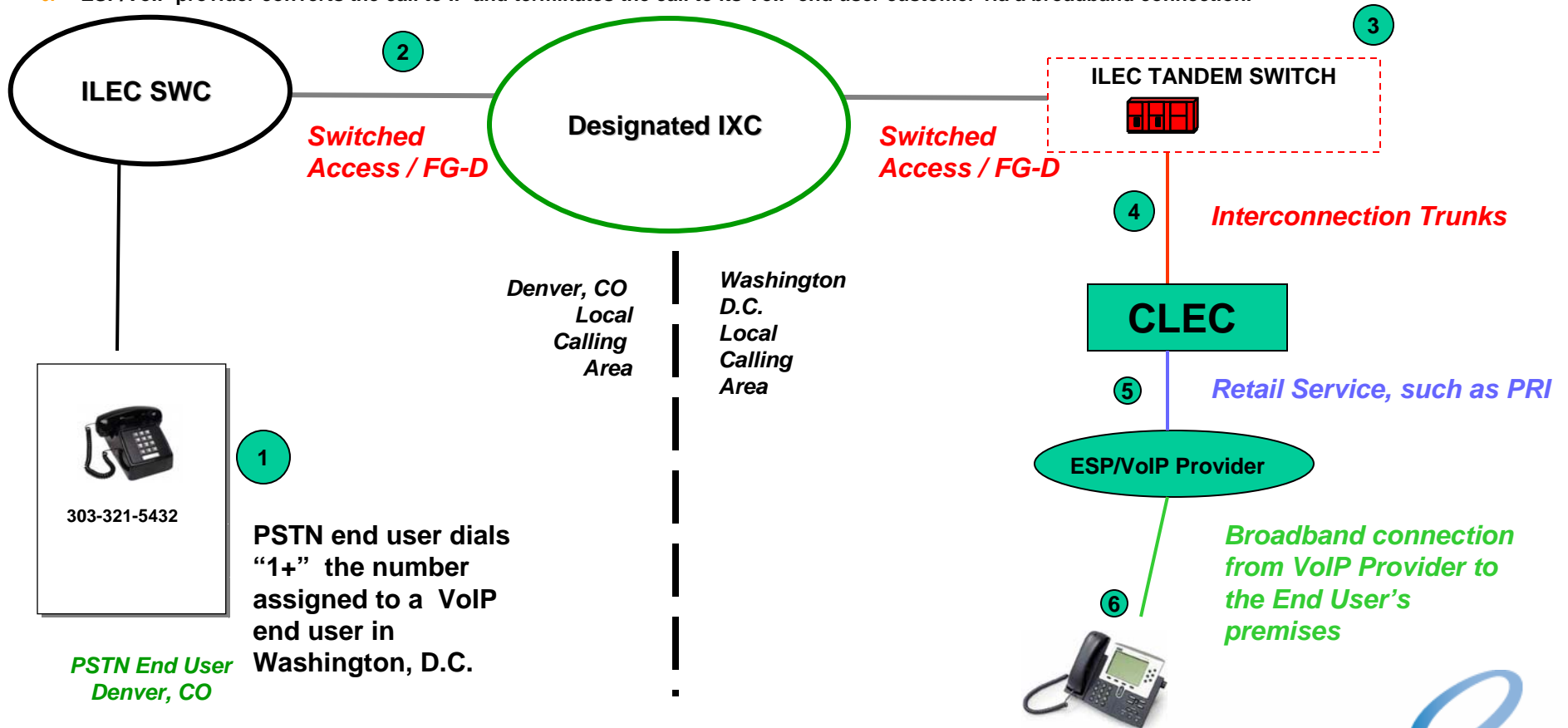
## ESP POP and Terminating End User in the Same LCA

1. VoIP Phone or VoIP Adapter at Customer Premises
2. Call initiated in IP over a Broadband Connection (e.g. IP over: DSL, T1, or Cable modem)
3. Call is routed via the Internet Protocol Network to an Enhanced Service Provider/VoIP Provider's POP located in the same Local Calling Area as the terminating PSTN end user
4. ESP/ VoIP Provider purchases Retail Service (PRIs) to connect to CLEC (4A) or alternatively purchases PRIs to connect to the ILEC (4B).
5. CLEC passes traffic to ILEC via Interconnection Trunks. Reciprocal Compensation applies
6. ILEC terminates call to end user.



