BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In The Matter Of Level 3 Communications, LLC'S Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by The Telecommunications Act Of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation	Docket No. UT-063006 QWEST CORPORATION'S OPENING BRIEF

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I. INTRODUCTION

1 The overriding issues in this arbitration are responsibility for intercarrier compensation and responsibility for costs of interconnection. Qwest proposes language for intercarrier compensation that is properly based on the type of traffic at issue and language for cost responsibility that makes the cost-causer responsible for costs that are incurred. In contrast, Level 3 proposes language for intercarrier compensation that departs from the applicable rules and proposes language for cost responsibility that improperly shifts costs to Qwest and ultimately Qwest customers who are not the cost-causers.

2 Today, virtually all of the traffic exchanged between Qwest and Level 3 is Internet Service Provider ("ISP") traffic. (Tr. 433, 544-45). Level 3 and its ISP customers have made the business decision to centralize their operations to minimize costs. (Tr. 462-63; Ex. 47). As a result, the calls placed by dial-up customers are often delivered to ISPs located outside of Washington. The service that Level 3 offers to its ISP customers, commonly known as VNXX, is the functional equivalent of a 1-800 toll free service. (Tr. 545-46, 549-50). Level 3 provides "local" telephone numbers to its ISP customers who, in turn, provide those numbers to their dial-up customers. Where the ISP customer is not physically located in the same local calling area ("LCA") as the calling party, Level 3 uses improper number assignment to disguise interexchange calls to the ISP as local calls. Level 3 creates this toll free arrangement because it is necessary if its ISP customers are to have a viable product. (*Id.*).

3 To provide its toll-free interexchange service, Level 3 undertakes to gather traffic from dial-up callers and to deliver that traffic to the ISPs it serves. (Ex. 111T at 10-13; Exs. 32-33). Since the dial-up customers are located on Qwest's network, Level 3 causes Qwest to incur costs to originate and transport these calls to Level 3. Under the established intercarrier compensation regime for interexchange traffic, Level 3 should compensate Qwest for the origination and

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transport that Qwest provides. Indeed, Level 3 witness Wilson conceded at hearing that for a 1-800 service, the terminating carrier (Level 3) is responsible for paying intercarrier compensation. (Tr. 561).

4 By engaging in VNXX, Level 3 unlawfully deprives Qwest of compensation to cover its cost of originating and transporting calls to ISPs. At the same time, Level 3 asks the Commission to require Qwest to pay intercarrier compensation to Level 3 on these VNXX calls. The Commission should not permit Level 3 to avoid compensating Qwest and it should certainly not permit Level 3 to receive compensation from Qwest for VNXX traffic. Qwest believes that the Commission should either ban the use of VNXX (and require proper telephone number assignment[1]) or, alternatively, deny Level 3 terminating compensation for calls delivered outside of the LCA of the caller. It is fundamentally unfair and inappropriate to allow Level 3 to deprive Qwest of compensation for originating long distance calls to ISPs and at the same time to require Qwest to pay Level 3 terminating compensation on these calls.

5 Level 3 seeks to reverse the established intercarrier compensation rules so that Qwest would bear virtually all of the costs of carrying dial-up traffic, while Level 3 collects the revenues from the ISP customers its serves. As a result of the Ninth Circuit's decision in *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006) (*Peevey*"), it is now clear that the *ISP Remand Order* does not require Qwest to pay intercarrier compensation on VNXX traffic. Since April 2006, four federal circuit courts (the D.C., First, Second, and Ninth Circuits) have issued decisions interpreting the *ISP Remand Order.*[2] Those decisions demonstrate that the only traffic subject to the *ISP Remand Order* compensation scheme is local ISP traffic—traffic delivered to an ISP located in the same LCA as the calling party.

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[1] This issue is currently pending in Docket No. 063038 (Qwest's VNXX complaint against nine CLECs). The Commission here should issue its order on an interim basis without prejudice to the outcome of that docket.

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

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6 It is also clear as a result of *Peevey* that the Commission has authority to require Level 3 to bear the cost of originating and transporting VNXX calls. The uncontradicted testimony at hearing established that this is the economically correct approach to follow. Requiring Level 3 to pay Qwest's full cost of originating and transporting long distance calls to ISPs ensures that the ultimate cost-causer, the ISP's dial-up customer, compensates both Qwest and Level 3 for costs that the dial-up customer causes.

7 In this case, only Qwest's proposed language ensures that ISPs and their customers bear the costs they cause. Level 3's proposed language would shift all of the costs (origination, transport, and termination) to Qwest and/or ratepayers generally, including individuals who do not use dial-up service. For the reasons that follow, the Commission should adopt Qwest's proposed contract language and reject the language proposed by Level 3.

II. ARGUMENT

A. The Commission should Adopt Qwest's Proposed Language Regarding the Scope of Interconnection and Responsibility for Costs of Interconnection (Issues 1)

8 Level 3 initially described Issue 1 as whether Level 3 was entitled to a single point of interconnection ("SPOI") in a LATA. In fact, the dispute concerned interconnection agreement ("ICA") language related primarily to responsibility for costs of interconnection.

1. Qwest's Proposed Language Prescribes the Legally Correct Terms of Interconnection (Issues 1 A and 1B)

9 Issues 1A and 1B address a mix of issues including interconnection terms, cost responsibility terms, and terms relating to VoIP. The interconnection terms will be discussed here. Level 3's Proposed Section 7.1.1.2 which addresses cost responsibility will be discussed in Section II.A.5, *infra*. The terms relating to VoIP will be discussed in Section II.E, *infra*.

10 Qwest's proposed Sections 7.1.1 (Issue 1A) and 7.1.2 (Issue 1B) properly describe SPOI under

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Section 251(c)(2). 47 U.S.C. § 251(c)(2). Qwest's proposed language properly sets forth the terms applicable for SPOI and has been found to be appropriate by commissions throughout Qwest's 14-state region, including the Washington Commission. (Ex. 91T at 6, 12-13). Qwest's language has been adopted by both the Iowa Utilities Board and the Arizona Corporation Commission in the current round of arbitrations with Level 3.[3]

11 In contrast, Level 3's proposed Sections 7.1.1, 7.1.1.1, 7.1.1.3, and 7.1.2 are laced with legally incorrect and ambiguous language. Level 3's Sections 7.1.1 and 7.1.1.1 are inappropriate because they expand the technical feasibility requirement of Section 251(c) to apply to all "telecommunications." There is no right to SPOI at any technically feasible point that applies to "all telecommunications." As the FCC stated in the *Local Competition Order*,[4] "interconnection" under Section 251(c)(2), and the rights that go with it, are intended solely to allow a CLEC to provide "telephone exchange service" or "exchange access." *Local Competition Order* ¶¶ 186-91.

12 Level 3's proposed Section 7.1.1.1 purports to require Qwest to provide "CLEC a Single Point of Interconnection in each Local Access Transport Area (LATA) for the exchange of all telecommunications traffic" at "Level 3's sole option." Under this language, Level 3 could seek to interconnect at a local tandem and then demand that Qwest arrange for Level 3 to route interexchange traffic through the local tandem. Qwest's local tandems do not have the capability to route toll traffic. (Ex. 91T at 9). While Level 3 has asserted in testimony that it does not intend to make such a request of Qwest, Level 3's language permits Level 3 to do so.

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[3] Order on Reconsideration, *In Re Level 3 Communications, LLC, vs. Qwest Corporation*, Docket ARB-05-4, 2006 WL 2067855 at *4-*5 (Iowa Util. Bd. July 19, 2006)) ("Iowa Level 3 Order"); Decision No. 68817, *In the Matter of the Petition of Level 3 Communications LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket Nos. T-03654A-05-0350 & T-01051B-05-0350, 2006 WL 2078565 at *39-*40 (Arizona Corp. Comm'n, June 29, 2006) ("*Arizona Level 3 Order*").

[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999).

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Because there is a disconnect between Level 3's testimony and the actual language that Level 3 proposes, Level 3's language should be rejected.

13 Level 3's proposed Section 7.1.1.3 purports to make a SPOI include "any and all facilities necessary for the exchange of traffic between Qwest's and Level 3's respective networks within a LATA." Under this language, Level 3 could demand that Qwest build facilities on its side of the point of interconnection ("POI") that do not yet exist and solely for Level 3's benefit. Moreover, under Level 3's proposed Section 7.1.1.2, Qwest would not be compensated for building those facilities ostensibly because they would be on Qwest's side of the POI. This is an unlawful requirement. *Local Competition Order* ¶¶ 199-200.[5]

14 Level 3's proposed Sections 7.1.1, 7.1.1.1, 7.1.1.3, and 7.1.2 have been rejected by the Iowa and Arizona commissions. Level 3's interconnection rights under Section 251(c) are not nearly as broad as Level 3's proposed language purports to make them. The Commission should adopt Qwest's proposed language and reject Level 3's attempt to overreach and obtain terms for which it has no right under the Act.

2. Level 3 Previously Agreed to Qwest's Proposed Section 7.1.2.3 and is not Entitled to Raise that Section as a New Issue (Issue 1B and Issue 28) (Section 7.1.2.3)

15 Qwest and Level 3 agreed to the language of Section 7.1.2.3. As a result, it was not listed as a disputed issue by Level 3 in its Petition or by Qwest in its Response to the Petition. The language that Qwest is proposing is what the Parties agreed to. (*See* Level 3 Petition, Appendix C, § 7.1.2.3; Qwest Response, Ex. A, § 7.1.2.3). Section 252(b)(4) does not permit Level 3 to raise an issue that was not included in its Petition or Qwest's Response. 47 U.S.C. § 252(b)(4).

[5] Section 7.1.1.3 is also objectionable because it allows Level 3 to require Qwest to provide facilities at higher transmission rates than are necessary (*i.e.,* higher than DS-3). (Ex. 91T at 9-10).

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16 Furthermore, certain of the changes that Level 3 proposes to make to Section 7.1.2.3 are unlawful. For example, the agreed-to language for Section 7.1.2.3 did not permit a Mid-Span Meet POI to be used to access unbundled elements. That follows from the FCC's *Local Competition Order*, in which the FCC stated that meet point interconnection arrangements in which the parties split the cost of the arrangement are not appropriate "for unbundled access under section 251(c)(3)," and concluded that "in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement." *Local Competition Order* ¶ 553. Since Level 3's proposed changes to Section 7.1.2.3 do not require Level 3 to bear the full cost of a meet point interconnection arrangement used to access unbundled elements, it is inconsistent with the law and should be rejected.

3. Level 3's Proposed Changes to Sections 7.2.2.1.2.2 and 7.2.2.1.4 should be Rejected (Issue 1D)

17 Qwest has proposed language for Section 7.2.2.1.2.2 that is identical to the language in the Parties' existing ICA. Section 7.2.2.1.2.2 is not in the UNE section of the ICA (Section 9) and is not intended to address the provision of unbundled transport. Yet, Level 3's changes improperly expand it to address unbundled transport. By using the phrase "to/from the POI," the first change could be read to require Qwest to provide transport on Level 3's side of the POI even when Qwest is not by law required to provide such unbundled transport. Similarly, Level 3's third change to Section 7.2.2.1.2.2 and its proposed change to Section 7.2.2.1.4 purport to create a Qwest obligation to provide transport for purposes "other than the exchange of Traffic" that does not by law exist and that is completely out of place in these sections of the ICA. Level 3's final change implies that Sections 51.703 and 51.709[6] ("Rule 703" and "Rule 709") of the FCC's reciprocal compensation rules impose obligations on Qwest, but that is not the case. Rules 703 and 709 impose limitations, not obligations, and those limitations do not, as discussed in the next section of this Brief, apply to interexchange (VNXX) traffic or

[6] 47 C.F.R. §§ 51.703 & 51.709.

