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 REPLY BRIEF

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I. INTRODUCTION

1 One of the primary issues that the Commission must decide in this arbitration is the appropriate intercarrier compensation for calls delivered to an ISP in a different local calling area ("LCA") than the caller. In this case, by assigning telephone numbers to disguise these interexchange calls as local calls, Level 3 ensures that Qwest receives no compensation for originating and transporting these interexchange calls to Level 3. However, Qwest is not compensated for these calls in its local rates because those rates only compensate Qwest for calls placed by a caller and received by the called party within the same LCA. Level 3's improper number assignment prevents Qwest from receiving originating access on these calls.

2 Given that Qwest should be, but is not, compensated for these non-local calls, it would be completely inequitable to require Qwest to pay Level 3 terminating compensation on such calls. Accordingly, Qwest again makes the request it made in its response to Level 3's petition that the Commission deny Level 3 terminating compensation on VNXX ISP traffic.

3 In its Opening Brief, Level 3 argues disingenuously that the Commission has already determined that the *ISP Remand Order*[1] requires Qwest to pay intercarrier compensation on all calls to ISPs, including non-local calls. Level 3 made this argument knowing full well that the Ninth Circuit subsequently rejected the Commission's conclusion in *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1159 (9th Cir. September 7, 2006) ("*Peevey*"). Not surprisingly, Level 3 does not cite or discuss *Peevey* in its Opening Brief.

4 *Peevey* concerned a decision of the California Public Utilities Commission ("CPUC"). The CPUC concluded that the LEC tariffs in California provided that calls are determined to be local calls solely based upon the NPA-NXXs of the calling and called parties and not based on

[1] 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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their physical location.[2] Thus, in California, it could be argued that the calling party compensated Verizon for delivering VNXX calls to the called party. In Washington, that is not the case. The Commission's rules, Commission decisions, and Qwest's tariffs categorize traffic based upon the relative geographic location of the parties. (Qwest Opening Brief ¶¶ 49-53). Thus, unlike in California, Qwest has not been compensated by the caller for VNXX calls that Level 3 arranges for its ISP customers. This distinction between Washington and California undermines any argument Level 3 may make that *Peevey* somehow supports VNXX in Washington.

5 In this Reply Brief, Qwest will again discuss the issues in their numbered order. For the reasons that follow, the Commission should adopt Qwest's proposed language because it properly reflects both Washington and federal law.

II. ARGUMENT

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

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

6 In its Opening Brief, Level 3 defends its proposed contract language by asserting that it is entitled to send all traffic types over interconnection trunks established pursuant to Section 251(c)(2). (Level 3 Opening Brief at 10-11). That is not the law. In its *Local Competition Order*, the FCC rejected the notion that a telecommunications carrier is entitled to interconnection under Section 251(c)(2) for the purpose of delivering interexchange traffic. The FCC stated:

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[2] In a 1999 decision, the CPUC concluded "that the rating of calls as toll or local should be based upon the designated rate center of the NXX prefix of the calling and called parties' numbers." Interim Opinion, *Re Competition for Local Exchange Service,* 1999 WL 1127635 at *11 (CPUC 1999). This conclusion was based on a unique call rating system in California based on "carriers' retail tariffs." (*Id.*). Under those tariffs, rate centers were critical points and "[e]ach rate center . . . is identified by *tariff* with a unique NPA-NXX code. Thus, it is the applicable rate center *as identified by the telephone number prefix*, not the physical location of the calling and called party that is used to rate calls." (*Id., emphasis added*). As discussed in Qwest's Opening Brief, the law of Washington mandates a different conclusion here. (Qwest Opening Brief ¶¶ 49-53).

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> We conclude . . . that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).[3]

The interconnection rules (and Level 3's rights) under Section 251(c)(2) apply only when and to the extent that Level 3 is *providing* telephone exchange service or exchange access. The interconnection rules that apply to other types of traffic are different. As the FCC stated in its 2001 *Intercarrier Compensation NPRM*:

> Interconnection arrangements between carriers are currently governed by a complex system of intercarrier compensation regulations. These regulations treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services. The interconnection regime that applies in a particular case depends upon such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, a CMRS carrier or an enhanced service provider; and whether the service is classified as local or long distance, interstate or intrastate, or basic or enhanced.[4]

7 Level 3's proposed contract language is inappropriate because it attempts to extend the interconnection rights under Section 251(c)(2) to interconnection for traffic types that are not governed by Section 251(c)(2). For example, Level 3's proposed language would allow it to interconnect solely for the purpose of carrying interexchange traffic even though the FCC has denied that CLECs have such a right under Section 251(c)(2). In contrast, Qwest's proposed language properly requires the terms of interconnection for interexchange traffic to be governed by interstate and intrastate switched access tariffs. (*Local Competition Order* ¶ 1033).

8 Moreover, as discussed below, Qwest's proposed contract language does not "ghettoize" (to

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 ¶ 191 (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).

[4] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 ¶ 5 (2001) ("*Intercarrier Compensation NPRM*").

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use Level 3's misleading term) traffic types. Under Qwest's proposed language, Level 3 is free to send all traffic types to Qwest over Feature Group D ("FGD") interconnection trunks that have been developed to have the capability to handle all traffic types.

2. Level 3's Criticisms of Qwest's Language for Issue 1B Are Erroneous

9 Level 3 asserts that it wants Section 7.1.2 "to specify that OC-3 or higher-speed circuits can be negotiated." (Level 3 Opening Brief at 26). This is not an argument for Level 3's proposed language. Level 3's proposed Section 7.1.2 does not contain such a specification. Furthermore, it is not a legitimate objection to Qwest's proposed language. Qwest's proposed language does not bar OC level or higher interconnection. It merely provides that if OCn level interconnection has not been previously provided to a third party or is not offered by Qwest as a product, that the Bona Fide Request Process ("BFR Process")[5] be followed. Level 3 agreed to Qwest's proposed language establishing the BFR Process and did not present testimony claiming that it was "cumbersome." Moreover, Level 3's extra-record reference to Qwest Communications Corporation's ("QCC's") "nationwide fiber optic network" does not demonstrate that OCn level interconnection with Qwest Corporation, a separate entity, is technically feasible. Whether OCn level interconnection is technically feasible depends upon the specific circumstances in which it is requested. The BFR Process may very well be necessary to make that determination.

3. Level 3's Proposed Modifications to Section 7.2.2.1.2.2 should be Rejected (Issue 1D)

10 Issue 1D concerns Level 3's proposed modifications to Section 7.2.2.1.2.2 which purport to create Qwest transport obligations. Level 3 erroneously claims that its changes concern interconnection. (Level 3 Opening Brief at 27). That is not the case. Level 3's proposed language changes plainly address transport services. FCC Rule 51.5 specifically defines

[5] Section 17 (Sections 17.1 to 17.15) of the ICA describes the BFR Process. Level 3 did not contest any language in Section 17.

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interconnection to exclude transport and termination. (47 C.F.R. § 51.5: "Interconnection"). Thus, whether Level 3 has a right to TELRIC-priced interconnection is irrelevant. The *Triennial Review Remand Order* limits the transport that Qwest must provide at TELRIC rates and Level 3's language is not properly qualified to reflect Qwest's limited obligation. Accordingly, Level 3's proposed modifications to Section 7.2.2.1.2.2 should be rejected for the reasons above and those set forth in Qwest's Opening Brief. (Qwest Opening Brief ¶ 17).

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)

11 Issues 1G and 1H concern Qwest's proposed relative use factor ("RUF"). The primary dispute between the parties concerns the treatment of interexchange (or VNXX) ISP traffic. In its Opening Brief, Level 3 attempts to build an argument upon footnote 149 of the *ISP Remand Order*. (Level 3 Opening Brief at 7-9). Footnote 149 states:

> This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' obligations under our part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection. (*ISP Remand Order*, n. 149; emphasis added).

In the prior arbitration with Level 3, the Commission interpreted footnote 149 to mean that the pre-*ISP Remand Order* obligations to transport traffic to the POI were not changed by the *ISP Remand Order*.[6]

12 Footnote 149, however, actually supports Qwest's position that Level 3 is responsible under the RUF for all VNXX traffic. That is because the FCC's pre-*ISP Remand Order* rules that required the ILEC to bear the cost of transporting traffic to the POI applied only to local

[6] Fourth Supplemental Order & Commission's Final Order, *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023042 at 9-11 (February 5, 2003).

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telecommunications traffic.[7] Prior to the *ISP Remand Order*, Rule 51.701 of the FCC's reciprocal compensation rules provided that "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of *local* telecommunications traffic between LECs and other telecommunications providers."[8] As the FCC expressly recognized in the *Local Competition Order*, the Act preserved the right of local exchange carriers who originate interexchange traffic to charge access charges for the origination and transport of interexchange traffic to a point of interconnection ("POI") with an interexchange carrier ("IXC").[9]

13 Similarly, Level 3's reliance upon Rule 703—47 C.F.R. § 51.703—is misplaced. Rule 703, by its express terms, only applies to the cost of originating "telecommunications traffic." Rule 701—47 C.F.R. § 51.701—defines "telecommunications traffic" to exclude "information access" and "exchange access." The FCC determined in the *ISP Remand Order* that ISP-bound traffic constitutes "information access." (*ISP Remand Order* ¶ 44). In *Peevey*, the Ninth Circuit held as a matter of federal law that interexchange (VNXX) ISP-bound traffic is "interstate or intrastate exchange access" that does not fall within the scope of Rule 703. (462 F.3d at 1157-59).[10]

14 Level 3's reliance upon Rule 709—47 C.F.R. 51.709—is also erroneous for two reasons. First, the use of the term "traffic" in Rule 703 has to be interpreted to mean

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7 This is not a case in which the traffic is local but is transported to a POI outside the LCA before being delivered to an ISP located in the caller's LCA. Thus, cases that address the treatment of local traffic with this routing pattern are not on point.