## PSTN-originated Call to VoIP End User in Different Local Calling Area (LCA)

1. End user in Denver dials a "1+" call to an end user in Washington, D.C. Call is transported in TDM. The originating end user has purchased a telecom service from the originating LEC
2. Call routes from ILEC SWC to designated IXC. Switched access / FG-D charges apply.
3. IXC carries call from Denver to Washington, D.C. and hands the call off to Washington, D.C.-based ILEC. Jointly provided switched access charges apply
4. The ILEC sends traffic via its tandem to the CLEC switch. Jointly provided switched access charges apply.
5. CLEC sends the call to the ESP/VoIP Provider via a Retail Service (such as PRI) offered via contract or tariff.
6. ESP/VoIP provider converts the call to IP and terminates the call to its VoIP end user customer via a broadband connection.



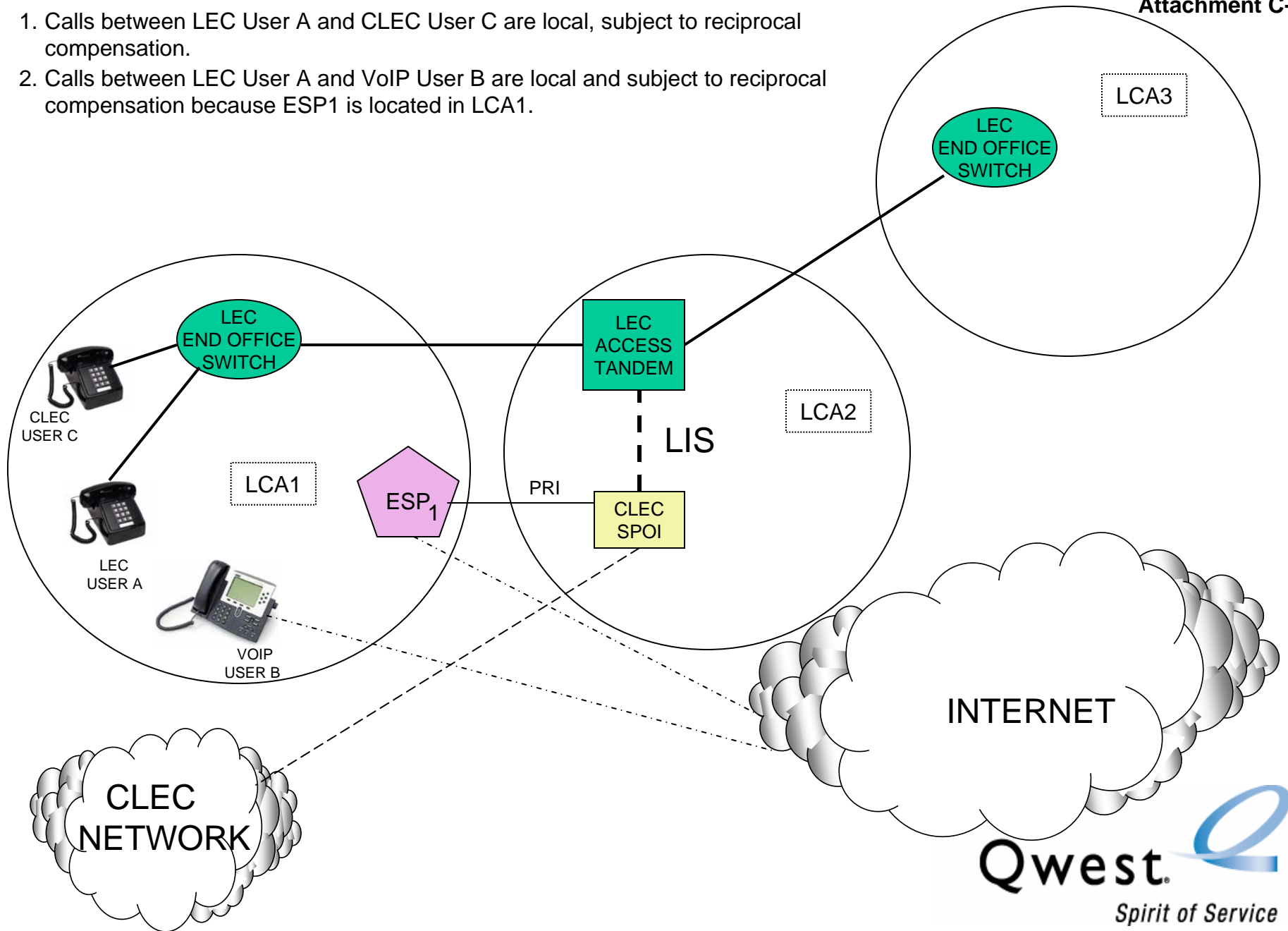
VoIP End User:  
202-444-6789  
Washington, D.C.





