

ISSUED February 13, 2007

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 665

In the Matter of)
)
LEVEL 3 COMMUNICATIONS, LLC)
)
Petition for Arbitration of an Interconnec-)
tion Agreement with Qwest Corporation,)
Pursuant to Section 252(b) of the)
Telecommunications Act.)

ARBITRATOR'S DECISION

Procedural History

On June 3, 2005, Level 3 Communications, LLC (Level 3), filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA) with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996 (the Act). A proposed ICA was attached to the petition as Appendix C. Qwest responded to the petition on June 28, 2005.

On June 30, 2005, the first prehearing conference was convened. Standard Protective Order No. 05-823 was issued on July 5, 2005, in response to a motion filed by Level 3.

The second prehearing conference was held July 8, 2005. The Arbitrator issued a conference report on July 12, 2005, adopting a procedural schedule. The evidentiary hearing scheduled for September 20-23, 2005,¹ was postponed after Level 3 notified the Commission that it had reached a tentative settlement with Qwest on all outstanding issues in this docket and related docket IC 12. The parties requested cancellation of the hearing and suspension of the procedural schedule.

By letter dated November 4, 2005, Level 3 notified the Commission that it was unable to reach an agreement with Qwest, and requested that the proceeding resume. A hearing was thereafter scheduled for February, 2006, but was rescheduled at the request of the parties to allow for an exchange of technical information. A conference

¹ Due to the complexity of the issues presented, several prehearing conferences were convened to exchange information, resolve discovery disputes, and discuss various procedural and substantive issues. In the interest of brevity, the procedural history does not include a comprehensive discussion of all of the matters decided by the Arbitrator at the prehearing conferences.

was convened for this purpose on March 7-8, 2006. The conference was facilitated by Mr. David Booth, Administrator, OPUC Telecommunications Division.

On April 13, 2006, Level 3 filed a motion requesting that the Arbitrator convene a technical conference to enable the parties to place on the record information regarding network operations, as well as the parties' respective positions regarding various technical matters. Qwest did not object to the proposed conference. Following the submission of network diagrams and other explanatory materials, the technical conference was convened on May 23, 2006. The transcript of that conference is part of the record in this proceeding.

The hearing in this proceeding was rescheduled for June 20, 2006, but was again postponed by joint request of the parties. Subsequently, the parties filed revised contract language, issue matrices, and additional testimony and exhibits. On July 25, 2006, the Commission issued a revised notice of hearing. Pursuant to the notice, the evidentiary hearing was held in Salem, Oregon, on August 29-30, 2006.

Post-hearing briefs were filed by the parties on October 11 and October 31, 2006. In conjunction with its reply brief, Qwest filed a motion to admit Exhibits 24, 25, and 26 into the record. The motion was unopposed and is hereby granted.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Legal and Regulatory Background

The interpretation of §§251-252 of the Act and the rules promulgated by the Federal Communications Commission (FCC) implementing those statutes have been the subject of continuous litigation since the Act was enacted over a decade ago. The

issues presented in this arbitration – particularly the disputes concerning Voice Over Internet Protocol (VoIP) traffic and “Virtual” NXX (VNXX) traffic – are no exception. In a recent decision involving the latter issue, the U.S. Court of Appeals for the Second Circuit acknowledged the strain that technological advancements have placed upon traditional regulatory concepts. The Court articulated a conceptual framework for analyzing these issues that is appropriate in this case:

The dispute here stands at the crossroads of technology and regulation. Since Global uses the wirelines to serve ISP-bound traffic, we must consider how the wireline-based regulations traditionally addressing voice communications interact with information communications. The dual nature of this traffic means it is subject to a multitude of potential regulations, many of which appear inconsistent, or even contradictory. Resolving these issues requires us to consider the broader themes and trajectory of the regulations, particularly since the 1996 overhaul.