8 *Local Competition Order,* Appendix B, § 701(a) (emphasis added) (found at 11 FCC Rcd 15499 at 16228).

9 *Local Competition Order* ¶¶ 176, 1034. Level 3's reliance on footnote 149 only underscores why the *ISP Remand Order* should be interpreted only to prescribe intercarrier compensation for calls placed to an ISP in the same LCA as the calling party. Only then does the preservation of the rules applicable to local traffic (Rules 51.703 and 51.709) make sense.

10 Level 3's reliance upon the example from the FCC's 2005 *Intercarrier Compensation Further Notice* is misplaced because the FCC's comments conflict with the FCC's actual rules. The FCC's reciprocal compensation rules (47 C.F.R. §51.701 *et seq*.) very clearly carve out "information access" and "exchange access" from the rule that prevents an originating carrier from charging for carrying traffic to a point of interconnection. Given the obvious conflict between the FCC's rules and its comments concerning the rules, the actual language of the rules obviously control.

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"telecommunications traffic" because it is a part of a set of provisions that only apply to "telecommunications traffic" as defined in Rule 701(b)—47 C.F.R. § 51.701(b). Second, Rule 709 cannot apply to traffic subject to access charges because the FCC recognized in the *Local Competition Order* that the access charge regime (including access compensation for entrance facilities used for interconnection for exchanging interexchange traffic) was preserved by the Act.

15 Interpreting Rules 703 and 709 to require Level 3 to bear the full cost of transporting ISP-bound traffic, and in particular, VNXX ISP-bound traffic, is the only economically rational approach. If Level 3 bears the cost of origination and dedicated transport, then the ISP and ultimately the ISP's dial-up customers will be required to compensate Level 3 for the origination and transport costs incurred to provide dial-up service. If those costs are shifted to Qwest, as Level 3 seeks to do in this proceeding, then Qwest either unfairly bears the cost without compensation or has to recover those costs from ratepayers generally, including those who do not use dial-up service. As the FCC stated 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).

B. <u>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)</u>

16 In its Opening Brief, Level 3 tries to merge an issue that is not before the Commission with an issue that is. The issue that *is not* before the Commission is whether Level 3 can deliver jointly provided switched access ("JPSA") traffic to Qwest over LIS trunks. The undisputed language of the ICA permits this but only so long as Level 3 is functioning as a LEC for the traffic in question and all of the requirements applicable to the provision of JPSA are met. The issue that *is* before the Commission is whether Level 3, acting as an IXC, can deliver

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interexchange traffic to Qwest over LIS trunks. On this point the parties disagree. As will be discussed below, allowing Level 3 as an IXC to deliver switched access traffic over LIS trunks is not just and reasonable.

1. Whether Particular Traffic Qualifies as Jointly Provided Switched Access Is Not Before the Commission

17 In its Opening Brief, Level 3 appears to argue that the only type of switched access traffic that it will send to Qwest will qualify as JPSA traffic. (Level 3 Opening Brief at 12-14). In making this argument, Level 3 relies upon the definition of "Jointly Provided Switched Access," but ignores all of the agreed-to contract provisions that govern whether particular arrangements qualify as JPSA.

18 Today, Qwest's end office switches subtend Qwest tandem switches, not Level 3 switches. Thus, before it can be said that Level 3 is providing JPSA with Qwest, the existing arrangement would have to be changed through negotiation.[11] In two separate sections of the ICA, the parties agreed as to how this would be done. Section 7.2.2.4 of the ICA's agreed-to language provides in pertinent part:

> "Jointly Provided Switched Access. The Parties will use industry standards developed to handle the Provisioning and Billing of Jointly Provided Switched Access (MECAB, MECOD, and the Parties' FCC and state access Tariffs)."[12]

Agreed-to Section 7.5.1 of the ICA further states:

> Jointly Provided Switched Access Service is defined and governed by the FCC and state access Tariffs, Multiple Exchange Carrier Access Billing (MECAB) and Multiple Exchange Carrier Ordering and Design (MECOD) Guidelines, and is not modified by any provisions of this

[11] In essence Level 3 is asserting that Qwest can be forced to arrange for its end offices to subtend Level 3 switches if Level 3's switches qualify as tandems. Qwest has its own tandems and has no legal obligation to arrange for its end offices to subtend Level 3 switches.

[12] Compare Section 7.2.2.4 of Appendix C to Level 3 Petition with Section 7.2.2.4 of Exhibit A to Qwest's Response.

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Agreement. Both Parties agree to comply with such guidelines.[13]

Thus, under the clear, agreed-to language of the Agreement, whether traffic qualifies as JPSA traffic, does not depend upon the definition that Level 3 relies upon. It depends upon whether Level 3 is functioning as a LEC and whether there is compliance with a set of industry standard guidelines that both Qwest and Level 3 have agreed to follow.

19 Level 3's entire argument (Level 3 Opening Brief at 12-14) is an attempt to ask the Commission to issue an advisory opinion concerning whether as yet unidentified traffic delivered over as yet unidentified routes is carried by Level 3 in the capacity of a LEC and meets the full set of contractual requirements contained in tariffs and the MECAB and MECOD Guidelines. The Commission simply does not have information before it sufficient to make the determination Level 3 is requesting. Moreover, whether particular traffic qualifies as JPSA was not presented as an issue in either the petition or response. Thus, under Section 252(b)(4)(A), the Commission may not properly consider it.

2. Level 3 Should Not Be Permitted to Deliver Interexchange Traffic (other than JPSA Traffic) to Qwest Over LIS Trunks

20 The issue that is before the Commission is whether Level 3 should be permitted to deliver interexchange traffic (which does not involve JPSA) over LIS trunks. The answer is clearly no. The reason Level 3 wants to send interexchange traffic to Qwest over LIS trunks is so that Qwest cannot record this traffic. That puts Level 3 in complete control of the information necessary for billing and enlarges its opportunities to avoid the payment of applicable access charges. Level 3's attempt to argue that access charges do not apply to VNXX traffic and VoIP traffic confirms that a major Level 3 priority is access charge avoidance. Its desire to route interexchange traffic over LIS trunks is just another facet of this access avoidance theme.

21 None of Level 3's arguments for sending interexchange traffic over LIS trunks withstand

[13] Compare Section 7.5.1 of Appendix C to Level 3 Petition with Section 7.5.1 of Exhibit A to Qwest's Response.

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scrutiny. The first argument, that it has a legal right to send interexchange traffic over LIS trunks is just plain wrong. On this point, Level 3 conflates the ability to combine all traffic types on interconnection trunks with the legal rules that apply when traffic is so combined. In this proceeding, Qwest is not contesting that Level 3 may send all traffic types over the same interconnection trunks.[14] Rather, Qwest contends that if the interconnection trunks are to be used to carry interexchange traffic, the trunks should be FGD interconnection trunks that can record and bill the traffic and that Qwest's tariffed rates applicable to those trunks apply. None of the authorities that Level 3 cites in its Opening Brief (or any other authorities for that matter) hold that the tariffed rates applicable to interconnection for interexchange traffic do not apply when local traffic is combined with traffic subject to switched access rates.

22 When Level 3 engages in VNXX, it is not providing "telephone exchange service" within the meaning of the Act "Telephone exchange service" is synonymous with local service and that did not change when Congress added 47 U.S.C. § 153(47)(B) to the definition. The "comparable service" addition to the definition "was added to ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional means of communication *within a local calling area*."[15]

23 The interconnection rules applicable to Section 251(c)(2) interconnection do not apply where the CLEC is receiving rather than providing "exchange access."(*Local Competition Order* ¶

[14] In footnote 34 of its Opening Brief, Level 3 attempts to argue that Qwest has sought to commingle traffic in Iowa and cites *Iowa Network Services v. Qwest*, 385 F.Supp. 2d 850 (S.D. Ia. 2005)("*INS*"), ostensibly in support. However, this case concerned Iowa Network Services attempt to charge Qwest access charges on local transit traffic that had already been delivered to Qwest commingled with non-local wireless traffic. *In re: Exchange of Transit Traffic*, Docket No. SPU-00-7, 2001 Iowa PUC LEXIS 548 (November 26, 2001). Moreover, in the underlying Iowa Utilities Board proceedings that were at issue in *INS*, the Board determined that the commingling issue and the billing issues it raised should be addressed through the interconnection arbitration process. Order Affirming Proposed Decision and Order, *In re: Exchange of Transit Traffic*, Docket No. SUP-00-7, 2002 Iowa PUC LEXIS 103, at *27-*28 (March 18, 2002). Significantly, in the Iowa arbitration between Level 3 and Qwest, the Board ruled that FGD interconnection trunks should be used and rejected Level 3's request to send interexchange traffic over LIS trunks. Order on Reconsideration, *In Re Level 3 Communications, LLC, vs. Qwest Corporation*, Docket ARB-05-4, 2006 WL 2067855 at *14 (Iowa Util. Bd. July 19, 2006)) ("*Iowa Level 3 Order*"). Thus, *INS* does not support Level 3's position.