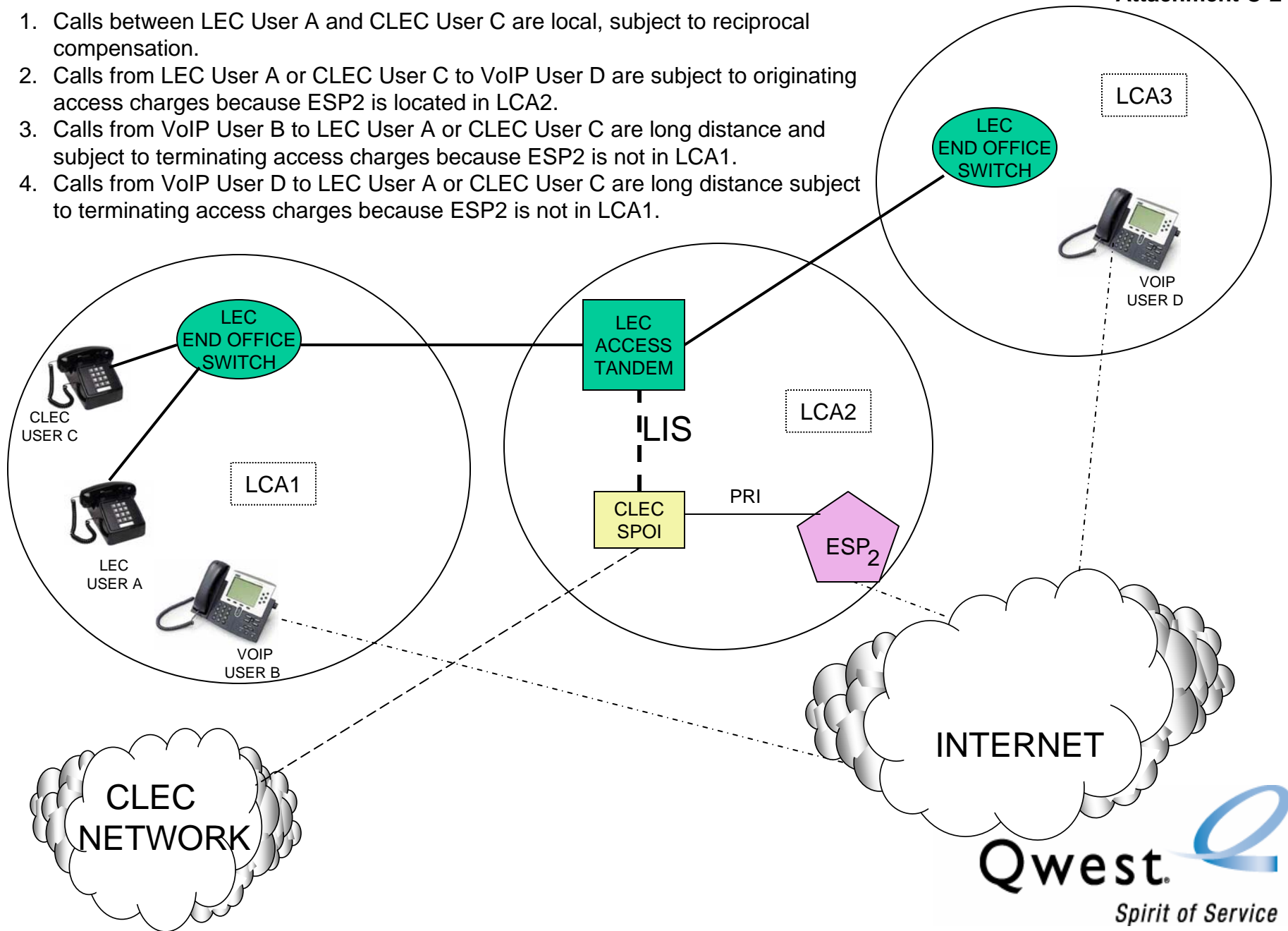
**Attachment C-1**

1. Calls between LEC User A and CLEC User C are local, subject to reciprocal compensation.
2. Calls between LEC User A and VoIP User B are local and subject to reciprocal compensation because ESP1 is located in LCA1.