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ISP-bound traffic. Level 3's proposed changes to Section 7.2.2.1.2.2 should be rejected.

4. The Commission should Adopt Qwest's Proposed Contract Language for the Relative Use Factor (Issues 1A, 1G and 1H) (Sections 7.1.1.4, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, and 7.3.2.2.1)

18 Issues 1G and 1H concern whether the Commission should apply a relative use factor ("RUF") to entrance facilities used for interconnection and direct trunk transport ("DTT") used to carry traffic between the POI and Qwest end offices. In the last arbitration, the parties agreed that a RUF was appropriate but could not agree as to how ISP-bound traffic would be treated. In this proceeding, only Qwest proposes a RUF. Qwest's proposed RUF for interconnection facilities is contained in its proposed Sections 7.3.1.1.3 and 7.3.1.1.3.1 (Issue 1G). Qwest's proposed RUF for transport from the POI to end offices (DTT) is set forth in its proposed Sections 7.3.2.2 and 7.3.2.2.1 (Issue 1H). Level 3 does not propose a RUF.

19 Under Qwest's proposed RUF, the terminating carrier is responsible for both ISP-bound traffic and VNXX traffic. In the last arbitration, the Commission determined that FCC Rules 703(b) and 709(b) require that ISP-bound traffic be attributed to the originating carrier in the RUF.[7] The Commission did not address the appropriate treatment of VNXX traffic. Much has happened on this issue since then, including the Ninth Circuit's controlling *Peevey* decision that requires that the Commission rule in Qwest's favor with respect to VNXX traffic and re-examine its prior ruling with respect to ISP-bound traffic.

20 In *Peevey*, the Ninth Circuit determined as a matter of federal law that VNXX traffic (both ISP-bound and non-ISP bound) is interexchange traffic that is carved out of Rule 703(b) pursuant to Rule 701(b). 462 F.3d at 1157-58. Rule 701(b) defines the "telecommunications traffic" that is subject to Rule 703(b) and specifically excludes "interstate or intrastate

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[7] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Fourth Supplemental Order, Docket No. UT-023042, ¶¶ 35-40 (February 5, 2003).

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exchange access" and "information access." 47 C.F.R. § 51.701(b). Although *Peevey* mentions only FCC Rule 703(b), it is clear that its analysis applies to Rule 709(b) as well. Rules 703(b) and 709(b) are both contained in the FCC's reciprocal compensation rules and those rules apply only to the "transport and termination of *telecommunications traffic*." 47 C.F.R. § 51.701(a) (emphasis added).

21 *Peevey* applies the same analysis to VNXX traffic that was applied by the Colorado federal court to ISP-bound traffic in *Level 3 Communications v. Colorado PUC*, 300 F.Supp.2d 1069, 1075-81 (D. Colo. 2003) ("*Level 3*"). In *Level 3*, the Court held that it was appropriate to make the terminating carrier responsible for ISP-bound traffic because Rules 703(b) and 709(b) do not apply to traffic that is "interstate or intrastate exchange access, information access, or exchange access services for such access." *Id.* at 1075-76. Since ISP-bound traffic is categorized by the FCC as "information access" traffic, the Colorado Federal Court held that Rules 703(b) and 709(b) did not apply. *Id.* at 1077-79.

22 Qwest's proposed language attributes ISP-bound traffic (and VNXX ISP traffic in particular) to the terminating carrier rather than the originating carrier because it is economically sound to do so. When a dial-up customer places a call to an ISP, he or she is acting as a customer of the ISP. (Ex. 111-T at 4-6). Level 3, the terminating carrier, has undertaken to gather the ISP traffic on behalf of the ISP, and uses Qwest's network to do so. (*Id*. at 10-13). So that ISPs will bear the full cost of providing Internet service, the flow of compensation must follow the chain of causation. Level 3 should pay for originating ISP traffic on Qwest's network. Level 3 can then pass this cost and its own transport and termination cost to its ISP customers. The ISPs can then pass these costs and their own additional costs to their customers, who are the ultimate cost-causers. (*Id*.)

23 Qwest's proposed RUF language properly makes the terminating carrier responsible for

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VNXX traffic so that the cost of providing service to ISPs is borne by the ISPs, and through them by the ultimate cost-causers, their dial up customers. In contrast, Level 3's proposed language would either (1) leave Qwest uncompensated for the costs of originating and transporting VNXX traffic or (2) result in these costs being borne by ratepayers generally. Neither of these outcomes sends the proper economic signals. As the FCC recognized in the *ISP Remand Order*, "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access." *ISP Remand Order* ¶ 87.

5. Level 3's Proposed Disclaimers of Cost Responsibility should be Rejected (Issues 1A, 1I, 1J, 2A and 21)

24 Level 3 has peppered disclaimers of cost responsibility throughout its proposed language in an attempt to absolve itself of cost responsibility for costs Level 3 causes. (*See* Level 3's proposed sections 7.1.1.2 (Issue 1A), 7.3.1.1.3 (Issue 1G), 7.3.2.2 (Issue 1H), 7.3.3.1 (Issue 1I), 7.3.3.2 (Issue 1J), 7.2.2.9.3.1 (Issue 2A) and 7.4.1.1 (Issue 21)). Sometimes the disclaimers are limited to origination costs and sometimes they are not. None of these disclaimers is legally correct. In each case, they overreach. For example, Level 3 proposed Section 7.1.1.2 purports to carve out Telephone Toll Service, but fails to allow Qwest to charge for the origination of interexchange traffic such as VNXX traffic that does not fit within Level 3's restrictive definition of Telephone Toll Service. Other sections disclaim cost responsibility regardless of where the costs are incurred. For example, Level 3 proposed Sections 7.3.3.1 (Issue 1I) and 7.3.3.2 (Issue 1J) preclude Qwest for charging for any facilities it provides regardless of which side of the POI is involved. The Commission should reject all of Level 3's proposed disclaimers because they are inconsistent with federal law.

25 Of its disclaimers, Level 3's proposed Section 7.2.2.9.3.1 (Issue 2A) is particularly egregious. In this section, Level 3 proposes language that would bar "any recurring and/or nonrecurring

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fees, charges or the like" that are associated with the exchange of telecommunications. The literal effect of this disclaimer would be to eliminate all intercarrier compensation for interexchange calls. Level 3's proposed section 7.2.2.9.3.1 is another example of the disconnect between Level 3's stated position and the actual contract language that it proposes.

B. If Switched Access Traffic and Local Traffic are to be Combined on the Same Interconnection Trunks, it should be Done on Feature Group D Interconnection Trunks (Issues 2A and 2B and 29) (Sections 7.2.2.9.3.1, 7.2.2.9.3.1.1, 7.2.2.9.3.2, and 7.2.2.9.3.2.1)

26 Issue 2 concerns Level 3's request to combine interexchange traffic ("switched access traffic") with local traffic on the interconnection trunks established pursuant to the ICA. Level 3 argues that combining all traffic types on the same interconnection trunks is efficient. Qwest does not object to combining all traffic types on the same interconnection trunks so long as they are Feature Group D ("FGD") interconnection trunks. FGD interconnection trunks are necessary so that Qwest and carriers who depend upon Qwest for records can properly record and bill switched access charges applicable to interexchange traffic. (Ex. 72-TC at 11; Tr. 263-65). Level 3 has refused Qwest's offer and insists on delivering switched access traffic to Qwest over LIS trunks.[8]

27 Qwest's proposal is superior for three reasons. First, Qwest's proposal allows Qwest to continue to use its mechanized systems for recording and billing switched access traffic. Allowing Level 3 to combine switched access traffic on LIS trunks would effectively disable the systems that Qwest and carriers who depend upon records from Qwest use to bill switched access. (Ex. 71-T at 25; Tr. 263-77). Furthermore, Qwest would incur significant additional costs to implement Level 3's factors system. (Tr. 552). The existing mechanized systems use actual traffic data and are clearly superior to a manual system that relies upon past data to estimate current volumes of switched access traffic. Indeed, given Level 3's expressed

[8] Level 3's proposed Section 7.2.2.9.3.2 (Issue 2B) would allow Level 3 to combine all traffic types on LIS interconnection trunks.

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intention to increase the volume of interexchange traffic (*Id.*), Level 3's factors proposal will consistently underestimate the amount of interexchange traffic because it will be based on data from prior periods when volumes were smaller.

28 To downplay Qwest's concerns, Level 3 contends that other ILECs have agreed to use a factors system. However, in making this argument, Level 3 completely disregards the circumstances in which the other RBOCs agreed to use factors systems. Unlike Qwest, the other RBOCs do not have the mechanized systems that would allow them to handle all traffic types on FGD trunks or on LIS trunks. (Tr. 570-71). Moreover, Level 3 made concessions, such as reducing the rate charged for ISP-bound traffic and capping compensation for ISP-bound traffic, in order to obtain concessions on the factors proposal. (Ex. 72-TC at 13-14). Finally, Level 3 entered these agreements at a time when Level 3 claimed it would not be carrying significant amounts of interexchange traffic. (Tr. 551-52) However, Level 3 recently acquired WilTel, and announced that it would significantly increase the amount of interexchange traffic that it carries. (Ex. 91-T at 25-26)

29 Second, Level 3's factors proposal would not allow Qwest to prepare records for wholesale customers who purchase Qwest's Platform Plus (QPP™) product. (Ex. 71-T at 25-26; Ex. 72-TC at 14-15). As part of the QPP™ offering, Qwest provides switched access billing records to allow CLECs to bill for switched access related to their QPP™ lines. If Level 3 is allowed to send switched access traffic over LIS trunks, Qwest will be unable to provide these records, and CLECs using the service would therefore be unable to bill for switched access. There are approximately 119,000 such lines in Washington. (Ex. 72-TC at 14-15).

30 Third, Level 3's proposal would not allow Qwest to provide industry-standard jointly-provided switched access records in circumstances in which Qwest and a CLEC or an Independent Telephone Company jointly provide switched access to Level 3. (Ex. 91-T at 23) Today these

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records are produced mechanically, using the information recorded on FGD interconnection trunks. If Qwest does not record this traffic as FGD, neither Qwest nor the collaborating CLEC or LEC can bill the IXC that originated the call. (*Id.*)

31 To get around this problem, Level 3 has proposed a transit limitation as Section 7.2.2.3.5. Under Level 3's proposal, Level 3 purports to agree only to send "IntraLATA Toll Traffic, InterLATA Traffic and VoIP traffic that would route to NPA-NXX codes homed to Qwest switches." As Mr. Linse testified, this is not an adequate solution. (Ex. 93-T at 10). To start with, the proposed transit limitation would be difficult for Qwest to enforce without FGD recording capabilities. However, even if Level 3 complied with its proposed Section 7.2.2.3.5 to the letter, it is still not a solution. Other carriers who depend upon records from Qwest have switches homed to Qwest's tandems. Furthermore, traffic destined for customers who have ported their numbers from Qwest to another carrier would be sent to Qwest's switches. Thus, even under Level 3's proposed language, Level 3 would be permitted to send switched access traffic through Qwest, destined for customers of other carriers for which switched access records could not then be produced. (*Id.*).

32 If traffic is to be combined, it should only be done on FGD interconnection trunks. Level 3 objects to the use of FGD trunks because it does not want to pay tariffed rates for those trunks. This is not a legitimate objection. Qwest is required to charge the same tariffed rates to all carriers. Today, all other carriers either segregate their switched access traffic onto separate trunks or combine traffic on FGD interconnection trunks. (Ex 71-T at 27). Level 3 is not entitled to the special treatment it seeks.