Two prevalent themes of the 1996 Act are emphasis on competition for the benefit of consumers and to further innovation, and a predilection to leave the Internet largely unregulated. The Code of Federal Regulations abounds with rules designed to open local telephone markets to competition. Those regulations are tempered, however, by a concern that would-be competitors may elect to enter the market not so much to expand competition as to take advantage of the relatively rigid regulatory control of the incumbents. In connection with this concern, the FCC has warned time and time again that it will not permit competitors to engage in regulatory arbitrage – that is, to build their businesses to benefit almost exclusively from existing intercarrier compensation schemes at the expense of both the incumbent and consumers. Finally, although no such claims have been made here, we are sensitive to the possibility that state regulators, who have dealt traditionally only with incumbents, may quite unknowingly tend to share their perspectives. (Citations omitted.)²

Level 3’s Network. Level 3 is a major provider of wholesale dial-up services to Internet Service Providers (ISPs) in North America. It is also a primary provider of broadband Internet connectivity through its cable and Digital Subscriber Line

² *Global NAPs, Inc. v. Verizon New England, Inc., f/k/a New England Telephone and Telegraph Co., dba Bell-Atlantic Vermont, Inc., et. al*, 454 F.3d 91, 94-95; 2006 U.S. App. LEXIS 16906 (CA 2, July 5, 2006) (hereafter *Global NAPs II*).

(DSL) partners. In addition, Level 3 provides long-haul carriage and local connectivity for a large number of providers of VoIP services.

Although broadband access to the Internet via DSL or cable modem service is growing in popularity, a substantial fraction of Oregon households continue to obtain their Internet access via dial-up connections. Level 3 emphasizes that the pricing and interconnection policies relevant to dial-up ISP traffic are critical to the ability of Oregonians to obtain the social, educational, and economic benefits derived from Internet access.

Level 3 operates an all-Internet Protocol (IP) network composed of high-speed links and core routers that ride on a fiber-optic backbone connecting 77 markets in the U.S. and 23 markets in Europe. Level 3's network was designed as a high-speed packet network for carrying IP traffic. It is not designed to carry voice traffic and, indeed, is able to do so only when voice traffic is converted to an IP format. Thus, Level 3's network architecture differs from the Public Switched Telephone Network (PSTN), which, conversely, is designed for voice traffic and can carry IP traffic only when it is converted to a Time Division Multiplexing (TDM) format.³

Level 3 serves several major ISPs who provide dial-up Internet service to end-user customers. These ISPs receive dial-up modem traffic from customers who are connected to the traditional PSTN and access the Internet without a broadband connection. Indeed, the vast majority of the traffic Level 3 exchanges with Qwest comes from end users reaching the Internet via dial-up connections.⁴ In addition, Level 3's VoIP customers must be able to send traffic to and receive traffic from the PSTN. Thus, in addition to transporting data traffic in IP format, Level 3 must provide translation services between the PSTN and its IP network.

Level 3 exchanges traffic with Qwest at several points of interconnection (POIs) located throughout Oregon.⁵ Level 3 breaks down its POIs into two categories – Primary and Secondary. Primary POIs are located in 12 Oregon cities and are either located in tandem offices or served by special access trunks that Level 3 leases from Qwest or other providers. For example, Level 3 maintains a primary POI in Portland where it collocates multiplexing equipment at the Qwest tandem office and transports traffic from that point.

³ Time Division Multiplexing (TDM) is an analog protocol used on the PSTN. Internet Protocol (IP) is a digital format used on the Internet. In order for a caller on the PSTN to communicate with a caller using VoIP service, the call must be converted from TDM to IP. The reverse is true if the call travels in the opposite direction. See generally, Qwest Exhibit 28, Brotherson/33-36.

⁴Tr. Vol. I. at 79.

⁵ A POI is the location where two carriers connect their networks for the purpose of exchanging traffic, and may be comprised of various types of leased or owned facilities, including a mutually agreed-to meet point, a collocation arrangement, etc. Level 3 Exhibit 800, Wilson/4.