[15] *Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC-Docket No. 92-273, 16 F.C.C.R. 2736, ¶ 21 (2001).

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186). Qwest does not dispute that IXCs who provide exchange access have the right to interconnect under Section 251(c)(2). But, when they do so, they are in fact acting as local exchange carriers, not IXCs. In this case, Level 3 claims to be a local exchange carrier, but is in fact acting as an IXC when it delivers switched access traffic to Qwest for termination. Significantly, in Washington, when IXCs like AT&T interconnect with Qwest and combine all traffic on the same interconnection trunks, they pay Qwest's full tariffed rates for the interconnection facilities they use. (Ex. 71-T at 24-27).

24 Level 3 erroneously argues that if Qwest's proposed interconnection terms are more costly than Level 3's proposed terms, then the Commission must choose the less costly terms. (Level 3 Opening Brief at 16). In this case, the opposite is true. The reason that Qwest's proposal "costs more" is because Qwest is required to charge, and Level 3 is required to pay, the applicable tariffed switched access facilities charges for interconnection that Level 3 uses to deliver its interexchange traffic to Qwest. (Ex. 71-T at 24). The Act did not change the access charge rules applicable to interconnection used to carry switched access traffic. (*Local Competition Order* ¶¶ 176, 1034).[16]

25 It is appropriate for Level 3 to pay the higher FGD rate because Level 3 gains the cost reductions and efficiencies that carrying all traffic on the same interconnection trunks provides. FGD interconnection trunks alone allow Level 3 to avoid having to send traffic destined for customers of CLECs and Independent Telephone Companies over separate trunk groups. LIS trunks do not offer as great an efficiency. (Tr. 253). Thus, while FGD trunks may cost slightly more, Level 3 obtains the maximum cost savings that combining all traffic types on the same FGD interconnection trunks allows.

[16] In footnotes 20 and 21 of its opening brief, Level 3 cites *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) for the proposition that Section 251(g) of the Act does not apply with respect to LEC to LEC interconnection. However, when Level 3 engages in VNXX, it is acting as an interexchange carrier offering a 1-800 service. *Worldcom* was addressing only the treatment of local calls to ISPs. Thus, Level 3's reliance upon *Worldcom* is misplaced. Section 251(g) does, in fact, preserve the access charge regime that predated the Act. *ISP Remand Order*, ¶¶36-39.

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26 Thus, the Level 3 cost benefit analysis (Level 3 Opening Brief at 16-17) is flawed for three reasons. First, the Section 251(c)(2) "just and reasonable" standard does not apply to interconnection used to carry interexchange traffic. Second, even if it did, the Commission does not have authority in this proceeding to reduce the facilities rates set forth in the interstate tariffs applicable to the traffic in question.[17] Finally, even if a cost benefit analysis was performed, the cost savings from combining all traffic types on FGD interconnection trunks (versus LIS) trunks have to be taken into account, which Level 3 has not done.

27 In this case, Level 3 clearly intends to send traffic subject to switched access charges to Qwest for termination. Level 3 recently acquired WilTel, a large user of Qwest's FGD switched access services and has expressed its desire to increase the volume of this traffic that it delivers to Qwest. (Ex. 91-T at 25). Thus, Qwest's intrastate and interstate switched access tariffs will apply to some, if not a significant portion, of the traffic that Level 3 delivers to Qwest for termination.

28 Level 3's argument that FGD trunks are not needed to record and bill switched access traffic is also wrong. Both the Iowa Utilities Board and the Arizona Corporation Commission have already rejected Level 3's argument on this point.[18] Qwest has already enabled its FGD trunks to handle both local and interexchange traffic, so there is no point in giving LIS trunks FGD functionality. Moreover, if the cost of "activating FGD functionality" in LIS trunks were incurred so that Level 3 could send interexchange traffic over LIS trunks, Level 3 would be required to bear that cost. Level 3 refers to Paragraph 202 of the FCC's *Local Competition*

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[17] 34th Supplemental Order; Order Regarding Qwest's Demonstration of Compliance with Commission Orders, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket Nos. UT-003022 and UT-003040, ¶ 22 (2002) ("We agree that this Commission may not assert jurisdiction over the pricing of interstate facilities, and cannot order Qwest to apply proportional pricing to those facilities").

[18] *Iowa Level 3 Order*, 2006 WL 2067855 at *14; 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 *50 (Arizona Corp. Comm'n, June 29, 2006) ("*Arizona Level 3 Order*").

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Order for the proposition that ILECs must make certain modifications to accommodate an interconnecting LEC's networks but omits to cite paragraph 199 of the *Local Competition Order*. (Level 3 Opening Brief at 17-18). In paragraph 199, the FCC makes clear that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1) be required to bear the cost of that interconnection, including a reasonable profit." (*Local Competition Order* ¶ 199).[19]

29 Contrary to Level 3's unsupported claim, Section 251(c)(2) never required Qwest to enable its LIS trunks to handle switched access traffic. Section 251(c)(2) contemplates that the interconnection trunks will be used *to provide* "exchange access," not to receive it. (*Local Competition Order* ¶¶ 186-91). Section 251(c)(2) interconnection requirements do not apply where the interconnection is used by a carrier to terminate its own interexchange traffic. Significantly, as Level 3 witness Wilson acknowledged, none of the other Regional Bell Operating Companies enabled their LIS trunks to handle switched access traffic. (Tr. 571)

30 Today, there is no switch that can be flipped that changes a LIS trunk into a LIS trunk with FGD recording capabilities. (Tr. 264-65, 271-72). The "flip of the switch" that Level 3 refers to on page 18 of its Opening Brief is the determination to make the interconnection trunks established under the agreement into FGD interconnection trunks in the first instance or to change them from LIS trunks to FGD trunks in the second instance. Consequently, what Level 3 is really saying is that it is appropriate for Qwest to create FGD interconnection trunks but Level 3 objects to paying for them. That is not a legitimate objection. Qwest developed FGD interconnection trunks that have the ability to handle all traffic types. A CLEC that purchases them gains the financial benefit of being able to combine all traffic types on the same interconnection trunks. If Level 3 wants the efficiencies that combining traffic types provide,

[19] In this case, Level 3 would be required to bear the full cost—at least $1 to $2 million and possibly much more—of giving LIS trunks FGD capabilities. (Tr. 265) The cost is not a state specific cost as Level 3 attempts to depict it and cannot be reduced as Level 3 claims by apportioning the cost among the states.

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it should pay the same rate that every other IXC pays – that is, the full tariffed rate.

31 Level 3's alternatives to FGD trunks do not pass muster. Level 3's proposed transit limitation would not extend to CLECs and Independents who have their switches homed to Qwest tandems or to purchasers of QPP™. (Ex. 91-T at 27-31; Tr. 675-76). Level 3 has never proposed contract language that would require it to provide records to Qwest that Qwest could actually use, so there is no commitment to back up Level 3's rhetoric. Furthermore, we now know from Level 3's opening brief that Level 3 does not really intend to supply Qwest with industry-standard records. It has something else in mind that will require Qwest "to take some steps to ensure that its billing systems can use these Level 3-supplied records." (Level 3 Opening Brief at 19).

32 Finally, Level 3's factor system will not work for QPP™ customers. These customers have a contractual right to records from Qwest and have never agreed to use factors supplied by Level 3. (Tr. 664). The Level 3-centric argument that the QPP™ customers should bear the cost of paying for recording system changes made necessary so that Level 3 can send interexchange traffic over LIS trunks is patently unreasonable. If Level 3 wants to gain the efficiencies (and corresponding cost-savings) of sending all traffic over the same interconnection trunks, it should be required to pay the costs that Qwest and other carriers incur to make that possible.

C. Issue 3A, 3B, 3C, and 4: Compensation Issues Related TO ISP VNXX Traffic (Section II.A of Level 3'S Opening Brief)

33 Level 3 characterized the ISP VNXX issue as one of the two "overarching disputes" in this docket. (Level 3 Opening Brief at 1). Yet Level 3 altogether ignores the critical issues that are part of that dispute. As noted above, Level 3 completely ignores the *Peevey* decision, even though it relates directly to issues in this docket, and was rendered by the Ninth Circuit. Level 3 ignores other critical issues as well:

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- Level 3 provides no analysis whatever to support its proposed contract language which would change Washington's well-established law concerning classification of telephone calls. Level 3 completely ignores the *AT&T Arbitration Order* in which the Commission reaffirmed that to be a local call, the call must originate and terminate within the same local calling area.[20] Level 3 likewise ignored the Commission's rules, which mandate the same conclusion.

- Level 3 completely ignores the principle of cost causation, an issue that is central to the *ISP Remand Order*. Qwest's testimony that Level 3's proposed contract language would reverse the compensation flow that should apply to such traffic was undisputed. (Qwest Opening Brief ¶¶ 43-48). By ignoring this issue, Level 3 apparently hopes to brush past the FCC's clear policy statement 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-up Internet access." (*ISP Remand Order* ¶ 87).