C. **Issue 3: Compensation Issues Related to ISP VNXX Traffic**

33 Issue 3 concerns how ISP and VoIP calls will be rated under the ICA. The Commission should follow its established rules and rate calls as local if the calling and called end users are

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physically located in the same LCA and interexchange if the calling and called end users are located in different LCAs. Level 3 proposes confusing and contradictory methods of rating calls that have never been approved by the Commission and are inconsistent with current rules. For clarity, Qwest first discusses the definition of VNXX (Issue 3B), then intercarrier compensation for VNXX ISP traffic (Issue 3C), and finally call rating generally (Issue 3A). Qwest will conclude this section by demonstrating that its proposed language properly implements the mirroring rule.

1. Qwest's Definition of "VNXX" is Legally Correct and Consistent with Washington Law (Issue 3B)

34 "VNXX" is a term used to describe a form of arbitrage in which a CLEC assigns telephone numbers so as to disguise long distance calls as local calls and to avoid the payment of applicable access charges. The Second Circuit described the nature and purpose of VNXX in *Global NAPs v. Verizon New England,* 454 F.3d 91, 102 (2nd Cir. 2006) ("*Global NAPs II"*), where it stated that the CLEC used VNXX "*to disguise the nature of its calls*—that is, to offer its customers local telephone numbers that cross Verizon's exchanges instead of the traditional long-distance numbers attached to such calls." (Emphasis added).

35 The Commission should adopt Qwest's proposed definition of VNXX because it matches the definitions used by both the FCC and this Commission. In its intercarrier compensation NPRM, the FCC stated: "Virtual NXX codes are central office codes that correspond with a particular geographic area that are assigned to *a customer located in a different geographic area*."[9] In the *Pac-West Complaint Order*, the Commission stated that VNXX refers "to a carrier's acquisition of a telephone for one local calling area that is *used in another geographic area*."[10]

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[9] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 01-132, ¶ 115, n. 188 (April 27, 2001) (emphasis added).

[10] Order No. 05, *Pac-West Telecomm, Inc. v. Qwest Corporation,* Docket No. UT-053036 at 2. n.1 (February 10, 2006)

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36 Level 3's proposed definition of "VNXX" is convoluted, self-contradictory,[11] and without any legal basis. Level 3's definition does not anywhere capture that VNXX involves misleading telephone number assignment. The first sentence of Level 3's definition ties "VNXX" to whether the Commission has determined that the local reciprocal compensation rate should apply to the traffic (a rate that applies only to local non-ISP traffic) and whether Level 3, rather than the parties to the call, has "facilities in the same LCA." The first sentence states:

> "VNXX traffic" is traffic that the Washington Utilities and Transportation Commission determines should be compensated at the WUTC approved local reciprocal compensation rate ($0.00161/MOU) *where Level 3 does not have facilities in the same Local Calling Area* as the end user customer making an ISP-bound or VoIP call to or receiving a VoIP call routed over such Level 3 facilities." (Emphasis added).

37 This sentence of Level 3's proposed definition contradicts the Ninth Circuit's holding in *Peevey* that VNXX traffic is interexchange traffic as a matter of federal law and that it is not subject to the Act's reciprocal compensation rules. In any event, the second sentence of Level 3's definition contradicts the first sentence by discarding the concept that the VNXX call must be rated as "local" and instead tying the "VNXX" definition to whether Level 3 has "facilities in the same LATA" (rather than the same LCA). The second sentence states:

> "ISP-bound and VoIP Traffic that is exchanged at a compensation rate of $0.0007 is not VNXX so long as Level 3 facilities are located within the same LATA as the end user customer making an ISP-bound or VoIP call to or receiving a VoIP call from Level 3's facilities located in the same LATA as that customer." (*Id.*)

("*Pac-West Complaint Order*") (emphasis added). The Commission repeated the same definition in the order denying rehearing in the Level Complaint Docket. Order No. 6, *Level 3 Communications v. Qwest Corporation*, Docket No. UT-053039*,* at 1, n. 1 (June 9, 2006). In the *Pac-West Complaint Order*, the Commission provided a more detailed description of VNXX that is entirely consistent with its shorter definition: "A VNXX arrangement 'converts what would otherwise be toll calls into local calls.' Traditionally, whether a call is billed as a local call or toll call depends on the location, or local calling area, in which the call originates and terminates. Ten-digit telephone numbers use the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix or number that identifies the specific telephone company central office serving the line. The NXX code identifies where a call is terminated, and determines whether a caller incurs local or toll charges. VNXX numbers are telephone numbers that have the same NXX as the local calling area of an end-user customer. The numbers are 'virtual' as the dialing pattern tells callers that it is made within the caller's local calling area, rather than the called party's local calling area, when in fact the call may terminate in a different calling area, [LATA], or state." *Pac-West Complaint Order* ¶ 8.

[11] See Mr. Brotherson's analysis of the internal inconsistencies of the Level 3's language. (Ex. 51-T at 17-21).

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38 In contrast to how calls are rated for all other carriers, Level 3 is, through its convoluted language, simply seeking a ruling that its ISP and VoIP traffic can never be rated as interexchange traffic and thus can never be subject to the rules that apply to interexchange traffic. In his reply testimony, Level 3 witness Mr. Greene admits that the purpose of Level 3's definition of "VNXX" is to render all of Level 3's traffic local traffic regardless of its true character. As Mr. Greene stated, "Level 3's definition simply states that ISP-bound and VoIP traffic *will not be considered VNXX* traffic for compensation purposes under the parties' agreement." (Ex. 46-T at 7, lines 9-11; emphasis added). Level 3 is not entitled to this type of preferential treatment. The Commission should reject Level 3's definition of "VNXX."

2. As a Matter of Law and Sound Public Policy, Level 3 should not be Permitted to Charge Qwest Terminating Compensation on VNXX ISP Traffic (Issue 3C)

39 Issue 3C concerns Section 7.3.6.1 of the agreement which addresses primarily intercarrier compensation for ISP-bound calls. Under Qwest's proposed Section 7.3.6.1, Qwest will be required to pay intercarrier compensation pursuant to the *ISP Remand Order* only on ISP traffic delivered to an ISP located in the same LCA as the calling party. Qwest would not be required to pay Level 3 intercarrier compensation on VNXX ISP traffic

40 The Commission previously addressed the scope of the *ISP Remand Order* in the Commission's *Pac-West Complaint Order*. (*Pac-West Complaint Order* ¶ 5).[12] Since that time, the Ninth Circuit Court of Appeals (in *Peevey*) and two other federal circuit courts have concluded that the *ISP Remand Order* only prescribes intercarrier compensation for calls delivered to an ISP located in the caller's LCA. In *Peevey*, the Ninth Circuit stated that the *ISP Remand Order's* rate caps were "intended to substitute for the reciprocal compensation

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[12] *See also* Order 06, *Level 3 Communications v. Qwest Corporation*, Docket No. UT-053039, ¶ 21 (June 9, 2006) ("the language of the [*ISP Remand Order*] is sufficiently broad to encompass *all* such [ISP] calls within the payment regime established by the order").

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that would otherwise be due to CLECs for terminating *local ISP-bound traffic*." 462 F.3d 1158-59 (emphasis added). The Ninth Circuit also held that in determining as a matter of federal law whether a call to an ISP is local or VNXX, the relevant end point is the place where "the call is picked up by the customer." *Id*. at 1159.

41 In *Global NAPs v. Verizon New* England, 444 F.3d 59 (1st Cir. 2006) ("Global *NAPs I*"), the First Circuit conducted a detailed preemption analysis (*id.* at 71-75), and held that "the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*." *Id.* at 62 (emphasis added). In *Global NAPs II,*" the Second Circuit reached the same conclusion. The Second Circuit upheld a Vermont decision banning VNXX, holding that the decision was a valid exercise of state authority. According to the Second Circuit: "[t]he ultimate conclusion of the 2001 Remand Order was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation." *Id.* at 99 (emphasis in original). In *In re Core Communications,* 455 F.3d 267 (D.C. Cir., June 30, 2006) ("*Core*"), the D.C. Circuit reaffirmed the original *WorldCom* decision that defined the *ISP Remand Order* as applying only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area*." *WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002 (emphasis added).

42 In light of *Peevey* and the other cases cited above, Qwest respectfully submits that the Commission should reverse its earlier conclusion that the *ISP Remand Order* applies to all ISP traffic. The analysis of the FCC's reciprocal compensation rules and the *ISP Remand Order* set forth in Section VI of the *Peevey* opinion constitute binding precedent that the Commission is required to follow.[13] As "delegated federal regulators," state commission must follow

[13] *Peevey* also ruled that "VNXX traffic is interexchange traffic" that is not subject to the FCC's rules governing the payment of terminating compensation. (462 F.3d at 1158), and that the relevant end point for call rating purposes is where the CLEC's "network ends and the call is picked up by the customer. Since that is the end of [the CLEC's] responsibility for the call, it should also be the relevant end point for purposes of determining whether the call is local or VNXX." *Id.* at 1159.

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binding federal law.[14]

43 Moreover, as a matter of sound economics, Qwest should not be required to pay intercarrier compensation on interexchange (VNXX) ISP traffic because that would reverse the compensation flow that should apply to this traffic. In a recent Qwest/Level 3 arbitration, the Iowa Utilities Board rejected Level 3's claim that ISP traffic should be treated as local traffic if the parties to the calls have the same NXXs:

> [T]he Board finds that Level 3's proposed solutions do not address the Board's compensation concerns in any meaningful manner. The Board's concern with VNXX has always been that a CLEC like Level 3 would be using Qwest's network to carry interexchange calls for free; *any logical response to that concern would require some payment from Level 3 to Qwest*. Instead, Level 3 claims that Qwest should make a payment to Level 3 or, at best, that the Board's bill-and-keep policy should apply, such that neither party would pay the other. Neither of these proposals addresses the problem identified by the Board.[15]

44 In offering VNXX service, Level 3 functions as a long distance carrier. (Ex. 111-T at 10-11). It offers its ISP customers a service that allows dial-up callers to place long distance calls for free. Level 3 does this by assigning telephone numbers to its ISP customers so that long distance calls appear to be "local" calls. The Vermont and South Carolina commissions have characterized this use of VNXX as equivalent to an incoming 1-800 service.[16] Mr. Wilson conceded at hearing that with a 1-800 service, the terminating carrier is treated as the originating carrier for intercarrier compensation purposes. (Tr. 561).

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[14] State commissions are required to make their decisions consistent with the Act, FCC orders like the *ISP Remand Order*, and the federal court decisions that interpret them. Under the federal act, Congress delegated several specific and narrowly-defined tasks to state commissions, including the authority, as in this case, to resolve disputed language in an ICA. The Seventh Circuit has characterized the state commissions as "deputized federal regulators." *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000).

[15] *Iowa Level 3 Order*, 2006 WL 2067855 at *19 (emphasis added).

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

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45 In the *ISP Remand Order*, the FCC was not addressing intercarrier compensation for interexchange calls to ISPs. Rather, the FCC was addressing whether reciprocal compensation (the compensation arrangement whereby an originating LEC compensates the terminating LEC for terminating a *local call*) should be paid on calls placed to an ISP located in the same LCA. The theory behind this arrangement is that the terminating carrier has performed a service (delivering, or terminating, the call *to the called party*) for which the originating carrier has received compensation (specifically, compensation through the flat monthly rate paid by the originating carrier's customer that allows the customer to place an unlimited number of *local calls*).

46 The theory justifying payment by the originating LEC to the terminating LEC does not apply to long distance calls, however, because the flat monthly rate paid by a customer to place an unlimited number of local calls does not include calls placed outside of the customer's LCA. (Ex. 113-T at 2-3). Interexchange calls are governed by a different intercarrier compensation scheme. Under the long distance compensation model, the IXC charges the customer placing the call and pays originating access charges to the originating LEC and terminating access charges to the terminating LEC. (Ex. 59-T at 10-11; Ex. 111-T at 4). Thus, when a Qwest customer originates a long distance call, Qwest receives rather than pays compensation. (*Id.*)

47 Level 3's proposed language would require Qwest to pay intercarrier compensation on interexchange (VNXX) calls to ISPs, rather than receive compensation. This violates the economic principle of cost causation. When an ISP customer places a dial-up call, three types of costs are incurred—origination, transport costs, and termination costs. (Ex. 51-T at 40; Ex. 111-T at 12-13). The question here is who should bear those costs—the ISPs and their dial-up ISP customers or ratepayers generally. The FCC has emphatically answered that question. In the *ISP Remand Order*, the FCC stated that "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-

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up Internet access."[17] *ISP Remand Order* ¶ 87.