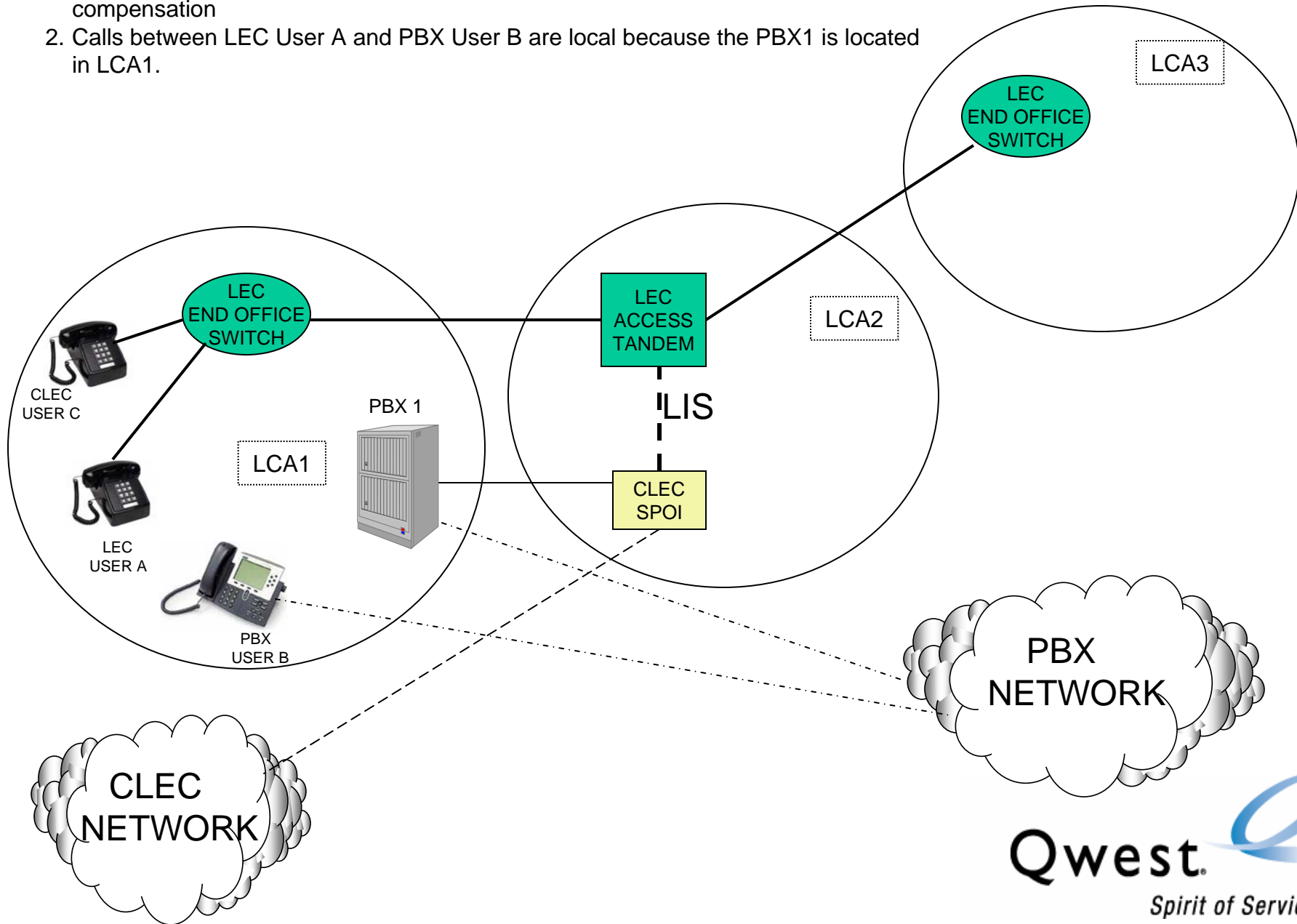


**Attachment C-2**

1. Calls between LEC User A and CLEC User C are local, subject to reciprocal compensation.
2. Calls from LEC User A or CLEC User C to VoIP User D are subject to originating access charges because ESP2 is located in LCA2.
3. Calls from VoIP User B to LEC User A or CLEC User C are long distance and subject to terminating access charges because ESP2 is not in LCA1.
4. Calls from VoIP User D to LEC User A or CLEC User C are long distance subject to terminating access charges because ESP2 is not in LCA1.



1. Calls between LEC User A and CLEC User C are local, subject to reciprocal compensation
2. Calls between LEC User A and PBX User B are local because the PBX1 is located in LCA1.



1. Calls between LEC User A and CLEC User C are local subject to reciprocal compensation.
2. Calls from LEC User A or CLEC User C to PBX User D are subject to originating access charges because PBX2 is not located in LCA1.
3. Calls from PBX User B to LEC User A or CLEC User C are long distance and subject to terminating access charges because PBX 2 is not in LCA1.
4. Calls from PBX User D to LEC User A or CLEC User C are long distance subject to terminating access charges because PBX2 is not located in LCA1.