In addition, Level 3 has established “Secondary” POIs in Qwest end offices where traffic from Qwest customers to Level 3 reaches a certain level. These POIs are designed to reduce pressure on Qwest’s tandem switches and to improve the overall efficiency of traffic routing. At the Secondary POIs, Level 3 purchases Direct End Office Trunks (DEOTs) from Qwest,⁶ to transport Qwest-originated traffic from the Local Calling Area (LCA) served by the Qwest end office back to the Level 3 Primary POI, which is often located in a different LCA.

Level 3 serves the ten largest ISPs providing service in Oregon. None of these ISPs maintain modem banks or servers within the local calling areas where their customers are located.⁷ Indeed, virtually all ISPs outsource a significant portion of their retail functionalities to providers like Level 3.⁸

Level 3 markets its dial-up Internet services to ISP customers under the product name “3 Connect Managed Modem Product” (Managed Modem). ISPs that purchase Managed Modem receive a bundle of services including: (a) Direct Inward Dial (DID) service in each LCA where its customers reside; (b) transport from the LCA to the Level 3 network; (c) conversion of the TDM-based modem connection to IP; (d) authentication services; (e) operations support; and (f) access to the Internet.⁹ Level 3 provides these ISPs with phone numbers local to those LCAs where the ISPs’ end-user subscribers reside to allow those subscribers to make local calls to the ISPs. Neither Level 3 nor its ISP customers impose any sort of toll or long distance charges on the ISP’s end-user subscribers.

The routing of an ISP-bound call initiated by a Qwest local service customer is illustrated in Level 3 Exhibit 701. If the customer resides in an LCA in which Level 3 maintains a Primary POI, the call is directed by the Qwest switch serving the customer to Level 3’s collocated equipment and transported on Level 3’s network from the LCA. If the customer resides in an LCA where Level 3 maintains a Secondary POI, the call is directed by the Qwest switch to a DEOT and transported by Level 3 from the LCA to a Level 3 Primary POI. Calls routed from the Primary POI travel over Level 3’s network to the Level 3 Soft Switch platform and Media Gateway in Seattle, Washington. There the soft switch communicates with the Qwest network via Session Initiation Protocol (“SIP”) and signals the Media Gateway to accept a call on a particular path. The Media Gateway performs the protocol conversion from TDM to IP.

⁶ Qwest refers to these trunks as Direct Trunk Transport (DTT).

⁷ Tr. Vol. I at 80.

⁸ According to Level 3, most large ISPs have centralized their servers at their corporate headquarters, or near one of the coasts. For example, America Online, a major ISP, locates its servers in Virginia. Tr. Vol. I at 59-60.

⁹ Level 3 Exhibit 700, Greene/7-8.

Disputed Issues. The parties identify three primary issues for arbitration: Issue 16 - Voice Over Internet Protocol (VoIP) traffic; Issue 3 - “Virtual” NXX (VNXX) traffic; and Issue 2 - Interconnection Trunking. I address these primary issues, as well as the numerous ancillary disputes between the parties, separately.

Issue 16 – VoIP

Level 3’s VoIP Service. Level 3 provides both wholesale and retail VoIP services. The service Level 3 provides to its VoIP customers includes translation, or protocol conversion, that allows communications between end users of the PSTN and the Internet.¹⁰ Confidential Exhibits 704 and 705, respectively, describe the call paths of IP to PSTN and PSTN to IP VoIP calls on Level 3’s network.¹¹

Level 3 employs the same interconnection network architecture to carry both VoIP and ISP-bound traffic. Thus, when a Level 3 VoIP customer makes a call to a Qwest PSTN end-user customer, Level 3 delivers the call to Qwest in TDM format at a Primary or Secondary POI in the terminating end user’s LCA.¹²

VoIP – FCC Decisions. Level 3 and Qwest disagree over the definition and classification of VoIP service, as well as the appropriate intercarrier compensation arrangements for the exchange of VoIP traffic. In order to place these disputes in proper context, it is necessary to address how the FCC has dealt with VoIP services to date.