48 The "vast majority" of the traffic at issue in this case is one-way traffic from ISP dial-up customers to ISPs who have purchased service from Level 3. (Tr. 433). ISPs hire Level 3 to provide the network facilities to make dial-up service possible, and Level 3 undertakes to do so. (Ex. 111-T at 3-5). Level 3, in turn, uses Qwest's network. Level 3 could compensate Qwest and then recover that cost from its ISP customers. Instead, Level 3 wants to require Qwest to provide the use of its network for free and then charge Qwest, rather than the ISP, for the cost that Level 3 incurs to deliver traffic to the ISP. Dr. Fitzsimmons testified that this is an economically irrational and inefficient proposal. (*Id.* at 10-14). No Level 3 witness rebutted Dr. Fitzsimmons' testimony nor was Dr. Fitzsimmons' testimony challenged on cross examination.[18]

3. Qwest's Proposed Language Properly Reflects the Commission's Call Rating Rules (Issue 3A) (Sections 7.3.6.3).

49 Issue 3A concerns Level 3's proposed language for Section 7.3.6.3 regarding how calls should be rated. Level 3 proposes that calls be rated based solely on the telephone numbers assigned to the calling and called parties, mandating local terminating compensation on all traffic where the NXXs are associated with the same LCA, irrespective of the actual location of the parties to the call. Qwest's proposed language for Section 7.3.6.3 provides that Qwest will not pay reciprocal compensation on VNXX traffic. Consistent with its rules, the Commission should reject Level 3's proposed language and should continue to adhere to its policy of rating calls based on the relative locations of the calling and called parties.

50 The Washington Commission previously addressed Level 3's proposal to rate calls based

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

[18] On cross-examination, Level 3 asked Dr. Fitzsimmons two basic questions. First, whether he was an attorney and, second, what he had read or reviewed in order to prepare his testimony. (Tr. 574-76). That was the full extent of his cross examination, which covered less than two pages of the transcript.

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solely on NXXs in the *AT&T Arbitration Order*. In the *AT&T Arbitration Order*, the Commission rejected language proposed by AT&T that would have defined "EAS/Local Traffic" on the basis of the NXXs assigned to the parties to the call. The Commission approved Qwest's language, which defined the same term as "traffic that is originated and terminated within the same local calling area as determined for Qwest by the Commission."[19] In so ruling, the Commission noted with approval the Arbitrator's concern that AT&T's definition "is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation." *AT&T Arbitration Order* ¶ 14. The Commission adopted the Arbitrator's decision, agreeing that "'AT&T's alternative simply goes too far—it is too sweeping in its implications—to be adopted on the record in this proceeding.'" *Id.* ¶ 15 (quoting the Arbitrator's Report). The concern expressed by the Commission in its order, and the potential sweeping impact, not just on Qwest but the entire industry, has not been resolved and remains a critical issue for the industry and for regulators today.

51 Under Washington law, calls are classified as local or long distance based on where *the called and calling parties are physically located*. WAC 480-120-021, for example, contains the following definitions:

> "Exchange" means a *geographic area* established by a company for telecommunications service *within* that area.
>
> "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 rates centers *within which* a customer can place calls without incurring long distance (toll) charges. (Emphasis added).

Each of these definitions confirms that the distinction between local and interexchange calling

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[19] Order No.05, *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b)*, Docket UT-033035, ¶¶ 12-16 (February 6, 2004) ("*AT&T Arbitration Order*").

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is based on the location of customers (*i.e.,* whether the call *is within* an exchange or EAS area or *is between* exchanges).

52 LCAs are approved by the Commission. If customers in a particular area wish to expand a LCA through an EAS expansion, the Commission must approve that process based on a variety of factors, the central factor being "community of interest," a test that focuses on geographical proximity to medical, police, schools, shopping, and other community resources. WAC 480-120-265(2) states:

> In evaluating requests for expanded local calling, the commission will consider whether the local calling area is adequate to allow customers to call and receive calls from community medical facilities, police and fire departments, city or town government, elementary and secondary schools, libraries, and a commercial center. The commission will consider the overall community-of-interest of the entire exchange, and may consider other pertinent factors such as customer calling patterns, the availability and feasibility of optional calling plans, and the level of local and long distance competition.

53 Thus, LCAs are meaningful and cannot simply be ignored. These rules also show that the local/interexchange distinction (1) is geographic in nature and (2) focuses on the ability of customers to call other customers within certain geographic areas. Qwest's approved tariffs are consistent with the Commission's rules.[20]

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[20] Qwest's Exchange and Network Services Tariff contains the following definitions:

> "Exchange" is "[a] specified geographic area established for the furnishing of communication service. It may consist of one or more central offices together with the associated plant used in furnishing service within that area." (WA U-40 Exchange and Network Services, § 2.1, at original page 6; emphasis added).
>
> "Local exchange" is an "[e]xchange *in which the customer's premises* are located." (*Id.* at original sheet 11; emphasis added).
>
> "Local service" is "[e]xchange access service furnished *between customer premises located within the same local service area*." (*Id.*; emphasis added).
>
> "Local service area" is "[t]he *area within which* exchange access service under specific rates. The area may include one or more exchanges without the application of toll charges." (*Id.*; emphasis added).

Consistent the Commission rules, the focus of these tariffs are on the geographic area defined as a local exchange area, and the relevant points for call rating are "between customer premises located with the same [LCA]."

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54 Most state commissions that have addressed the use of VNXX have concluded as the Washington Commission did in the AT&T arbitration that calls should be classified based on the geographic locations of the parties to the call. In the Iowa Qwest/Level 3 arbitration, for example, the Iowa Utilities Board adopted Qwest's proposed language on this issue. *Iowa Level 3 Order*, 2006 WL 2067855 at *17. In a recent arbitration order between Qwest and Universal Telecom, the Oregon commission adopted language that, while not identical, contains all of the same elements and key phrases of the Qwest-proposed language in this docket.[21] The Massachusetts commission found that "VNXX calls will be rated as local or toll based on the *geographic end points of the call*" and that the Verizon tariff in Massachusetts "defines [LCAs] in terms of municipalities and geographic areas, not in terms of NXXs."[22] The New Hampshire commission ruled that terminating compensation applies only to local calls. This conclusion, in turn, "leads ineluctably to a determination here that the parties did not intend reciprocal compensation to apply to calls that were *terminated to an ISP physically located outside the originating caller's local service area*."[23] The Colorado commission ruled that the "calling party and the called party must both be physically located in the same local calling area for the call to be a local call subject for reciprocal compensation purposes."[24] In an AT&T/Qwest arbitration, the Nebraska commission rejected a proposal virtually identical

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[21] Section 7.3.4.5 of the Universal ICA states: "The Parties will not pay reciprocal compensation on traffic, including ISP-bound traffic, when the traffic does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the calling and called NPA-NXXs and, specifically, regardless whether an End User Customer is assigned an NPA-NXX associated with a rate center that is different from the rate center where the End User Customer is physically located (also known as "VNXX traffic")." *Arbitrator's Decision*, ARB 671, p. 11 (February 2, 2006), *aff'd with modifications*, Order No. 06-190 (April 19, 2006). (http://edocs.puc.state.or.us/efdocs/HDE/arb671hde11432.pdf and http://apps.puc.state.or.us/orders/2006ords/06-190.pdf). *See also* ALJ Ruling, Docket IC 12, at 3 (Oregon PUC, August 16, 2005), affirmed unanimously in Order No. 06-037 (Ore. PUC, January 30, 2006) (emphasis added). (http://edocs.puc.state.or.us/efdocs/HDA/ic12hda1032.pdf and http://apps.puc.state.or.us/orders/2006ords/06-037.pdf).

[22] Order, *Petition of Global NAPs, Pursuant to Section 252(b) . . .for Arbitration . . . with Verizon New England,* D.T.E. 02-45, 2002 Mass PUC LEXIS 65 at *50 (Mass. Dep't of Tel. and Energy, December 12, 2002) (emphasis added), *aff'd Global NAPs I,* 444 F.3d at 66.

[23] Order, *Re New England Fiber Communications*, Nos. DT 99-081 & DT 99-085, 2003 N.H. PUC LEXIS 128, pp. *32-*33 (NH PUC 2003) (emphasis added).

[24] In the Matter of Petition of Qwest Corp. for Arbitration of an Interconnection Agreement with AT&T of the Mountain States et al, 2003 Colo. PUC LEXIS 1149, p. *45, n. 52 (CO PUC 2003).

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to Level 3's because it would have "far reaching implications and unintended consequences by reclassifying a large number of interexchange calls as local calls *in violation of state statutes and Commission rules*."[25] The Vermont board ruled that "the determination of whether traffic is local or toll is based upon the physical termination points."[26]

55 According to Level 3, NXXs have always been used to classify calls as local or long distance. However, this argument is an example of getting the cause and effect relationship between two concepts backwards. Geographical factors have always been both the basis for assigning telephone numbers and the basis for the proper categorization of calls. Telephone numbers, because they have always been historically linked to the exchange where the customer is located, are the means of assuring geographical proximity. The court in *Global NAPs I* described the significance of NXXs and their historical role this way:

> The "NXX" has generally been associated with a particular "switch" (that is, the equipment that routes phone calls to their destination) physically located within a local calling area; NXXs *have thus served as proxies for geographic location*. This means that if the NXX numbers of the caller and the recipient were within the same local calling area, *one could assume that the caller and recipient were actually physically within the same calling area and bill the call as a local call.* 444 F.3d at 64; emphasis added.

56 But the ability of telephone numbers to serve "as proxies for geographic locations" depends on carriers following proper numbering rules, and not assigning local telephone numbers to customers that the CLEC knows have absolutely no geographical connection to the LCA with which the telephone number is associated. This issue is not new to Level 3. Indeed, one of its witnesses in a Florida case agreed with the principle enunciated in *Global NAPs I*:

> We disagree . . . that the jurisdiction of traffic should be determined based upon the NPA/NXXs assigned to the calling and called parties.

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[25] Arbitrator's Recommended Decision, In the Matter of the Petition of Qwest Corp. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha, Docket No. C-3095, p. 18 (Neb. PSC, May 4, 2004) (emphasis added).

[26] Order, Petition of Global NAPs, Inc. for Arbitration . . . With Verizon New England, Docket No. 6742, 2002 VT PUC LEXIS 272 (VT PSB December 26, 2002).

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> Although presently in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, we believe this practice was established based upon the understanding that NPA/NXXs were assigned to customers within the exchanges to which the NPA/NXXs are homed. *Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of the call.*[27]

Thus, Level 3's own witness admitted that telephone numbers "were geographic indicators" used as a "surrogate" for determining a geographical end point.

57 Telephone numbers are supposed to be assigned to specific geographic areas so that they can be used to properly rate calls. As Mr. Linse testified, Section 2.14 of the Central Office Code (NXX) Assignment Guidelines ("COCAG") provides that wireline telephone numbering resources (referred to in COCAG as "codes/blocks") must be "utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned." (Ex. 93-T at 13 quoting COCAG § 2.14; emphasis added). VNXX is not an exception to this rule. Section 42.6 of COCAG requires that "numbers assigned to the facilities identified *must serve* subscribers in the *geographic area corresponding with the rate center requested.*" (*Id.* at 14, emphasis added; see Mr. Linse's general discussion of numbering guidelines, *id.* at 12-16). Level 3 ignores these rules.