- Level 3 ignores each of the four federal circuit court decisions in addition to *Peevey* that confirm that the *ISP Remand Order* only prescribed intercarrier compensation for calls placed to an ISP located in the same LCA as the caller.[21]

- Perhaps the most peculiar aspect of Level 3's discussion of Issues 3 and 4 is that Level 3 never once quotes either Level 3's or Qwest's proposed contract language.[22] As will

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[20] Qwest Opening Brief ¶¶ 49-53, 63-64; *see also id.* ¶¶ 54-62, 65 for a discussion of (1) call rating standards in other states and (2) a discussion of calling rating in the context of Level 3's smorgasbord of call rating theories. Qwest also addressed the proper application of numbering the Central Office Code (NXX) Assignment Guidelines ("COCAG"). (*Id.* ¶ 57).

[21] Qwest addressed these decisions at length in its Opening Brief. (*See* Qwest Opening Brief ¶¶ 5-6, 19-21, 34, 37, 40-42, 55-56, 59).

[22] Even though Level 3 filed Supplemental Testimony whose purpose was to explain its new proposed contract language (Ex. 43), that testimony did not explain its new language for issues 3A, 3B, 3C, or 4. The only additional testimony provided by Level 3 on these issues was Mr. Greene's Reply Testimony, where he briefly addressed Level 3's VNXX definition (Issue 3B), and then only to state, without explanation, the broad conclusion that "Level 3's [VNXX] 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).

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be discussed below, Level 3 undoubtedly did so because its contract language largely departs from the legal position and authorities Level 3 bases its position on.

1. Level 3's Proposed VNXX Definition and the VNXX Definition in its Opening Brief are Contradictory (Issues 3A and 3B)

34 Qwest's proposed VNXX definition is consistent with both the Commission's and FCC's definitions of that term, as well the common definition of VNXX used by other state commissions. (Qwest Opening Brief ¶¶ 34-35, 54). Level 3's new VNXX definition, which it first unveiled in Washington, is convoluted, internally inconsistent, and is inconsistent with other Level 3 language (*e.g.,* Section 7.3.6.3). (Qwest Opening Brief ¶¶ 36-38, 49). Given the definition it proposed, it is ironic indeed that in its Opening Brief, Level 3 describes VNXX in a manner consistent with Qwest's language, not its own. In its Opening Brief, Level 3 states:

> VNXX refers to a routing arrangement in which the calling party dials a number with an NXX code that is "local" to that customer, *but the call is physically delivered to the called party in a distant location*. (Level 3 Opening Brief at 3, n. 5; emphasis added).

35 In other words, Level 3 acknowledges the two principal features of VNXX: (1) the assignment of telephone numbers by a CLEC to its customers that appear to be local to the calling party but which are assigned to customers actually physically located in a LCA different than the LCA to which the telephone number corresponds; and (2) the calls are actually "physically delivered" to a customer "in a distant location."

36 To be sure, the definition of VNXX in Level 3's Opening Brief is a concession that VNXX calls are interexchange in nature. The Commission's rules define "interexchange" as "telephone calls, traffic, facilities or other items that originate in one exchange and terminate in another." (WAC 480-120-021, definition of "interexchange"). The Level 3 description of VNXX is, therefore, the description of an "interexchange call" under Washington Commission rules. The Washington rules correspond with the Ninth Circuit's determination that VNXX

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calls constitute interexchange traffic as a matter of federal law. (*Peevey*, 462 F.3d at 1158).

37 Level 3's definition of VNXX in its Opening Brief closely resembles the definition Qwest has proposed in this arbitration. Qwest's definition states:

> "VNXX traffic" is all traffic originated by the Qwest End User Customer that is not terminated to CLEC's End User Customer physically located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether CLEC's End User Customer is assigned an NPA-NXX associated with a rate center in which the Qwest End User Customer is physically located.

38 The Commission should adopt Qwest's proposed definition of VNXX because it matches the VNXX definitions used by the Commission, the FCC, *Peevey*, and now Level 3's own description of VNXX in its opening brief.

2. The Commission Cannot Follow its Decision in Docket UT-053039 Because the Conclusion the Commission Reached Has Now Been Rejected in the Ninth Circuit

39 Level 3's primary argument in support of its language for Sections 7.3.4, 7.3.6.1, 7.3.6.3 and its VNXX definition (Issues 3A, 3B, 3C, and 4) is its claim that the Commission has already decided the issue. (Level Opening Brief at 1, 3-4). Level 3 bases this argument on the Commission's recent ruling in the Level 3 complaint docket (Docket No. UT-053039). (*See id.* at 1, 4, and n. 2). For the reasons set forth hereafter, the Commission must reconsider its prior ruling that the *ISP Remand Order* applies to *all* ISP traffic.

a) Controlling Federal Law Holds that the *ISP Remand Order's* Compensation Regime Applies Only to Local ISP Traffic

40 Since the time of the Commission's original February ruling in Docket No. UT-053039, four federal circuit court decisions addressed the scope of the *ISP Remand Order*; three of those decisions (including *Peevey*) were rendered after the Commission's June 9, 2006 denial of Qwest's rehearing petition in UT-053039. A review of these authorities demonstrates that the

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Commission must reconsider its earlier decision in order to comply with current federal law and policy.

41 The original D. C. Circuit decision that considered the *ISP Remand Order, WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002) ("*WorldCom*") concluded that the *ISP Remand Order* applied only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area*." (Emphasis added). Each of the four federal circuit court decisions rendered in 2006 agrees with *WorldCom*. Each interprets the *ISP Remand Order* to apply only to calls placed to an ISP located in the caller's LCA. *Global NAPs v. Verizon New England,* 444 F.3d 59, 62 (1st Cir. 2006) ("*Global NAPs I*") ("the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*.") (emphasis added); *Global NAPs v. Verizon New England*, 454 F.3d 91, 99 (2nd Cir. 2006) ("*Global NAPS II*") (upholding a Vermont decision banning VNXX, court stated that "[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.") (Emphasis in original); *In re Core Communications,* 455 F.3d 267 (D.C. Cir., 2006) (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*.") (Emphasis added); *Peevey*, 462 F.3d at 1159 (*ISP Remand Order's* compensation scheme applies *only* to "local ISP-bound traffic"). While all four cases are important because they unanimously describe current federal law as determined by four separate circuit courts, the *Peevey* case is particularly important because Washington is located in the Ninth Circuit. There is no contrary authority at or above the circuit court level.[23]

[23] *Southern New England Telephone v. MCI WorldCom Communication* ("*SNET*"), 359 F. Supp.2d 229 (D. Conn. 2005, a federal district court decision in Connecticut, had held that the *ISP Remand Order* applied to all ISP traffic. However, in *Global NAPs I*, the First Circuit expressly rejected the reasoning of *SNET*: "Global NAPs relies on a decision by a Connecticut federal district court . . . which held that the *ISP Remand Order* was unambiguous in its preemption of state regulation of intercarrier compensation for all ISP-bound traffic. . . . We simply disagree with the *SNET* court's analysis." *Global NAPs I*, 444 F.3d at 75, n. 17 (emphasis added). *Global NAPs II*, a Second Circuit decision (Connecticut is in the Second Circuit) expressly followed *Global NAPs I*, holding that "[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."

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b) Alleged Unique Qualities of ISP traffic Are Irrelevant Here

42 In other states, Level 3 has attempted to avoid the impact of these decisions by trying to claim that ISP traffic has "no normal end point," and that it is "neither truly local, nor quite long distance." In the VoIP section of its Opening Brief, Level 3 makes essentially the same argument by categorically stating that the FCC concluded that "the location of the ISP is irrelevant." (Level 3 Opening Brief at 23). The inference from these arguments is that ISP traffic is so unique that normal call rating rules cannot be applied to it, and that, therefore, all such traffic should be subject to terminating compensation.

43 Level 3's premise and the arguments that flow from that premise are based on a misreading the *ISP Remand Order* and can only be advanced by ignoring the federal court decisions discussed above. The FCC did not, in the *ISP Remand Order*, prescribe terminating compensation for the delivery of ISP calls based on the location of websites, nor is there anything in the order to suggest that the FCC believes a POI or CLEC facilities are relevant locations for classifying wireline traffic. The *ISP Remand Order* focuses specifically on *delivery* of ISP traffic *to an ISP*. In the *ISP Remand Order*, the FCC defined the issue as "whether reciprocal compensation obligations apply *to the delivery of calls* from one LEC's end-user customer *to an ISP in the same local calling area that is served by a competing LEC*." (*ISP Remand Order* ¶13; emphasis added). And, "[t]his Order . . . focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to deliver traffic *to ISPs*." (*Id.* ¶ 9; *see also id.* ¶¶ 2, 7, 66; emphasis added).

44 Level 3's claims that ISP calls have no end point and that "the location of the ISP is irrelevant" is not supported by any authority. Indeed, the *ISP Remand Order* and the federal cases

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454 F.3d at 99. The Second Circuit thus also rejected the *SNET* analysis. Given these later actions by the First and Second Circuits, the Commission's reliance on the *SNET* decision in its February 10, 2006 Orders in Docket Nos. UT-053039 (Level 3) and UT-053036 (Pac-West) is one more good reason the Commission should reverse its decision on the scope of the *ISP Remand Order*.