In March, 2004, the FCC initiated a proceeding to examine issues relating to IP services (*IP-Enabled Services docket*). The *Notice of Proposed Rulemaking* issued

¹⁰ VoIP service requires specialized customer premises equipment (CPE). Standard touch tone or dial pulse phones will not work on a VoIP network unless they are connected to a computer or other device that can handle VoIP format. Special phones called “SIP” phones can be used for VoIP. These phones have small computers built into them that packetize the voice signal and generate SIP messages. Computers with headsets and microphones can also be used for VoIP. These SIP or computer phones can be plugged into any broadband connection to receive VoIP service, and thus the user can send and receive calls from any location with a broadband connection. Level 3 Exhibit 300, Greene (Ducloo)/35-36.

¹¹ For an IP-PSTN call, the VoIP end user uses a broadband connection to access a VoIP feature server. Level 3’s VoIP network converts the IP-format dialing data into SS7 signaling and converts the IP format voice signals into PSTN-format TDM signals. For calls to Qwest in Oregon, these IP-based signals are all routed to the Level 3 Softswitch and Media Gateway in Seattle, which sets up a normal TDM call with Qwest’s network. The outbound call is handed off in Oregon at the Primary or Secondary POI nearest the Qwest end user receiving the call. The Qwest switch then sends the call on to the Qwest end user in the same manner as it does for any other voice traffic. For a PSTN-IP call, the process is reversed. Qwest initiates the call in TDM and routes the TDM signal to Level 3 at the POI nearest the Qwest end user. Level 3 then performs the same protocol conversion in reverse and initiates the VoIP session. As noted below, Qwest disagrees with Level 3’s position that PSTN-IP (also, TDM-IP) calls qualify as VoIP calls. Additional explanations of the call paths of VoIP calls initiated from and terminating to Level 3 customers in Oregon are shown in Level 3 confidential Exhibits 709, 710, and 711.

¹² Qwest’s affiliate, Qwest Communications Corporation (QCC), markets VoIP services to residential and business customers in Oregon using its “OneFlex” product. Level 3 Exhibit 112 at 1.

in that docket¹³ asked commenters to address services and applications making use of the Internet, including, but not limited to, VoIP services. Since that time, the FCC has issued orders in the *IP-Enabled Services* docket establishing E911 requirements (*VoIP 911 Order*),¹⁴ and Universal Service obligations (*Universal Service Order*).¹⁵ In addition, the FCC issued an order in *Vonage Holdings (Vonage Order)*,¹⁶ addressing a number of regulatory and jurisdictional issues relating to the provision of IP-Enabled Services.¹⁷

Although the FCC “has not adopted a formal definition of ‘VoIP,’ it has “use[d] the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony.”¹⁸ The *Universal Service Order* released in June, 2006, defines “interconnected VoIP Services” as follows:

The Commission has defined ‘interconnected VoIP services’ as those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.¹⁹

¹³ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4864, ¶1, fn. 1 (2004) (*IP-Enabled Services NPRM*).

¹⁴ *In the Matter of E911 Requirements for IP-Enabled Service Providers, et seq.*, WC Docket 05-196, First Report and Order and Notice of Rulemaking, FCC 05-116 (2005) (*VoIP 911 Order*).

¹⁵ *In the Matter of Universal Service Contribution Methodology, et seq.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (2006) (*Universal Service Order*).

¹⁶ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd. 22404 (2004) (*Vonage Order*), appeal pending, *National Ass’n of State Util. Consumer Advocates v. FCC*, No. 05-71238 (Ninth Cir. filed Feb. 22, 2005).

¹⁷ For a summary of the FCC’s orders relating to IP-Enabled Services, see the *Universal Service Order* at ¶¶13-15.