58 Level 3's testimony is nothing more than a revisionist history of how telephone numbers have been used in the telecommunications industry. For example, Mr. Wilson states that "the only thing the PSTN 'knows' about a call is the originating and terminating telephone number"; thus, "the status of traffic as 'local' should not be determined based on the supposed geographic area associated with the telephone numbers of the calling and called parties." (Ex. 11-T at 6). The unstated premise of this testimony is that, because telephone numbers have

[27] Order on Reciprocal Compensation, In re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, 2002 WL 31060525 at *17 (Fla. PUC, September 10, 2002) (emphasis added).

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been used to rate calls as local or interexchange, telephone companies and commissions must have made a conscious decision that physical location is not relevant to call rating (*i.e.*, that commissions made the decision that assigned telephone numbers are the only criterion for call rating). Level 3 thus implies that community of interest, distance, and the geographical location of parties to a call were never relevant factors. This argument has no basis in Washington, is completely inconsistent with the Commission's rules, and is contradicted by the testimony of Level 3's witness in the Florida case discussed above.

59 Level 3's proposal to use NXXs to classify calls (and in particular, calls to ISPs) cannot be reconciled with *Global NAPs II*. There the court described the FCC's concern that competitors may enter markets, not to "expand competition," but "to take advantage of the relatively rigid control of the incumbents." 454 F.3d at 95. Thus, the court noted that "the FCC has warned time and again that it will not permit competitors to engage in regulatory arbitrage—that is, to build their businesses to benefit almost exclusively from existing intercarrier compensation schemes *at the expense of both incumbents and consumers*." *Id.*; emphasis added. The court summarized its underlying policy concerns with VNXX:

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

Level 3's proposal would produce the results condemned by the FCC.

60 Not only should the Commission not classify calls based on NXX's, the Commission should also ban the use of VNXX in Washington. (Ex. 51-T at 44). The use of VNXX allows CLECs to avoid paying the intercarrier compensation that properly applies to interexchange calls. In

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Global NAPs II, the Second Circuit upheld the Vermont Board's ban of VNXX in that state. The Second Circuit, citing the *Local Competition Order*, found that the FCC "had early indicated that it intended to leave authority over defining local calling areas where it always had been—squarely within the jurisdiction of state commissions." 454 F.3d at 97. Nothing on that issue had changed, and thus the court stated that "state boards have authority to define local calling areas with respect to intercarrier compensation." *Id*. at 99. Thus the court concluded that the Board violated no federal rules in prohibiting the use of VNXX. *Id.* at 101.

61 The Oregon commission recently ordered that the following language be inserted into the ICA: "Qwest and CLEC shall not exchange VNXX traffic."[28] Responding to several CLEC arguments made in the CLEC's rehearing request, the Commission ruled that the

> Arbitrator was correct to conclude that VNXX arrangements are prohibited in Oregon. Given that VNXX arrangements violate state laws and regulations that have not been preempted by the federal government, Universal's arguments regarding this type of traffic pursuant to those illegal arrangements are moot.[29]

62 In its proposed Section 7.3.6.3, Level 3 proposes that calls be classified solely based the telephone numbers of the calling and called parties. However, Level 3's proposed language also contains other provisions that appear to classify calls in other ways. For example, Level 3's definition of VNXX suggests that calls would be classified based on the locations of Level 3's facilities. This is a variant of what is known as the "POI Theory" under which Level 3 suggests that calls should be classified based on the location of Level 3's POI with Qwest (that is, where its facilities come into contact with Qwest's facilities).

63 The "POI Theory" has no basis under Washington law. Call rating in Washington has never been based on a POI location or the location of carrier facilities. Both parties agree that a POI

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[28] Order No. 06-190 (ARB 671), Appendix A, at 10, 16 (Or. PUC, April 19, 2006). This order may be viewed at http://apps.puc.state.or.us/orders/2006ords/06-190.pdf.

[29] *Id.* at 7.

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is the point at which two carriers networks meet to exchange traffic. Qwest witness Mr. Brotherson testified that a POI is "the point where the trunks connecting a Qwest switch and a CLEC switch are connected so traffic from each parties' network will flow to the network of the other carrier." (Ex. 51-T at 27). Level 3 witness Mr. Wilson stated that a POI "is the location where two carriers connect their networks for the purpose of exchanging traffic." (Ex. 11-T at 3). Mr. Wilson also agreed that a POI is "generally not a customer location" (Tr. 542).

64 POIs are nothing new. They have existed ever since telephone companies began connecting to each other. Yet, in his 30 years in the industry, Mr. Brotherson has never seen a situation where a POI "has ever been used as the relevant point to rate a call between customers of the two companies." (Ex. 51-T at 29). Mr. Brotherson testified that IXCs often place a POI within a particular ICA so that the IXC can transport calls to distant LCAs. However, "[t]he fact that an IXC establishes a POI where the it picks up traffic within a particular LCA has never been relevant for call rating purposes" and "[t]he fact that a calling party and an IXC's POI are in the same LCA does not transform calls originated in one LCA but delivered to a called party in a different LCA into local calls." (*Id*. at 28) Precisely the same situation has existed with independent local exchange carriers. As in the IXC situation, customer location, and not the location of the POI, has always been the test for call rating purposes. (*Id.* at 29). Level 3 did not rebut Mr. Brotherson's testimony on this point.

65 The Ohio Commission recently rejected the POI theory in its *Telcove* decision.[30] In *Telcove*, CLEC had argued that "rather than focus on the geographic end points of the call, . . . the Commission [should] focus on the *call's point of entry into and use of the PSTN* . . . ." 2006 Ohio PUC LEXIS 54 at *27; emphasis added. The CLEC thus argued that the POI (or something very akin to a POI), instead of the customer location, should be treated as the

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

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relevant endpoint for intercarrier compensation purposes. The Commission rejected that argument, concluding that "for all types of [VoIP] traffic . . . , *the physical location of the calling and called party,* to the extent known, is the deciding factor in the jurisdiction of the call for traffic routing and intercarrier compensation purposes." *Id*. at *42; emphasis added.

4. Qwest's Proposed Language Properly Implements the Mirroring Rule (Issues 3A, 3B, 3C, 4, 16, and 19) (Sections 7.3.6.3, 7.3.6.1, 7.3.4.1, 7.3.6.2, Definitions of VNXX and VoIP)

66 In several instances in Level 3's new language—its VNXX definition (Issue 3B), Section 7.3.6.3 (Issue 3A), Section 7.3.6.1 (Issue 3C), Section 7.3.4.1 (Issue 4), the VoIP definition (Issue 16), and the 3:1 Rule (Issue 19)—Level 3 suggests that Qwest may opt out of the mirroring rule set forth in the *ISP Remand Order*. So that there is no mistake, Qwest has not opted out of the mirroring rule. In the *ISP Remand Order,* the FCC described the mirroring rule in these terms:

> Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an *incumbent LEC offers* to exchange all traffic subject to section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts. *ISP Remand Order* ¶ 8 (emphasis added).

The reciprocal compensation rate in Washington is $.001178 per MOU.

67 The mirroring rule is very simple. An ILEC (like Qwest) must offer a CLEC (like Level 3) the option of (1) exchanging all appropriate local traffic[31] (whether ISP or voice traffic) at the $.0007 rate established for local ISP traffic or (2) exchanging local ISP traffic at $.0007 and local non-ISP traffic (*e.g.,* voice traffic) at the voice rate established by the state commission ($.001178 in Washington). Given that the ILEC must offer to exchange appropriate traffic at

[31] "All appropriate traffic" means local ISP traffic subject to the $.0007 rate and all other local voice traffic subject to section 251(b)(5) (and the voice rate).

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$.0007, then it follows that the election is the CLEC's to make.

68 To demonstrate Qwest's compliance, Mr. Brotherson actually provided Attachment J to the 2005 template agreement (Ex. 53), an attachment to the ICA by which the CLEC (when it executes the ICA) makes its election under the mirroring rule.[32] But to make it crystal clear, Mr. Brotherson stated: "so there is no misunderstanding as to whether Qwest has offered to exchange all appropriate traffic at $.0007, *Qwest hereby offers Level 3 the election under the mirroring rule as discussed above*." (Ex. 51-T at 35-36; emphasis added).

D. VoIP Issues (Definition of VoIP and Sections 7.2.2.12 and 7.2.2.12.1 (Issue 16), New Issue Related to "PSTN-IP-PSTN Traffic" Definition)

69 This issue relates to the definition of VoIP, and to other related provisions (Sections 7.2.2.12 and 7.2.2.12.1). The Qwest definition, which was adopted by the Iowa and Arizona commissions,[33] defines VoIP traffic for purposes of this ICA as calls that originates in Internet Protocol ("IP") on IP-compatible equipment that terminates to Qwest PSTN customers. This traffic is commonly referred to as "TDM-IP" traffic. Further, Qwest's language in Section 7.2.2.12 and 7.2.2.12.1, consistent with the ESP Exemption, treats such VoIP traffic as local calls subject to reciprocal compensation only if the VoIP Provider Point of Presence ("POP") is in the same LCA as the called party, thus properly applying the ESP Exemption in the ICA.

70 Level 3's language, on the other hand, would classify TDM-IP calls as VoIP and would ignore the proper application of the ESP Exemption. Thus, Level 3's language classifies all traffic that either originates in IP or terminates as IP as VoIP traffic. Further, Level 3 takes the position that no VoIP traffic would ever be subject to access charges. (Tr. 440; Ex. 46-T at 7, lines 9-11). Thus, Level 3 believes that it, or its third-party VoIP providers, can place VoIP

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[32] The 2003 template likewise contained an identical Attachment J. (Ex. 51-T at 35).

[33] *Iowa Level 3 Order*, 2006 WL 2067855 at *30 (adopting Qwest's language on all Tier II issues); *Arizona Level 3 Order*, 2006 WL 2078565 at *27 ("We agree that the VoIP Provider's POP is the appropriate point to determine the end point of the call," "we adopt Qwest's proposed [VoIP] definition as well as Section 7.2.2.12 and 7.2.2.12.1").

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calls on the PSTN or receive traffic destined to VoIP end users from the PSTN and never pay the access charges that would apply to any other carrier under the same circumstances. Level 3 maintains this position even though many of these calls are neither local in nature nor qualify for the ESP Exemption. In fact, although Level 3's advocacy is vague, an analysis of its proposals demonstrates that Level 3 is merely proposing another variation of VNXX for VoIP traffic. Level 3's proposed VoIP definition should be rejected. Level 3's compensation scheme for VoIP VNXX calls should be rejected for the same reasons the Commission should reject its ISP VNXX proposals.

1. TDM-IP Traffic is not VoIP Traffic

71 Time Division Multiplexing ("TDM") is the language of the PSTN, while IP is the language of the Internet that is used to transmit VoIP. (Ex. 51-T at 53). In order for voice traffic to be exchanged between a TDM network and an IP network equipment, it must convert the traffic from one protocol (*i.e.*, TDM to IP, or IP to TDM) to the other. (Tr. 418-20). Modems (or other devices like Level 3's Media Gateway) perform that function. (Tr. 406-07). For VoIP traffic exchanged between Qwest and Level 3, this function occurs at Level 3's Media Gateway in Seattle. (Exs. 33, 35-36).