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construing clearly rule to the contrary. There is no dispute that Level 3's customers are ISPs and that calls are delivered to those ISPs at specific, identifiable locations. Level 3 conceded at hearing that it knows where it hands calls off to its ISP customers.[24] The FCC clearly concluded that ISP traffic is *delivered to ISP equipment*:

> [A]n ISP's end-user customers typically *access the Internet* through *an ISP Server* located in the same local calling area, and . . . the end users pay the local exchange carrier for connections to the local ISP. Customers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to the local ISP. They also generally pay the ISP a flat monthly fee for access to the Internet. ISPs then combine "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." (*ISP Remand Order* ¶ 10; citations omitted).

Other provisions of the *ISP Remand Order* could not be more clear on this point. *ISP Remand Order* ¶ 1 ("In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic *delivered* to Internet service providers"); *id.* ¶ 2 ("The regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because ISPs typically generate large volumes of traffic that is virtually all one-way—that is, *delivered to the ISP*"); *id.*¶ 5 ("We believe that this situation is particularly acute in the case of carriers *delivering traffic to ISPs* because these customers generate extremely high traffic volumes that are entirely one-directional"); *id.*¶ 7 ("Specifically, we adopt a gradually declining cap on the amount that carriers may recover from other carriers for *delivering* ISP-bound traffic"); *id.*¶ 9 ("This Order . . . focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to *deliver traffic to ISPs*"). (Emphasis added.)

[24] Level 3 knows where it hands off traffic to its ISP customers; indeed, Mr. Greene testified that Level 3 sends traffic to AOL to AOL's location in Herndon, Virginia. (Ex. 38; Tr. 436, 460-62).

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45 Under call rating rules that have applied in Washington for decades, calls are classified based on the *location* of the parties to a call. Here the parties to the call are the caller and the ISP from whom the caller has purchased dial-up Internet access service.[25] Despite Level 3's contrary assertions, it is a simple matter to determine whether a call qualifies for compensation under the *ISP Remand Order*. In *Peevey*, the CLEC also claimed that it could not determine an end point for ISP traffic. The Ninth Circuit rejected that argument, concluding that a CLEC has both the *ability* and the *obligation* to know where its traffic "terminates":

> The CPUC's conclusion that Pac-West is able to distinguish VNXX traffic from local traffic that is first transported long-distance to a Pac-West switch and then back to the original calling area rests on statements by Pac-West witnesses that 'Pac-West knows where its network ends' and the ***call is picked up by the customer***. *Since that is the end of Pac-West's responsibility for the call, it should also be the relevant end point of the call for purposes of determining whether the call is local or VNXX.*" (462 F.3d at 1159; emphasis added).

46 Thus, for purposes of determining whether traffic is local or VNXX, the Ninth Circuit holds that the relevant point is where the traffic is handed off by the CLEC *to its ISP customer*. This, of course, is an identifiable location, and it is neither the POI nor the location of ISP equipment in a specific LCA.[26] Thus, if the ISP call is delivered to an ISP located in the caller's LCA, it is compensable. Otherwise, it is not.

c) Level 3 Inappropriately Asks the Commission to Ignore Current Federal Law

47 Level 3's claim that the Commission should simply follow its earlier decision on the scope of

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[25] The telephone number that the end user customer dials to gain access to the Internet is assigned to the *ISP* and not to the websites the end user seeks to access.

[26] At hearing, Mr. Greene claimed that and ISP has facilities at the POI as the result of the bundled service it buys from Level 3. (Tr. 432). He also claimed that Qwest hands off traffic to the ISP at the POI. (*Id.*) Yet he also agreed that the ISP owns no facilities that are placed at the POI. (Tr. 433). And in another twist, he testified that, in the case of AOL, Level 3 sends traffic to AOL at AOL's facilities in Herndon, Virginia. (See Ex. 46-T at 3-4, where Mr. Greene acknowledges that "AOL *picks up* the vast majority of its traffic in one location in Virginia.)" (See also Tr. 436, 461-62). However, if one accepts Mr. Greene's fiction that the ISP is located at the POI, the conclusion must be that Level 3 is not entitled to termination compensation because Qwest, not Level 3 will have delivered the traffic directly to the ISP. Thus, Qwest, not Level 3, would be entitled to terminating compensation.

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the *ISP Remand Order* is, in reality, Level 3's request that the Commission ignore the obligations that accompany the delegation of federal authority under which the Commission operates in cases like this arbitration. As "deputized federal regulators," state commissions must follow federal law.[27] Under the Act, Congress delegated several specific and narrowly-defined tasks to state commissions. These tasks, and the state commission's authority to perform them, derive from the Act, not from the state commission's state statutory authority.[28] Thus the Tenth Circuit has ruled that Congress "preempted state regulatory authority over some aspects of local phone service" and has described the state commission's authority on those issues as a federal "gratuity."[29] The Ninth Circuit ruled that "the FCC's implementing regulations . . . must be considered part and parcel of the requirements of the Act."[30] In the same case, the Ninth Circuit ruled explicitly that in Section 252 cases, state commissions have a duty to apply the interpretations of the Act of the federal courts:

> Our reading of the reviewing court's duty under § 252(e)(6) of the Act is consistent with the Supreme Court's general view of a court's duty to apply its new interpretations of law to pending cases. As the Court has explained: "When this Court applies a federal law to the parties before it, that rule is the controlling rule of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[31]

The application of the principle underlying this language to this docket is clear. It is the

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[27] 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, 344 (7th Cir. 2000).

[28] *Id.* at 343 ("[state commission] authority to act [is] derived from provisions of the Act and not from [its] own sovereign authority"); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise* §14.2 ("An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so").

[29] *MCI Telecommunications Corp. v. Public Service Commission of Utah*, 216 F.3d 929, 938 (10th Cir. 2000) ("Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity.").

[30] *US West Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002).

[31] *Id.*, quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

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interpretation of the Act by the federal courts (preeminently, of course, the Supreme Court) upon which a state commission must rely, because such rulings represent the "the controlling rule of federal law." In this case, the Supreme Court has not ruled on the scope issue, but four circuits, including the Ninth Circuit, have explicitly ruled on that issue. These cases thus establish the "controlling rule of federal law" on this issue and the Commission must follow them.

48 This rule is consistent with the a Third Circuit decision, *MCI Telecommunication Corp. v. Bell Atlantic-Pa,* 271 F.3d 491, 516 (3d Cir. 2001), which described the Act's narrowly confined delegation of authority to state commissions as follows:

> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute . . . . State Commissions have been given only the power to resolve issues in the arbitration and to approve and reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.
>
> . . . . If the [state commission's] interpretation conflicts with that of the FCC, the [state commission's] determination must be struck down.

The Ninth Circuit cited and followed the Third Circuit's language in *Pacific Bell v. Pac West Telecomm, Inc.,* 325 F.3d 1114, 1126-27 (9th Cir. 2003):

> [T]he authority granted to state regulatory commissions is confined to the role described in § 252—that of arbitrating, approving, and enforcing interconnection agreements. As the Supreme Court noted in *AT&T v. Iowa Utilities Board*, the Act *limited* state commissions' authority to regulate local telecommunications competition. . . . The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic.

Thus, a state commission has no authority to impose requirements on Qwest that do not exist under the Act, under FCC orders that implement the Act (*e.g.,* the *ISP Remand Order*), and

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under federal court decisions that interpret those orders.[32]

49 In first United States Supreme Court case to interpret the Act, *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378, n.6 (1999), the Court noted the fundamental obligation of state commissions to regulate "in accordance with federal policy." In this case, the federal circuit court that directly governs the Commission has ruled on the scope issues (and on several critical issues directly relevant to the ICA at issue in this case). In other words, the *Peevey* decision articulates the "federal policy" to which the Supreme Court referred. The Commission has a responsibility to apply *existing* federal law. If the Commission were to follow Level 3's request to simply apply its prior decision in this arbitration, and thus ignore the unanimous authority on the scope issue, the Commission would fail to perform its duty under section 252 and its order would be unlawful.[33]

3. Level 3's Mirroring Rule Argument Distorts the Record and is Legally Incorrect (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)

50 Level 3 argues that the offer by counsel for Qwest "that is contemplated by the mirroring rule" somehow requires Qwest to pay terminating compensation on VNXX traffic. (Level 3 Opening Brief at 5-6). Level 3's argument turns the mirroring rule upside down and backwards to get to a result that it wants but that does not follow from the mirroring rule itself. Not surprisingly, Level 3 never cites the mirroring rule.

51 In the *ISP Remand Order*, the FCC stated the mirroring rule as follows:

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[32]To ensure that state commission determinations adhere to the Act, Congress expressly provided for exclusive review in federal district court. 252 U.S.C. § 252(e)(6). Thus, the United States Supreme Court stated that "[i]f federal courts believe a state commission *is not regulating in accordance with federal policy,* they may bring it to heel." *AT&T Corp. v Iowa Utilities Board*, 525 U.S. 366, 378, n.6 (1999) (emphasis added).

[33] Level 3 acknowledges that, in requesting that the Commission simply apply its earlier ruling, its request does not meet the requirements of the collateral estoppel doctrine. (Level Opening Brief at 4, n. 6). But then Level 3 claims that it would be a "waste" of "Commission resources" to reconsider this issue, and that the Commission "should simply rule for Level 3 on this issue, citing its earlier decisions." (*Id.*). There are two problems with this simplistic argument. First, it ignores the Commission's duty to apply current federal law (and thus to apprise itself of what that law is). Second, the suggestion that the review of four federal circuit court decisions would constitute a waste of commission resources is nonsense. It is not a waste of resources for an agency to perform the functions that have been delegated to it.