¹⁸ *Vonage Order* at ¶4, fn. 9; *VoIP E911 Order* at ¶24; *Universal Service Order* at ¶36.

¹⁹ *Universal Service Order* at ¶36, readopting the definition in the *VoIP E911 Order* at ¶24. The FCC also noted that “interconnected VoIP services” are a category of IP-Enabled Services. *Universal Service Order* at ¶15. The term “interconnected” refers to the ability of the user generally to receive calls from and terminate calls to the PSTN, including commercial mobile radio service (CMRS) networks. See *VoIP 911 Order* at ¶1, fn. 1. The term “IP-compatible CPE” refers to end-user equipment that processes, receives, or transmits IP packets. See *Vonage Order*, 19 FCC Rcd. at 22407, ¶6; see also *Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3308, fn. 2 (2004) (*Pulver Order*).

A primary issue raised by the FCC in the *IP-Enabled Services NPRM* is whether the agency “can best meet its role of safeguarding the public interest by continuing its established policy of minimal regulation of the Internet and the services provided over it.”²⁰ The FCC further observed that “the nature of IP-enabled services may well render the rationales animating the regulatory regime that now governs communications services inapplicable here, and that the disparate regulatory treatment assigned to providers of ‘telecommunications services’ and ‘information services’ might well be inappropriate in the context of IP-enabled services.”²¹

The complexities associated with classifying VoIP service are underscored by the fact that the FCC has still not decided whether it should be treated as an information service or a telecommunications service. In the *Universal Service Order*, the FCC emphasized:

The Commission has not yet classified interconnected VoIP services as ‘telecommunications services’ or ‘information services’ under the definitions of the Act. Again here, we do not classify these services.²²

The FCC has also declined to establish intercarrier compensation arrangements for carriers exchanging VoIP traffic. In the *Vonage Order*, the FCC noted that its pending *IP-enabled Services* proceeding:

will resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice,²³ concerning issues such as the Universal Service Fund, *intercarrier compensation*, 911/E911, consumer protection, disability access requirements, *and the extent to which states have a role in such matters.*²⁴ (Footnote Added.) (Emphasis added.)

The *Vonage Order* preempted an order of the Minnesota Public Utilities Commission applying “traditional telephone company regulations” to Vonage’s Digital Voice service, a type of interconnected VoIP service. The FCC concluded that

²⁰ *IP-Enabled Services NPRM* at ¶2.

²¹ *Id.* at ¶45.

²² Although the FCC concluded that interconnected VoIP providers are “providers of interstate telecommunications” under §254(d) of the Act, and therefore obligated to contribute to the Universal Service Fund contributions, it did not determine that interconnected VoIP providers supply “telecommunications services” under the Act. *Universal Service Order* at ¶¶35, 41-42.

²³ The FCC recognizes Vonage’s DigitalVoice service as an interconnected VoIP service. *Universal Service Order* at ¶14.

²⁴ *Vonage Order*, fn. 46 at 8.

preemption was necessary for several reasons, including its finding that “permit[ing] more than 50 different jurisdictions to impose traditional common carrier economic regulations” on Vonage’s interconnected VoIP service would not allow it to meet its responsibility to ensure Congress’s objective of an Internet “unfettered by Federal or State regulation.”²⁵

In the *Universal Service Order*, the FCC reiterated its intention to articulate a comprehensive federal policy regarding interconnected VoIP services:

The *Vonage Order* made ‘clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.’ (Emphasis in Original.)²⁶

Disputed Issues – VoIP. Notwithstanding the FCC’s admonition that “it intends to resolve important regulatory matters with respect to IP-enabled services generally,” Qwest and Level 3 ask this Commission to resolve disputes and adopt contract language that would prejudge critical issues currently under scrutiny by the FCC. For example:

1. Level 3 and Qwest disagree over the definition of interconnected VoIP service. Level 3 contends that VoIP service includes calls that are initiated in TDM protocol and terminated in IP protocol (TDM-IP calls). Qwest maintains that only those calls initiated in IP protocol and terminated in TDM protocol may legitimately be considered as interconnected VoIP service.