72 The parties addressed the four general types of calls that could arguably fall within the definition of VoIP traffic. However, the only issue in this docket relates to TDM-IP calls—calls originating in TDM over a regular PSTN line, but terminating in IP. Qwest's language excludes such call from the definition of VoIP because they do not originate in IP on a broadband connection over the proper type of equipment. (Ex. 51-T at 54, 60-63).[34] Level 3

[34] The other categories are not at issue. The first category is IP-IP calls, or calls that both originate and terminate on IP-compatible customer premises equipment ("CPE") over broadband connections. No one disputes that these are VoIP calls, but both parties agree they are irrelevant to this docket because they are originated, transmitted, and terminated entirely over the Internet, and thus never touch the PSTN. (Ex. 51-T at 55-56). The second category of calls originates in IP (*i.e.*, on IP-compatible equipment over a broadband connection), but terminate to a traditional TDM line on the PSTN (*i.e.,* IP-TDM calls). Both parties agree that this category meets the proper definition of VoIP. The third category is known at TDM-IP-TDM, or "IP in the middle" calls. Both parties acknowledge that the FCC has ruled that this traffic is not VoIP, not subject to the ESP Exemption, and should be treated like any other TDM call. (*Id.* at 57). The FCC ruled in the *AT&T*

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proposes language that would include TDM-IP calls in the definition of VoIP.

73 The FCC, in its *Vonage* order, declined to provide a definitive definition of VoIP, including for intercarrier compensation purposes.[35] In the FCC's *VoIP E-911 Order*, the FCC discussed the fact that VoIP customers may receive and place calls to other VoIP customers, and may be able to make and receive calls to and from PSTN customers.[36] Given the absence of definitive direction on the subject from the FCC, Qwest takes the position the PSTN and VoIP calls should be treated neutrally. Thus, Qwest's position is that the nature of calls should be defined by how they are originated. In other words, a call originated in IP on a broadband connection using IP-compatible equipment is properly categorized as a VoIP call, whether it terminates to another VoIP customer (using only the Internet) or whether it terminates to a customer on the PSTN. Applying the same logic, a call originated in TDM on the PSTN should be categorized as a PSTN call whether it terminates to another PSTN customer or to a VoIP customer. Level 3's approach, without the benefit of any citation of authority or a rational argument as to why its position makes sense, essentially takes the position that the IP-nature of a call, even those originated in TDM on the PSTN, trumps everything else. Just as Qwest believes that a call originating in IP on IP-compatible equipment over a broadband connection is VoIP, it also believes in a consistent manner that traffic that originates in TDM on the PSTN should *not* be categorized as VoIP, regardless that it terminates in IP. Nothing in any of the FCC orders supports Level 3's logically inconsistent position. Thus, in order to assure internal consistency and neutrality, Qwest strongly urges the Commission to adopt Qwest's language, and thus

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Declaratory Ruling that this type of call is not a VoIP call, even if at some point during the call it was converted to IP, because, before delivery, it was reconverted to TDM and delivered over the PSTN. Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (April 21, 2004).

[35] Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation*, 19 FCC Rcd 22404, ¶4, n. 9 (2004) ("*Vonage*").

[36] First Report and Order and NPRM, In the Matters of IP-Enabled Service and E911 Requirements for IP-Enabled Services, 20 FCC Rcd 10245 ¶¶ 23-24 (June 3, 2005).

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exclude TDM-IP traffic from the VoIP definition.

74 Level 3 criticizes Qwest's use of the term "premises" in its VoIP definition. (Ex. 46-T at 6). The use of this term was placed in Qwest's definition to underline the fact that VoIP calls must originate in IP on IP-compatible end user equipment. If such IP-compatible equipment is not at the premises where the call originates, then it must necessarily originate in TDM and be converted to IP elsewhere; thus, it would not meet the proper test for a VoIP call. Level 3 challenges those references on the mistaken belief that Qwest is trying to eliminate the "geographic portability" of VoIP. (*Id.*) Qwest has never suggested that a VoIP customer is bound to one location to originate VoIP calls. Mr. Brotherson testified that a VoIP call, assuming the subscriber had the proper equipment, may be initiated anywhere the VoIP customer has access to a broadband connection. (Exhibit 51-T at 54). The point of Qwest's language is to underline the fact that, as discussed above, in order for a call to a VoIP call it must be originated on IP-compatible equipment at the "premises" (wherever the VoIP end user is located)

75 In addition to its misconception of the proper scope of VoIP traffic, there are several other problems with Level 3's proposed VoIP definition. For its case in Washington, Level 3 unveiled a definition of VoIP that is substantially different than its proposal in other states. Level 3's definition is rife with problems and should be rejected for the three specific additional reasons.

76 First, Level 3's language is not really a definition, but describes two types of calls that Level 3 claims are VoIP calls. However, the purpose of the VoIP definition is to describe the criteria by which a third party can determine if certain calls fall within or outside of the definition. Level 3's "definition" does not do that.

77 Second, in its "definition," Level 3 describes a "1+" call to a VoIP customer. That language is

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completely unnecessary because (1) it does not clarify anything in dispute (a "1+" call is, by definition, a call handed off to an IXC) and (2) it does not purport to define VoIP—it merely states that Level 3 will terminate the call on the Internet to a VoIP customer (again, an issue that is not disputed by the parties).

78 Third, Level 3's "definition" states that "locally-dialed *VoIP calls* and all *VoIP calls* terminated within the LATA to the appropriate Qwest Tandems" are subject to terminating compensation. (Emphasis added). Here, Level 3 attempts to define "VoIP" by using the term "VoIP" in the definition. This creates a classic circular definition, which violates the fundamental principle that a word cannot properly be defined by using the word being defined in the definition.[37] Level 3's language makes no sense and represents an effort to avoid the proper application of the ESP Exemption, which, as discussed below, makes the relevant rating point for ESP traffic the ESP POP or VoIP Provider POP.[38]

79 Thus, for the reasons set forth above, Qwest's VoIP definition should be approved.

2. Qwest's Language Results in Proper Application of the ESP Exemption (Qwest Issue 16) (Sections 7.2.2.12 and 7.2.2.12.1)

80 Both parties agree that VoIP is an enhanced service that qualifies for the FCC's ESP exemption. To properly apply the ESP exemption, Qwest has proposed Sections 7.2.2.12 and 7.2.2.12.1. (Ex. 51-T at 65-68). Although Level 3 proposes to eliminate both sections, it provided no testimony whatsoever explaining its reasons for opposing these sections. Qwest's language should be adopted.

81 Qwest's language is solidly based on current law. An Enhanced Services Provider Point of

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37 This is commonly referred to as a "circular definition." Such a definition does not provide any useful information because either the audience already understands the meaning of the term, or it cannot understand the explanation that includes that term. Such a definition is obviously inadequate in a contract.

38 Level 3's proposed "PSTN-IP-PSTN" definition should not be adopted for the simple reason that it is not used anywhere in the ICA.

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Presence ("ESP POP") (the same concept as a VoIP Provider POP) is a well-understood concept in telecommunications and is critical to the proper application of the ESP Exemption (discussed in more detail below). The concept of a "VoIP provider POP" is simply another way to describe the concept the FCC established as part of the ESP Exemption. The FCC ruled that an ESP, such as a VoIP provider, can purchase service as an end user out of the local exchange tariffs. When a VoIP provider purchases local service from Qwest, Qwest knows where it provisions the service to its end user customer. If there is a service problem, Qwest knows where to go to make repairs. If Level 3 is representing that the VoIP ESP (*e.g.,* Vonage) is a Level 3 local customer entitled to the ESP Exemption, it is surely not too much to ask Level 3 where the customer is located (which is the location of the "VoIP provider POP"). Level 3 never suggests that it does not know where its customers are located. Contrary to Level 3's advocacy, the VoIP Provider POP is the relevant point for rating enhances service traffic.

82 Level 3 takes the position that access charges should never apply to a VoIP call originated on its IP network, no matter where it enters the PSTN, and without regard to where Qwest must transport the call for termination. (Tr. 440). Thus, if a VoIP call from a Level 3 VoIP customer to an Olympia Qwest end user on the PSTN is delivered to Qwest anywhere in the LATA, and is transported to the Olympia LCA over a LIS trunk, Level 3's language would require Qwest to deliver that traffic to its Olympia end user and, instead of receiving access charges, Qwest would perform the transport and termination functions for $.0007 per MOU. Mr. Greene testified that the only time that Level 3 would ever hand off a VoIP call to an IXC would be in an unusual overflow situation, but that in normal circumstances, it does not hand off any VoIP traffic to an IXC. (Tr. 442-44). Level 3's position is that access charges can never be assessed on a VoIP-originated call that is terminated by Qwest in TDM, no matter how far Qwest must transport the call in order to terminate it. (Tr. 440).

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

84 The ESP Exemption was originally established in 1984 at the time that access charges were established following the Modified Final Judgment that governed the divestiture of the old Bell System. While establishing the access charge regime in use today for all IXCs, the FCC permitted Enhanced Service Providers ("ESPs") to connect their POP (point of presence) to the local network via local exchange service, as opposed to access services (*e.g.*, FGD) that IXCs were (and still are) required to purchase. The most critical aspect of the exemption is that the ESP is treated like an end user; thus, the physical location of the ESP's POP is the relevant location for call rating purposes. This principle is clearly articulated in the FCC's 1988 *ESP Exemption Order*:[39]

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

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

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

86 Under Washington law, a voice call between separate LCAs is an interexchange call and must be treated as such. There is nothing to suggest that this rule does not apply equally to VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the VoIP provider POP is located, but the call is being sent for termination to another LCA, the VoIP provider is not exempt from the call rating rules that have applied for decades in Washington, under the ESP Exemption or on any other basis. Nor is the VoIP provider allowed to connect to the terminating LCA as an end user under the ESP Exemption if it does not have a POP in that LCA. Calls of this sort are properly classified as interexchange traffic and must be handed off to an IXC, which must connect to Qwest via a Feature Group connection. Another clear FCC policy statement is directly relevant: "As a

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policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on and IP network, or on a cable network. *We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways*."[40] Thus, clear FCC policy would mandate that when Level 3 sends VoIP traffic from the its IP network to Qwest, Level 3 should bear the same responsibilities for use of Qwest's network that an IXC that uses Qwest's network should bear for the identical use of Qwest's network..

87 Nevertheless, Level 3 tries to do precisely what the FCC says it should not be allowed to do. That is, Level 3 attempts to improperly use the ESP Exemption to affect a VNXX scheme for VoIP calls. Level 3's proposed language would magically transform every interexchange VoIP voice call into the equivalent of a local call. For all of the reasons set forth in Qwest's earlier sections dealing with ISP VNXX traffic, the Commission should also reject Level 3's attempt to apply VNXX to VoIP traffic. Level 3 cited has never provided a meaningful reason why this traffic (which consists of voice calls that are qualitatively no different to the end user than a voice call using the PSTN) should receive special regulatory treatment. Qwest's language in Section 7.2.2.12, which determines the proper compensation regime for VoIP calls based on the two relevant physical locations (*i.e.*, the VoIP Provider POP and the PSTN end user), is completely consistent with both the ESP Exemption and Washington law and thus should be adopted.

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[40] Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, 19 FCC Rcd. 4863 ¶ 61 (March 10, 2004) (Emphasis added).

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E. <u>Compensation for VoIP and Voice Traffic (Issue 4) (Sections 7.3.4.1 and 7.3.4.2) (VoIP Aspects of Issues 3a, 3b, and 3c); Qwest Issue 1a (VoIP Audit and Certification Requirements) (Sections 7.1.1.1 and 7.1.1.2)</u>

1. The Commission should Reject the Level 3's Multiple Call Rating Theories for VoIP Calls (Issue 4) (Section 7.3.4.1 and 7.3.4.2) (VoIP Aspects of Issues 3A, 3B, and 3C)

88 Earlier, Qwest discussed Issue 3 in the context of ISP traffic. Those same sections also have VoIP implications. For example, in Issue 3B (the VNXX definition), Level 3's definition states, in the first sentence, that VoIP traffic from Level 3 VoIP customers to Qwest customers is VNXX traffic in any LCA in which Level 3 has certain undefined facilities, although in the second sentence it says that traffic is not VNXX if Level 3 has facilities in the LATA. Aside from the incongruities of that language, in Section 7.3.6.3 (Issue 3A), Level 3 proposes a completely different theory, in this case to use the NXX theory as the basis for compensation on VoIP calls as well as ISP calls. That theory has no more validity under Washington law for VoIP traffic than it does for ISP traffic and should be rejected for the same reasons. (*Id.* at 36-37). In Section 7.3.6.1 (Issue 3C), Level 3's language would require Qwest to pay terminating compensation on all VoIP traffic at $.0007 per minute of use (MOU) without limitation (or at the voice rate based on Level 3's erroneous interpretation of the mirroring rule discussed above). Sections 7.3.4.1 and 7.3.4.2 (Issue 4) are related sections. Subject to Level 3's election under the *ISP Remand Order's* "mirroring rule," Qwest's language in these sections states that local voice and VoIP traffic will be exchanged at the state voice rate,[41] and that no terminating compensation will be paid on VNXX traffic. (*Id.*).