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> The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate. Thus, if the applicable rate cap is $.0010/mou [now $.0007/mou], the ILEC must offer to exchange section 251(b)(5) traffic at the same rate. (*ISP Remand Order* ¶ 89).

Traffic subject to Section 251(b)(5) is the traffic that is encompassed by the FCC's reciprocal compensation rules. In *Peevey*, the Ninth Circuit held that VNXX traffic is interexchange traffic that is not subject to reciprocal compensation because it falls under the category of "interstate or intrastate exchange access." (462 F.3d at 1157-58).

52 The offer that Qwest has made several times to Level 3 is the offer contemplated by the mirroring rule, nothing more. Since traffic subject to Section 251(b)(5) does not include VNXX traffic, Qwest has in no way committed to paying Level 3 terminating compensation on VNXX traffic. It has only offered to exchange traffic subject to Section 251(b)(5) at the rate applicable to the ISP-bound traffic for which the FCC prescribed intercarrier compensation in the *ISP Remand Order*. To be sure, a dispute remains concerning whether the *ISP Remand Order* prescribes intercarrier compensation for VNXX traffic, but that is an issue entirely separate from the mirroring rule.

53 Because numerous sections of the Level 3's proposed language are encumbered with mirroring rule language, Mr. Brotherson addressed the mirroring rule in his Replacement Direct Testimony (Ex. 51-T):

> The mirroring rule is very simple. An ILEC (like Qwest) must offer a CLEC the option of (1) exchanging all *appropriate traffic* (whether ISP or voice traffic) at the $.0007 rate established *for local ISP traffic* or (2) exchanging ISP traffic at $.0007 and non-ISP traffic (e.g., voice traffic) at the voice rate established by the state commission. ($0.001178 in Washington). If the ILEC must offer to exchange all appropriate traffic as $.0007 (and Qwest clearly makes that offer to Level 3), then it follows that the election is the CLEC's to make. In other states, Level 3 has similarly taken the odd position that it is the ILEC that must make the election under the mirroring rule, a position that is clearly at odds with the language of the mirroring rule and undisputed portions of the

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ICA in this docket.

> Attachment J to the 2005 template agreement (which I have attached at Exhibit LBB3 [Ex. 53] does exactly that: it is a form whereby the CLEC (when it executes the ICA) makes its election under the mirroring rule. . . . But just so the record is clear and so there is no misunderstanding of Qwest's position, Qwest acknowledges that, at the election of the CLEC, the mirroring rule requires that all local traffic be exchanged at $.0007. Furthermore, 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; footnote omitted; emphasis added).

In a footnote to that testimony, Mr. Brotherson stated Qwest's position that "'[a]ll appropriate traffic' means local ISP traffic subject to the $.0007 rate and all other voice traffic subject to Section 251(b)(5) (and the voice rate)." (*Id.* at 35, n.19). This footnote, of course, reflects Qwest's position that only local ISP traffic is subject to $.0007. In its Opening Brief, Qwest reaffirmed Mr. Brotherson's testimony, including restating the footnote quoted above. (Qwest Opening Brief ¶¶ 66-68).

54 Level 3's attempt to turn the offer made by Qwest's counsel, Mr. Dethlefs, into an agreement to pay $.0007 on VNXX ISP traffic is absurd. Counsel for Qwest never objected to Level 3 asking any questions of any witness concerning the precise scope of Qwest's offer. Thus, Level 3's claim that it wanted to cross examine Qwest witnesses because of an alleged concern that "Qwest's 'offer' was not adequate under the mirroring rule" is beside the point. (Level 3 Opening Brief at 5 & n.7). Qwest never objected to any such questions and never took any other steps to prevent Level 3 from asking them. Clearly, Level 3's failure to pursue cross-examination was a unilateral decision. Nor did Judge Rendahl instruct Mr. Savage that he could not ask questions on this subject. (Tr. 335).

55 Moreover, Mr. Dethlefs statement at the hearing is directly tied to the actual scope of the mirroring rule, not to Level 3's interpretation of the mirroring rule. As he stated: "I want to go

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on record that the traffic that is contemplated by the mirroring rule Qwest is today offering, if it hasn't in the past, to exchange traffic at the rate contemplated by the mirroring rule." (*Id.* at 5, citing Tr. 335). This is clearly not a statement as to the scope of traffic subject to the *ISP Remand Order*. And while Mr. Dethlefs may have made it with knowledge concerning the Commission's ruling on the scope of the *ISP Remand Order*, he also made it with knowledge concerning the Ninth Circuit's decision in *Peevey*. Level 3 was aware of the *Peevey* decision as well. In short, there is simply no way that this offer under the mirroring rule is an admission (or concession or agreement) that the *ISP Remand Order* requires payment of terminating compensation on anything other that calls delivered to an ISP in the same LCA as the caller.

56 In addition, Level 3's argument is based on a fanciful interpretation of the record. Mr. Dethlefs' statement was made during that portion of the hearing in which Judge Rendahl was ruling on specific issues related to Level 3's motion to strike—in this case, when Mr. Brotherson's testimony was being addressed. The record is clear that Judge Rendahl decided to allow Mr. Brotherson's testimony (quoted above) to remain in the record and that she affirmatively ruled that she would "*allow cross-examination on that point*." (Tr. 335; emphasis added). Immediately thereafter, Mr. Dethlefs, without mentioning cross examination, without challenging Judge Rendahl's ruling that the testimony was subject to cross examination, and without asking that Judge Rendahl to alter that ruling, simply re-stated the offer Mr. Brotherson had made in his prefiled testimony. Judge Rendahl then said, "I think that's – you've said it, so that's enough." (*Id.*). Thus, the premise of Level 3's argument—that it wished to cross examine Qwest on the mirroring rule and that Qwest somehow prevented that—misrepresents the record. In fact, Judge Rendahl's ruling that Mr. Brotherson's mirroring rule testimony was admitted subject to cross examination was not altered in any way, and Level 3 did not ask Mr. Brotherson a single question on the mirroring rule. (Tr. 802-

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25).[34] That was Level 3's choice, not a decision forced upon it by Mr. Dethlefs' statement or by any ruling of Judge Rendahl.

4. The Commission Should Not Replicate the Errors of the Arizona Commission's FX-Like Traffic Order

57 Level 3 has, in other states, argued that the action taken by the Arizona Commission to mandate the exchange of "FX-like traffic" at $.0007 should be a model to follow in other states. Recently, the Arizona Commission ordered additional language be added to the ICA between Qwest and Level 3 that requires the exchange of "FX-like traffic" at $.0007.[35] The Arizona order is fraught with errors, and should be disregarded by the Commission. Among the key errors are the following:

- The Arizona order adopts a VNXX definition that is virtually identical to the definition proposed by Qwest (the same definition proposed in Washington) and then bans VNXX.
- In the original order, the Arizona Commission acknowledges that evidence of how an "FX-like traffic" scheme would work was not placed in the record.[36] In light of the Commission-acknowledged lack of a record on that issue, Qwest requested that the parties have the opportunity to present additional evidence, have the matter heard, and

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[34] One of the most fundamental issues of this case is the question of the scope of the *ISP Remand Order*. In section II.C.2.a, *supra*, Qwest explained why the Commission follow the four recent circuit court decisions on that point and limit the scope of the order to local ISP traffic. If, hypothetically, the Commission were to refuse to do so, and were to rule that all ISP traffic is subject to $.0007, then Qwest will likely appeal that issue (as it has done in the Pac-West and Level 3 complaint cases). However, in that event, Qwest's offer to exchange all appropriate traffic at the ISP rate would apply to interexchange ISP traffic as well, subject, of course, to Qwest's right to seek legal review and reversal of that decision. Level 3 is attempting to turn Qwest's innocent offer, the same offer it makes to all other carriers, into a Catch-22.

[35] Order No. 69176, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration of an Interconnection*, Docket Nos. T-03654A-05-0350 & T-01051B-05-0350 (Ariz. Corp. Comm'n, December 5, 2006) ("*Order No. 69176*").

[36] "Although we disapprove Level 3's use of VNXX, as it has been described in this proceeding, Level 3 should be able to serve customers through FX or an FX-like service. In addition, there may be ways Level 3 could use "VNXX-like" arrangements and compensate Qwest for transport (perhaps using a TSLRIC rate) that would alleviate our concerns about intercarrier compensation distorting the market by improper cost shifting. *Evidence of how such a scheme might work, or if it could work, was not offered in this docket, but we would not want to eliminate such compensation scheme and encourage the parties to be creative in creating a "win-win" resolution and present a revised ICA for our approval." Arizona Level 3 Order*, 2006 WL 2078565 at *21 (emphasis added).

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have an opportunity to brief the "FX-like traffic" issue. That request was denied[37] and the Commission adopted the order based on a record that, by its own admission, is inadequate. Qwest was thus denied the opportunity to present evidence on the fundamental differences between FX and VNXX traffic. Ironically, the Commission now states that it "did not intend that such arrangement would be comparable to the FX service being provided by Qwest."[38]

- The *Peevey* decision was rendered in early September, long prior to the Arizona Commission's order establishing final ICA language. Despite the fact that *Peevey* directly addressed VNXX and other issues related to the Commission's "FX-like traffic" issue, Qwest's request to brief the impact of *Peevey* on the Commission's order was denied.[39]

58 Finally, the Arizona Commission order was interim only and will last only until the propriety of VNXX is addressed in a generic docket. Therefore, despite the errors described above, the Arizona decision does not purport to be a permanent solution of any kind on VNXX and thus does not even purport to provide permanent guidance on the VNXX issues in this docket.