89 Level 3's language demonstrates its inability to settle on a consistent theory. Section 7.3.4.2 would require (assuming Qwest "elects the single rate plan") that all VoIP and ISP traffic be exchanged at $.0007 based on the NXX theory. (*Id.* at 83). Then, in its proposed Section

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[41] Level 3 has claims that under the *ISP Remand Order's* "mirroring rule," Qwest must pay the voice rate on all traffic, including ISP traffic. Qwest addressed that argument, *supra,* in Section II.C.4. Level 3's mirroring rule arguments, as they relate to VoIP, are invalid for the same reasons they fail with regard to ISP traffic.

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7.3.4.2, Level 3 advances a "facilities in the LATA" theory, stating that ISP and VoIP traffic "will be compensated at the FCC mandated rate of $0.0007 per MOU, *on a per LATA basis,* so long as such traffic is exchanged between the parties *at a single POI per LATA*." (*Id.*; emphasis added). Then Level 3 proposes a second Section 7.3.4.3 that says that if Qwest fails to opt into the FCC's single rate plan, than all VoIP and EAS/Local traffic will be exchanged at the voice rate. (*Id.*). What Level 3's real intentions are (other than maximizing revenue and minimizing cost) is anyone's guess because it has not explained itself. Nonetheless, none of Level's 3 multi-level theories complies with Washington or federal law. Terminating compensation is proper only where the physical end points of a call are within the same LCA.

90 As in the case of ISP traffic, Level 3's language abandons proper call rating on VoIP traffic, local and interexchange alike. For reasons that Level 3 has not explained, it proposes a scheme for VoIP traffic that amounts to a complete end run around normal compensation rules for the exchange of traffic between carriers. Level 3's effort to abandon the historical distinction between local traffic (for which reciprocal compensation under section 251(b)(5) and terminating compensation for ISP traffic under the *ISP Remand Order* are appropriate) and non-local traffic (whose compensation is governed by an alternative compensation system) for VoIP traffic should be rejected.

2. The Commission should Adopt Qwest's Proposed VoIP Operational Audit and VoIP Certification Language (Qwest Issue 1A) (Sections 7.1.1.1 and 7.1.1.2).

91 In Section 7.1.1.1, Qwest proposes language that would allow operational audits related to VoIP traffic. (Ex. 51-T at 71-76.) Level 3, in Mr. Greene's reply testimony, opposes this language on the ground that this would give Qwest the unilateral right to redefine traffic. (Ex. 46-T at 7-8). This argument ignores a critical right that Level 3 has with regard to disputes under the ICA. The provision does give Qwest the right to redefine traffic, but it does not make such a decision final nor does it prevent Level 3 from challenging the redefinition. A

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Qwest audit finding that Level 3 disagrees with is subject to dispute resolution under the agreement. Thus, the inference that Qwest has unchallenged authority to redefine traffic without any right by Level 3 to challenge the redefinition is simply not true.

92 In Section 7.1.1.2, Qwest offers language requiring Level 3 to certify that traffic it characterizes as VoIP traffic meets the Commission-approved VoIP definition. (Ex. 51-T at 76-78.) Level 3 opposes this language on the ground that "it would essentially turn Level 3 into a guarantor of all of its VoIP customers' product practices." (Ex. 46-T at 8). Level 3's argument is disingenuous, however, and simply points out why Qwest's language is necessary. It is Level 3, not Qwest, which has the business relationship with Level 3's VoIP provider customers. Thus, to the extent that Level 3 is able to obtain intercarrier compensation from Qwest for VoIP traffic, it should also bear the obligation to "certify" that it really is VoIP traffic. In other words, Level 3's claim that it has a right to compensation for VoIP traffic should be accompanied by a duty to certify that the traffic is indeed what it says it is. In essence, Level 3 wants the right, but not the duty. Qwest's language should be adopted.

F. The Commission should Adopt the Definition of "Basic Exchange Telecommunications Service" Proposed By Qwest (Issue 7)

93 The term 'basic exchange telecommunications service" is used in several undisputed provisions of the ICA.[42] Accordingly, it is appropriate to define it in such a way as to make sense in the provisions in which it is used. Level 3 proposes to define the term "Telephone Exchange Service" instead. However, the question is not whether to add that term to the ICA, but whether to remove the definition of "basic exchange telecommunications service." Level 3 has provided no reason to remove it, and it is commonly used in Qwest's SGATs throughout its 14-state territory, including in the current Washington SGAT.[43]

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[42] It is used, for example, in the definition of "Busy Line Verify/Busy Line Interrupt," "Wire Center," and Section 12.3.8.1.3.

[43] Washington SGAT, Eighth Revision (June 25, 2002) at 9.

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G. The Commission should Adopt Qwest's Definition of "Interconnection" (Issue 10)

94 Qwest defines "interconnection" as "the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic and Jointly Provided Switched Access traffic." Qwest's definition is a commonly accepted definition in most Qwest ICAs and in SGATs. Qwest's proposed language is not, as Level 3 suggests in its Petition, an attempt by Qwest to "regulate the types of traffic that may be exchanged between the Parties." (Petition at 45). Rather, Qwest attempts to use standard terminology that clearly defines the terms of the agreement in contrast to Level 3's proposals. As Mr. Brotherson pointed out:

> Level 3 mischaracterizes this issue as Qwest's attempt to exclude traffic from being exchanged. That is not the issue at all. In fact, this is simply another version of Level 3's inappropriate effort to reclassify all traffic (including all VoIP interexchange traffic) to its benefit. VoIP traffic can in fact be local (Telephone Exchange Service) or it can be IntraLATA Toll, or, when carried by and IXC, ride Jointly Provided Switched Access. But by creating VoIP traffic as separate category Level 3 wants to carve out VoIP for unique treatment. VoIP calls that are handed off for termination are either local or toll and are not a distinct category entitled to different treatment. (Ex. 51-T at 79).

The point here is that Qwest fully intends to exchange VoIP traffic, but the real issue is which category into which that VoIP traffic falls. Level 3 provided no response to Mr. Brotherson's characterization of Level 3's VoIP language.

95 Qwest's language is consistent with the language of other ICAs and with the Act, and should be approved.

H. The ICA should Contain a Definition of "Exchange Service" (Issue 14)

96 Issue 14 involves the definition of "exchange service" or "extended area service (EAS)/Local traffic." Qwest proposes that the term "exchange service" should have a meaning consistent with Washington law ("traffic that is originated and terminated within the Local Calling Area as determined by the Commission"). (See discussion in Sections II.C.1-3, *supra*). Level 3

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proposes to delete the term altogether. (*Id.*) The term "exchange service" is used in provisions throughout the ICA, including in provisions that Level 3 does not dispute. The term is even used by Level 3 in language it proposes on disputed issues.[44] Accordingly, it is appropriate to define it.

I. **The Commission should Reject Level 3's Proposal to Include A Definition of "Telephone Toll Service" (Issue 15)**

97 Level 3 includes a definition for "telephone toll service" (the statutory definition in the Act); Qwest does not believe such a definition is necessary in the agreement. (Ex. 51-T at 80-81). The real issue regarding this definition is the manner in which Level 3 has used the "telephone toll service" definition in an attempt to receive terminating compensation on interexchange traffic. In other states, Level 3 has argued that if neither Level 3 nor Qwest charge the end user a discrete charge for VNXX traffic, the call, because of the telephone toll definition in the Act, cannot be a toll call subject to access charges.

98 Level 3's theory was expressly rejected by the Second Circuit in *Global NAPs II*. There, the CLEC argued that "since the regulations prescribe that a charge separate from the applicable service contracts is necessary to make a call a 'toll' call, and since Global imposes no separate toll charges, its traffic is not subject to access fees, regardless of how the Board defines local calling areas." The Second Circuit responded by stating that "*This argument attributes far too much significance to the term 'separate charge*.'" 454 F.3d at 98; emphasis added. The court, among other things, ruled that the determinative distinction between toll and local is whether the traffic is interexchange in nature: "But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier

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[44] The term "exchange service" is uses scores of times in undisputed provisions of the agreement, including, for example, the definitions of "Competitive Local Exchange Carrier," "Rate Center," and "Serving Wire Center." It is also included in many substantive provisions that are not contested such as paragraphs 6.2.2.4, 6.2.9, 6.2.14, 6.4.1, 7.2.1.1.1, 7.2.2.1, and 7.2.2.1.1. It is even used by Level 3 in language it proposes on disputed issues—*e.g.,* see Level 3's version of sections 7.2.2.1.2.2 (Issue 1D) and 7.2.2.9.3.2 (Issue 2B).

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chose to bill its customers. Thus, Global's argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point." *Id*. In its recent order, the Iowa Board rejected Level 3's "separate charge" argument; in so doing, the Board relied explicitly on *Global NAPs II*. *Iowa Level 3 Order*, 2006 WL 2067855 at *22-*23.

J. Level 3's Proposed System of Jurisdictional Allocation Factors is Plagued with Problems and should be Rejected (Issue 18) (Sections 7.3.9, 7.3.9.1, 7.3.9.1.1, 7.3.9.1.2, 9.3.9.1.3, 7.3.9.2, 7.3.9.2.1, 7.3.9.2.1.1. 7.3.9.3, 7.3.9.3.1, 7.3.9.4, 7.3.9.4.1, 7.3.9.5, 7.3.9.5.1, 7.3.9.5.2, 7.3.9.6)

99 Issue 18 concerns Level 3's proposal to use a manual system of "factors" to bill for switched access traffic that Level 3 proposes be combined over LIS trunks. A system of factors is not necessary if switched access traffic and other traffic types are combined on FGD interconnection trunks, as Qwest proposes. A system of factors becomes necessary only if switched access traffic is delivered to Qwest over LIS trunks because Qwest's LIS trunks do not have the capability to properly record and bill switched access traffic. (Ex. 71-T at 30-31).

100 As discussed above, if all traffic types are to be combined on the same trunks, it should be done on FGD trunks. Problems with Level 3's factor proposal only confirm this conclusion. First, the factors proposal is an entirely manual process from beginning to end. Switching to a factors system would require Qwest to discard its existing systems and thus replace them with new manual systems. (Ex. 72-TC at 16-17). Moreover, under Level 3's proposal, Qwest would no longer be able to use its existing mechanized systems to record traffic and thus supply Qwest with independent evidence of the volume of each traffic type delivered by Level 3. Level 3 would have sole control of the raw information necessary for billing. (Easton, Tr. 264-67). Thus, Qwest's only mechanism to verify the correctness of billing information supplied by Level 3 would be to conduct manual audits. Given the enormous volumes of traffic exchanged between the parties, this would be an extremely complex and time-consuming endeavor.

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101 Second, Level 3's proposed factors proposal does not correctly address the existing traffic types. For example, there is no factor for intrastate switched access. (Ex. 71-T at 31). The factor that Level 3 proposes for interstate switched access does not cover all of the variable components of Qwest's tariffs related to distance and rates. (Tr. 264-67). Moreover, under Section 7.3.9.1.1 of Level 3's proposal, all VoIP traffic appears to be placed in a single category and treated as a single type of traffic. Such a categorization is not consistent with existing law. As discussed above, both parties agree that VoIP is an enhanced service. As a result, a VoIP provider is treated as an end user for purposes of applying access charges. If the VoIP provider is located in a different LCA than the called party, the call is an interexchange call and is subject to switched access charges just like any other interexchange call. By lumping all VoIP traffic together in one category; however, Level 3's factor proposal would inextricably combine local VoIP traffic with VoIP traffic that is subject to switched access. The result would be a large volume of traffic that would have to be manually sorted out. (Ex. 71-T at 30-31).

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

K. <u>The Commission should Reject Level 3's Attempt to Inject the Mirroring Rule into the 3:1 Ratio Issue (Issue 19) (Section 7.3.6.2)</u>

103 This issue relates to Section 7.3.6.2, which relates to the application of the 3:1 ratio for determining ISP-bound traffic. In other states, Qwest and Level 3 have been able to resolve this issue by agreeing to the language proposed by Qwest in this case, which states:

> 7.3.6.2 Identification of ISP-Bound Traffic. Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-Bound traffic. Either Party may rebut this presumption by demonstrating the factual ratio to the state Commission.

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The problem in Washington is that Level 3 proposes to add the following sentence: "Traffic exchanged that is not ISP-Bound traffic will be considered to be local traffic unless the Commission determines that Qwest has affirmatively opted out of the FCC's mirroring rule." This addition is completely inappropriate because, by its terms, it purports to classify interexchange traffic as local traffic. Interexchange traffic is not local traffic by definition. Accordingly, Level 3's proposed addition should be rejected.

L. New Level 3 Proposed Definitions

1. The Commission should Reject Level 3's Definition of "Meet Point Interconnection Arrangement" and "Mid-Span Meet" (New issues – Issues 23 and 24)

104 Issues 23 and 24 are new issues in which Level 3 attempts to redefine the previously agreed term "Mid-Span Meet" by interjecting, among other words, a newly defined term "Meet Point Interconnection Arrangement." Level 3's proposed changes should be rejected. The definition of "Mid-Span Meet" was not raised as an issue in either the petition or the response and, accordingly, Level 3 is not entitled to raise it as an issue now. 47 U.S.C. § 252(b)(4). Level 3 agreed before the arbitration to use the language that Qwest is now proposing. (Ex. 71-T at 34-35; Level 3 Petition, Attachment C, at 22).

105 Level 3 has also proposed a definition of "Meet Point Interconnection Arrangement" which was not raised as a disputed issue in either Level 3's Petition or Qwest's Response. There is no need for this definition because the FCC has already defined a "Meet point interconnection arrangement" to be "an arrangement by which each telecommunications carrier builds and maintains its network to a meet point." 47 C.F.R. § 51.5. Level 3 seeks to change this definition so that it will not have the obligation to build or maintain a network to the point POI. The only conceivable purpose of this change is to allow Level 3 to unlawfully avoid the prerequisites for a meet point interconnection arrangement and still claim the benefits of such

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an arrangement.

2. The Commission should Reject Level 3's New Definition of the Word "Traffic" (New Issue – Issue 26)

106 For reasons that are unclear, Level 3's new language contains a proposed definition for "Traffic" as a stand-alone term. Qwest opposes this definition for two basic reasons. First, it is completely unnecessary, and Level 3 has provided no testimony explaining why such a definition is necessary. Second, the Level 3's proposed definition, which is nothing but legal conclusions, will inappropriately change the meaning of innumerable sections of the ICA.

107 The term "Traffic" is used innumerable times in the agreement, usually modified by any one of many different adjectives, such as "VNXX," "local exchange," "VoIP," "interexchange," "CRS," "Inter-LATA," Intra-LATA," "transit," "BLV/BLI," "local (EAS)," and many others. In each case, the type of traffic in question is defined by its modifier, and is meaningful in the ICA only in the context of that modifier. For example, Level 3 uses the term "Traffic" in its proposed Section 7.1.1.4 which provides that "Each Party Shall Charge Reciprocal Compensation for the Termination of Traffic to be carried." If the term "Traffic" encompasses all telecommunications, Level 3's proposed section 7.1.1.4 would then call for reciprocal compensation to be paid on long distance traffic. Such a result is clearly unlawful. Similarly, in its proposed Section 7.2.2.9.3.1 (Issue 2A), Level 3 proposes language that would bar any charges "associated with the exchange of … Traffic." The use of the word Traffic in this section would eliminate all intercarrier compensation. This too would be unlawful.

108 In a few instances the term "Traffic" is used more generically, without a modifier. For example, the POI definition states that a "POI is that point where the exchange of *traffic* takes place."[45] In none of the instances where the term is used without a modifier is the language in

[45] For example, the term "traffic" is used generically in definitions such as "Access Tandem Switch," "Tier 1 Wire Center," and in Section 7.2.1.1.

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the agreement in dispute, and there does not appear to be any dispute about the meaning of the term in those sections. In those instances, the term is obviously used in a broad sense, consistent with the definition in *Newton's Telecom Dictionary*: "Bellcore's definition: A flow of attempts, calls, and messages."[46] The effect of Level 3's definition would be to dramatically change the meaning of those stand-alone references. But it would also change the meaning of every other reference to traffic, even those modified by the host of modifiers described above. In other words, the addition of this definition would overlay a second definition on top of other defined terms. At the very least, it will create confusion and, at worst, could dramatically change the meaning of the ICA in completely unintended ways. Thus, without careful analysis of the impact of Level 3's new definition in every instance in which "traffic" appears in the ICA, the impact on the agreement is unknown. Level 3 bears the burden of explaining and justifying the new language. It has done neither.

109 Level 3's proposed definition of "Traffic" appears to be based on an intent to interpret existing FCC rules. FCC rules are relevant in this case. Qwest also agrees that certain types of traffic, for example, fall into the category of "information services traffic." But those are issues that are addressed in FCC rules and orders. To the extent the parties disagree on these issues, they should look to those rules and orders for clarification instead of injecting such an ambiguous term into the ICA. Level 3's proposal to define the word "Traffic" should be rejected.

3. The Commission should Reject Level 3's Proposed Definition of "Unbundled Network Element" (New Issue – Issue 27)

110 Issue 27 is a dispute concerning the definition of "Unbundled Network Element" ("UNE"). In its proposed definition, Level 3 seeks to give the Commission authority to define UNEs. However, under Section 251, there is no unbundling obligation absent an FCC requirement to unbundle and an FCC impairment finding. The Supreme Court made it clear in *AT&T Corp. v.*

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[46] *Newton's Telecom Dictionary* (21st ed. 2005) at 860.

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Iowa Utilities Board, 525 U.S. 366, 390 (1999) that the Act does not authorize "blanket access to incumbents' networks." Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]." Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[47]

111 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC. The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Iowa Utilities Board*, 525 U.S. at 391-92. And the D.C. Circuit confirmed that Congress did not allow the FCC to have state commissions perform this work on its behalf. *United States Telcom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA II*"). *USTA II*'s clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B).

112 *Iowa Utilities Board* makes clear that the essential prerequisite for unbundling any given

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[47] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *United States Telcom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("*USTA I*") (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

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element under Section 251 is a formal finding by the FCC that the Section 251(d)(2) "impairment" test is satisfied for that element. Simply put, if there has been no such FCC finding, the Act does not permit any regulator, federal or state, to require unbundling under Section 251. In its *Triennial Review Order* ("*TRO*"), the FCC reaffirmed this principle:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime.
>
> ***
>
> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).[48]

Level 3's UNE definition should be rejected.

M. The Commission should Reject Level 3's Proposed Language Relating to Quad Links (New Issue – Issue 30) (Sections 7.2.2.6.1.1, 7.2.2.6.1.2, and 7.2.2.6.1.3)

113 Qwest and Level 3 agreed to Section 7.2.2.6.1 of the agreement, which allows Level 3 to use a single set of quad links. (Ex. 93-T at 18-19). Under Section 7.2.2.6.1, Qwest's sole obligation to provide signaling is contained in Qwest's tariffs. Level 3 proposes three new sections (Sections 7.2.2.6.1.1, 7.2.2.6.1.2 and 7.2.2.6.1.3), ostensibly to address the use of a single set of quad links. However, Qwest's tariffs do not require more than a single set of quad links. (Ex. 93-T at 19). Moreover, Level 3's proposed contract language either duplicates or contradicts what the parties agreed to and should be rejected. Level 3's proposed section 7.2.2.6.1.1 should be rejected because it is duplicative of the agreed-to language in section 7.2.2.6.1. (Ex. 91-T at 34-36). Level 3's proposed language for Sections 7.2.2.6.1.2 and

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[48] Report and Order, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 ¶ 193 (2003) ("TRO").

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7.2.2.6.1.3 should also be rejected because they are ambiguous, such that one could not determine what Qwest's obligations would be. Both provisions could be interpreted to obligate Qwest to provide signaling that is not required by FCC regulations or Qwest's tariffs. (*Id.*) Level 3 has offered no lawful basis or policy rationale for expanding Qwest's obligation to provide signaling beyond what the law today requires and what the parties previously agreed to.

N. Qwest's Proposed Language for UNE Non-Impairment Standards should be Adopted (New Issues 31, 32 and 33)

114 Issues 31, 32 and 33 address non-impairment determinations under the FCC's *Triennial Review Remand Order*[49] ("*TRRO*"). Under the TRRO, Qwest is not required to provide unbundled transport or loops in wire centers that are not impaired under the *TRRO*'s prescribed standards. Qwest proposes language in Section 9.1.1.4 (Issue 31) that allows the Commission to resolve disputes concerning whether the FCC's non-impairment standards have been met in Washington. Qwest has also proposed language in Sections 9.1.1.4.1 and 9.1.1.4.2 (Issue 32) that provides that Qwest is not required to provide UNEs where the non-impairment thresholds have been met as determined by the Commission. Level 3's proposed language for these sections attempts to divorce the Commission from any role in enforcing the FCC's prescribed standards. The Commission presently has a proceeding pending to determine which wire centers are not impaired. Level 3's proposed language would render that proceeding meaningless. Qwest's proposed language for Section 9.1.1.5.1 appropriately provides for a transition to UNEs where Qwest has designated a wire center as non-impaired that is in fact impaired. Level 3's proposed changes to Section 9.1.1.5.1 do not make sense because they contemplate a transition from alternative services to UNEs even though Qwest had not designated a wire center as non-impaired and even though UNEs were previously available.

[49] Order on Remand, In the Matter of Unbundled Access to Network Elements & Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd 2533(February 4, 2005).

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For all of these reasons, the Commission should adopt Qwest's proposed language for Issues 31, 32 and 33.

III. SUMMARY OF UNDISPUTED ISSUES

115 Based on Qwest's review of Level 3's new proposed language and testimony, the following issues appear to be resolved as a result of Level 3's acceptance of Qwest's language and/or positions: Issue 1C (Section 7.2.2.1.1); Issue 1F (Section 7.2.2.9.6); Issue 5 (SGAT references); Issue 6 (Definition of "Automatic Message Accounting); Issue 8 (Definition of "Call Record"); Issue 9 (Definition of "Exchange Access"); Issue 11 (Definition of "Interexchange Carrier"); Issue 12 (Definition of "IntraLATA Toll Traffic"); Issue 13 (Definition of "Local Interconnection Service or 'LIS' Entrance Facility"); Issue 17 (Sections 7.2.2.8.1 through 7.2.2.8.16); Issue 20 (Section 7.3.8); and Issue 22 (Section 19.1.1).

IV. CONCLUSION

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

DATED this ______ day of December, 2006.

QWEST

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