59 There is no basis, legally or factually, to replicate the Arizona approach in Washington.

5. Level 3 Mischaracterizes QCC's Wholesale Dial Service

60 In other states, Level 3 argues in its reply brief that QCC's Wholesale Dial service somehow provides QCC with an inappropriate advantage over Level 3, and has even claimed that it results in unlawful discrimination. Given Level 3's testimony on the subject, Qwest can only presume that Level 3 intends to address this issue in its Reply Brief.

61 QCC's Wholesale Dial product, and its regulatory treatment, does not in any way support

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37 *Order No. 69176* ¶ 20.

38 *Id.*¶ 22.

39 *Id*. ¶ 24.

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Level 3's position. First, if Level 3 chose to offer service in same way that QCC does, Level 3 would be entitled to do so on the same terms. (Ex. 59-T at 9-10). However, to do so, Level 3 would have to claim that it is an ESP, rather than a CLEC, and purchase local exchange service in the exchanges from which its ISP customers wanted to receive calls. Under those circumstances, Level 3 would pay what QCC pays to cover Qwest's cost of origination—about $.0009 per MOU. (Ex. 125).

62 Second, Level 3's arguments analogizing its service to Wholesale Dial are simply wrong. Mr. Brotherson's testimony on this issue is undisputed. (Ex. 53-T at 8-11). In order to offer Wholesale Dial, QCC, Qwest's affiliate, purchases retail local exchange service in the originating LCA (which means that QCC pays to place and receive calls *within* that LCA) and retail private line transport from the originating exchange to one of QCC's NAS server (which means that QCC pays for all transport *between* LCAs). Under the current ICA, Level 3 pays nothing for transport (not even the much lowered priced TELRIC-rated transport). Furthermore, unlike QCC, Level 3 pays absolutely nothing to compensate Qwest for the costs Qwest incurs to originate calls to ISPs—specifically, the local loops, distribution facilities, and transport within the originating LCA. (*Id.*).

63 Moreover, QCC is not operating under an ICA. It provides its Wholesale Dial Product as an enhanced service provider ("ESP"), a status that gives it the right to be treated as an end user and to lawfully purchase service out of retail tariffs. (*ISP Remand Order* ¶ 11). Moreover, as an end user, QCC *is not* entitled to charge terminating compensation to the telecommunications carrier that delivers traffic to it. (Ex. 59-T at 8-11). In short, the regulatory framework that QCC operates under differs substantially from what Level 3 proposes in this proceeding.

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D. VoIP Issues (Definition of VoIP and Sections 7.2.2.12 and 7.2.2.12.1) (Issue 16)

1. Level 3 Mischaracterizes Qwest's Position on the Rating of VoIP Traffic and Unlawfully Proposes that the LCAs Established by the Commission be Ignored for VoIP Traffic

64 Issue 16 concerns the definition of VoIP and how VoIP traffic should be treated for intercarrier compensation purposes. Level provides no argument on the differences between the competing VoIP definitions. The Commission should, therefore, adopt Qwest's proposed definition for the reasons set forth in Qwest's Opening Brief. (Qwest Opening Brief ¶¶ 69-79).

65 However, on two other critical VoIP issues, Level 3 mischaracterizes Qwest's position. First, Level 3 incorrectly claims that Qwest's language makes two physical locations relevant: "the VoIP end user premises" and the VoIP POP. (Level 3 Opening Brief at 21). In fact, for classifying VoIP calls, Qwest's position is that the two relevant locations are the location of the PSTN end user and the location of the VoIP Provider POP. Under Qwest's VoIP definition, the VoIP caller is relevant only for purpose of determining if a call is really a VoIP call. In other words, Qwest's position is that a call should be classified as VoIP only if it originates in IP on a broadband connection *at the premises of the VoIP end user originating the call*. Qwest, however, is very clear that the VoIP end user premises can be anywhere that the end user originates a call over a broadband connection and that that location is *never* a relevant location for call rating purposes. Level 3 thus confuses two issues: whether a call should be defined as a VoIP call and how VoIP calls should be rated. The VoIP caller's premises, contrary to Level 3's contention, are not relevant for call rating.

66 Level 3 also confuses the VoIP Provider POP issue. Level 3 claims that the term "VoIP Provider POP" is undefined and will lead to disputes. (Level 3 Opening Brief at 21, n. 37). In fact, the VoIP Provider POP referred to in Qwest's language is precisely the same as an Enhanced Services Provider ("ESP") POP, a concept that is well understood in telecommunications and that is critical to the proper application of the ESP Exemption. As

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Qwest noted in its Opening Brief, the FCC ruled that an ESP, such as a VoIP provider, can purchase service as an end user out of the local exchange tariffs. If Level 3 is saying 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 (and that location is the location of the "VoIP provider POP"). And if the VoIP Provider POP is not in the same LCA as the calling party, the call is an interexchange call. Both the Iowa Utilities Board and the Arizona Corporation Commission adopted Qwest's language on this issue.[40] Level 3 finds it inconvenient that the VoIP Provider POP is the relevant point for classifying enhanced service traffic—but that is the law and should be a part of the ICA. (*See* Qwest Opening Brief ¶¶ 80-84).

67 In its opening brief, Level 3 asserts that "the FCC's $.0007 rate should apply as long as the traffic exchange occurs in the *same LATA* as the party on the PSTN is located." (Level 3 Opening Brief at 21; emphasis added). Level 3 provides no authority for such an expansive call rating scheme because there is none. Level 3's proposed language would directly violate Washington call rating rules because it would effectively eliminate the LCAs approved by the Commission and substitute the LATA as the LCA for VoIP calls.

2. It is Level 3 That Misunderstands and Misapplies the ESP Exemption (Qwest Issue 16) (Sections 7.2.2.12 and 7.2.2.12.1)

68 Despite Level 3's contrary assertions, it is Level 3 that misunderstands and misapplies the ESP Exemption. The FCC has stated on many occasions that enhanced service providers are treated as end users "for purposes of applying access charges." (*See e.g. ISP Remand Order* ¶ 11). The meaning of this rule is clear from the way it is stated. Access charges are applied to enhanced services traffic carried by a telecommunications carrier and it is done by treating the

[40] *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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enhanced service provider as an end user.

69 Level 3 cites *SBC v. Mo. Pub. Serv. Comm'n*, 2006 WL 3103677 (E.D. Mo. 2006) "*SBC*") for the proposition that "reciprocal compensation obligations—not access charges—apply to VoIP. Level 3's reliance on *SBC* is misplaced." (Level 3 Opening Brief at 23, n. 40). In SBC, the CLECs were operating as enhanced service providers when providing VoIP. In this case, Level 3 cannot claim that it is an enhanced service provider. A separate affiliate, Level 3 Enhanced Services, is the entity that provides service to third party VoIP providers, such as Vonage and Skype. (Tr. 438-39). Thus, when Level 3 sends interexchange VoIP traffic to Qwest for termination, nothing in the ESP Exemption or in the *SBC* decision exempts Level 3 Communications, the CLEC entity, from access charges that would apply.[41] As the FCC's rule makes apparent, the enhanced service providers whose traffic Level 3 carries would be treated as end users and access charges would apply accordingly.

E. The Commission should approve Qwest's VoIP Audit and Certification Requirements (Sections 7.1.1.1 and 7.1.1.2) (issue 1A)

70 Level 3 did not address Qwest's proposed Sections 7.1.1.1 and 7.1.1.2 in its Opening Brief. Thus, for the reasons set forth in Qwest's Opening Brief, the Commission should adopt that language. (Qwest Opening Brief ¶¶ 91-92).

F. The Commission Should Adopt the Definitions of "Basic Exchange Telecommunications Service" (Issue 7) and "Exchange Service" (issue 14)

71 Level 3 asserts that the Commission should adopt its proposed definitions of "Telephone Exchange Service" (Issue 7) and "Telephone Toll Service" (Issue 15) because they are statutory definitions that will eliminate and help resolve disputes. According to Level 3, the

[41] The *SBC* decision is obviously wrong on one important point. The court correctly ruled that reciprocal compensation applies to telecommunications "unless a separate pre-Act rule prescribed a different form of compensation for that form of communication." (2006 WL 3103677 at * 21). But the court errs in its conclusion that "[b]ecause IP-PSTN is a new service developed after the Act, therefore there is no pre-Act compensation regime which could have governed it." (*Id.* at *22). This is simply wrong. The ESP Exemption under which ESPs are treated as end users was created in 1983 and was still in effect when the Act became law. Thus, the court's seemingly unlimited statement that IP-PSTN is subject to reciprocal compensation is not correct.

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"Telephone Exchange Service" definition should be adopted instead of Qwest's proposed "Exchange Service" and "Extended Area Service (EAS)/Local Traffic" definitions. (Level 3 Opening Brief at 32-33, and n. 50). Level 3's position fails for three reasons.

72 First, the terms proposed by Qwest are used throughout the ICA. For example, the term "Basic Exchange Telecommunications Service" is used in several places in the ICA, even in provisions that Level 3 does not contest. (*See* Qwest Opening Brief ¶ 93, n. 42). Likewise, the terms "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" are used throughout the ICA, including many provisions not disputed by Level 3.[42] In fact, Level 3 uses these terms in sections that are otherwise disputed: for example, Level 3's version of Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1 (Issue 2B), Section 7.3.4.3 (Issue 4), and Section 7.3.9 (Issue 18) all use one or both of Qwest's proposed terms. Thus, use of a statutory definition of "telephone exchange service" will not resolve or help avoid any disputes. It will leave key terms that are used in the agreement undefined.

73 Second, under Qwest's proposed language, all of these terms are defined. Thus, in the event of a dispute, the state commission or court would have a definition to use to resolve disputes, which would not be the case with Level 3's proposed language

74 Third, Qwest's proposed definitions are innocuous. Level 3 cannot provide even a hypothetical example of how these terms might lead to an improper outcome. These terms are not complicated technical terms. For example, the "Exchange Service" definition states that it is "traffic that is originated and terminated within the same Local Calling Area as determined by the Commission." These terms are exactly the same definitions used in the Washington SGAT, and thus are terms that have withstood scrutiny by the Commission and Qwest's

[42] For example, "Exchange Service" or "EAS/Local Traffic" is used in the following undisputed Sections: Definitions of "Competitive Local Exchange Carrier," "Current Service Provider," "New Service Provider," Sections 1.3, 6.2.2.4, 6.2.9, 6.2.14, 6.4.1, 7.2.1.2.1, 7.2.2.1, 7.2.2.1.1, 7.2.2.1.2, 7.2.2,1.2.1, 7.2.2.9.6, 7.3.1, 7.3.2.1.2, 7.3.8, and many other Sections of the ICA.

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competitors on prior occasions.[43]

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

75 Level 3 did not support its proposed amendments to Qwest's proposed definition of "Interconnection" in its Opening Brief. Thus, for the reasons set forth in Qwest's Opening Brief, the Commission should adopt Qwest's language. (Qwest Opening Brief ¶¶ 94-95).

H. The Commission should reject Level 3's Definition of "Telephone Toll Service" (Issue 15)

76 In its Opening Brief, Level lumped this issue with its discussion of Issues 7 and 14 (Level 3 Opening Brief at 32-33 & n. 50), though it is not clear why, since, unlike Issues 7 and 14, Qwest proposes no language for Issue 15. Furthermore, as noted in Qwest's Opening Brief, the issue here is not so much Qwest's objection to Level 3's proposed definition, but Qwest's opposition to a discredited argument that Level 3 has attempted to make using that definition. (Qwest Opening Brief ¶¶ 97-98). As the Second Circuit has held, interexchange calls do not cease being interexchange calls subject to access charges merely because a caller does not pay a separate charge for making these calls. (*Global NAPs II*, 454 F.3d at 98-99).

I. 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)

77 Level 3 did not defend the specific jurisdictional factors that it has proposed. For the reasons given in Qwest's Opening Brief, the Commission should reject the use of Level 3's factors proposal and instead require that if traffic is combined, it be done on FGD interconnection trunks.

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[43] For "Basic Exchange Telecommunications Service," see Washington SGAT, Eighth Revision (June 25, 2002) at 9. For "Exchange Service" and "Extended Area Service (EAS)/Local Traffic," see *id.* at 15

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J. The Commission Should Reject Level 3's addition to section 7.3.6.2 (Issue 19)

78 Level 3 did not support its proposed addition to Section 7.3.6.2 in its Opening Brief. Thus, for the reasons set forth in Qwest's Opening Brief, the Commission should adopt Qwest's language without the additional sentence proposed by Level 3. (Qwest Opening Brief ¶ 103).

K. 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)

79 Level 3 asserts that the Commission should incorporate statutory definitions into the parties' contract because it (1) will eliminate disputes (2) make it more likely that disputes will have been resolved in other cases by the FCC or state commissions and (3) it will prevent the parties from inadvertently expanding or limiting rights and obligations. (Level 3 Opening Brief at 33). Those are all good reasons for rejecting Level 3's definition of "Meet Point Interconnection Arrangement" and "Mid-Span Meet" (which uses the term "Meet Point Interconnection Arrangement."). The FCC has 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). The essence of a "Meet Point Interconnection Arrangement" is that parties build their own facilities to the meet point *and* then maintain those facilities. The FCC's definition simply does not include situations in which a carrier leases facilities that are maintained by the carrier from whom they lease them.

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

80 Level 3 claims that the term "traffic" is not otherwise defined and, since it is used throughout the ICA, a definition should be adopted that ties it to "telecommunications" and "information services." (Level 3 Opening Brief at 33). This simply makes no sense, and changes its meaning from its common usage. *Newton's Telcom Dictionary* cites the Bellcore definition of

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traffic: "A flow of attempts, calls, and messages." (*Newton's Telecom Dictionary* (21st ed. 2005) at 860). Further, the definition is unnecessary. As Qwest pointed out in its Opening Brief, in virtually every instance in which the term traffic is used, it is accompanied by a modifier. (Qwest Opening Brief ¶¶ 107-08). Adopting Level 3's definition will make other terms hopelessly confusing.

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

81 Issue 27 is a dispute about the definition of "Unbundled Network Element." Level 3's proposed language would authorize the Washington Commission to make the determination as to the unbundled network elements Qwest that Qwest must provide pursuant to Section 251(c)(3). However, the Act and law interpreting it are clear that it is the FCC, and the FCC alone, that has the authority to make the impairment determination called for by Sections 251(c)(3) and 251(d)(2).[44]

82 Level 3 asserts that Sections 251(d)(3) and 261(c) confer upon the Washington Commission the authority to require Qwest to unbundle network elements. (Level 3 Opening Brief at 28-30). Neither of these statutory sections supports Level 3's position. Both provisions are circumscribed by the limitation that the Washington Commission's regulations be consistent with Section 251 and the FCC's regulations under it. A Washington Commission decision requiring Qwest to unbundled a network element for which the FCC has not made the impairment determination required by Sections 251(c)(3) and 251(d)(2) would not be consistent with either Section 251 or the FCC's regulations because it would have been done without the FCC first having made the impairment determination that only the FCC may make.

[44] *United States Telecom Ass'n v.* FCC, 359 F.3d 554, 568 (D.C. Cir. 2004).

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L. 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)

83 Issue 30 concerns the appropriate language relating to quad links. Qwest and Level 3 resolved this issue prior to the arbitration by agreeing to Section 7.2.2.6.1 of the Agreement. When Level 3 raised the quad links issue in its testimony, its sole concern was whether more than a single set of quad links would be required. Qwest is on record that the agreed to language does not require more than a single set of quad links. Level 3 never offered any testimony or legal basis to support its proposed language for Sections 7.2.2.6.1.2 or 7.2.2.6.1.3. Qwest is not required to provide unbundled signaling[45] or to provide signaling to a meet point. Accordingly, the Commission should reject Level 3's proposed additional language relating to quad links.

M. UNE Non-Impairment Standards (New Issue – Issues 31, 32 and 33)

84 Issues 31, 32 and 33 address the circumstances in which Level 3 is entitled to high-capacity unbundled transport, loops and dark fiber. Level 3 erroneously asserts that Qwest's proposed language allows Qwest to deny Level 3 UNEs even when Level 3 is entitled to them. (Level 3 Opening Brief at 30-32). Actually, the opposite is true. Level 3's proposed language is designed to give Level 3 access to UNEs, even when it is not entitled to them.

85 In Washington, there is a proceeding to review non-impaired wire centers. That proceeding and any subsequent proceedings will determine whether Level 3 has a right to UNEs, not a unilateral decision on Qwest's part. When viewed in that context, it is clear that the only purpose of Level 3's proposed language is to unlawfully expand Level 3's UNE rights. To make its unlawful access to UNEs permanent, Level 3 seeks to deprive the Commission of any role in enforcing the correct UNE requirements – whether they benefit Level 3 or Qwest. Thus, in Section 9.1.1.4, Level 3 proposes to delete the last sentence of Qwest's proposed

[45] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 545 (2003).

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language that would permit Level 3 to go to the Commission to enforce its unbundling rights. The purpose of this proposed deletion is obviously not to protect against overreaching by Qwest.

86 In Section 9.1.1.4.1, Level 3 proposes that Qwest be required to provide UNEs to Level 3 under any circumstances in which Level 3 requests them. Qwest's proposed language appropriately limits that right to circumstances in which "the UNE is in a location that does not meet the applicable non-impairment thresholds." The Commission will make the final decision.

87 Level 3 next proposes to delete Qwest's proposed Section 9.1.1.4.2, whose purpose is to allow Qwest to identify additional non-impaired wire centers. Under Qwest's proposed language, if the Commission finds that additional wire centers are not impaired, Qwest can provide notice to Level 3 that it is reclassifying such wire centers. Level 3's purpose in opposing this provision is clearly to prevent Qwest from asserting its lawful right not to provide UNEs in non-impaired wire centers.

88 In short, Level 3's proposed changes are not designed to protect against what Level 3 calls "moral hazard." Under Qwest's proposed language, the Commission performs that function. Instead, Level 3 seeks to unlawfully expand its unbundling rights by eliminating the "impairment" requirement altogether and then denying the Commission any role in limiting the expanded rights Level 3 seeks to create. The Commission should reject Level 3's proposed changes and adopt Qwest's proposed language for Issues 31, 32 and 33.

III. CONCLUSION

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

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DATED this 22nd day of January, 2007.

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