The resolution of this issue is problematic because the FCC has not clearly indicated whether TDM-IP calls qualify as VoIP service.²⁷ Whereas the definition of interconnected VoIP service adopted by the FCC suggests that TDM-IP calls may be included, the *Vonage Order* appears to deal principally with IP-TDM traffic. Indeed, both parties appear to acknowledge that the definition of VoIP requires further clarification by the FCC.²⁸

2. Equally problematic is Qwest’s proposal to define “VoIP traffic” as originating “*at the premises* of the party making the call” In the *Vonage Order*, the FCC stressed that interconnected VoIP services such as Vonage’s DigitalVoice service are “fully portable,” meaning that customers may make calls from “anywhere in the

²⁵ *Vonage Order* at ¶¶33-35.

²⁶ *Universal Service Order* at ¶14; *Vonage Order* at ¶1.

²⁷ Qwest Exhibit 28, Brotherson/28.

²⁸ Tr. Vol. II at 135-136; Level 3 Op. Br. at 34.

world where they can find a broadband connection to the Internet.”²⁹ Moreover, the VoIP provider has no practical means of determining where in the world its users are located when making a call.³⁰ This characteristic of VoIP service appears to be incompatible with Qwest’s notion that it is possible to identify the premises of a customer originating a VoIP call.³¹

3. Both Qwest and Level 3 ask the Commission to decide that interconnected VoIP service is an “information service” rather than a “telephone service,” and further agree that VoIP providers should be categorized as enhanced service providers (ESPs).³² The dispute arises over Qwest’s insistence that, in order to qualify for the ESP exemption and avoid paying access charges, a VoIP provider must maintain a physical point of presence in the same local calling area (LCA) as the end-user customer initiating a VoIP call. Level 3, on the other hand, maintains that access charges should not apply to VoIP traffic.

²⁹ *Vonage Order* at ¶5. For example, a VoIP call can be originated using a “personal computer with a microphone and speakers, and software to perform the conversion. . . .” *Id.* at ¶6.

³⁰ *Id.* at ¶¶5,18, 39.

³¹ In the *Vonage Order*, the FCC concluded that it had no practical means of separating Vonage’s interconnected VoIP service into interstate and intrastate components for jurisdictional purposes. In this context, it observed that “Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber. Even, however, if this information were reliably obtainable, Vonage’s service is far too multifaceted for simple identification of the user’s location to indicate jurisdiction. Moreover, the significant costs and operational complexities associated with modifying or procuring systems to track, record, and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers.” *Vonage* at ¶23. In addition, the FCC observed that “[i]ndeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications. Consequently, Vonage has no service-driven reason to know users’ locations, and Vonage asserts it presently has no way to know. Furthermore, to require Vonage to attempt to incorporate geographic ‘end point’ identification capabilities into its service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape.” *Id.* at ¶25. (Footnotes omitted.) (Emphasis in original.)

³² The FCC defines “enhanced services” as “services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.” 47 C.F.R. §64.702(a). The 1996 Act describes these services as “information services.” Since 1983, the FCC has exempted ESPs from the payment of certain interstate access charges, under a policy known as the “ESP Exemption.” The FCC has held that dial-up ISPs are one class of ESPs. As such, ISPs are permitted under the ESP exemption to pay local business rates for their connections to LEC central offices and the PSTN, despite the fact that they utilize interstate access services (and would otherwise have to pay access charges). At the time the *ISP Remand Order* was issued, the FCC envisioned that ISPs eligible for the exemption would provision service by maintaining a point of presence in the same LCA as the end-user making the Internet call. *ISP Remand Order* at ¶¶10-11, ftns. 16-18. See also, discussion, *infra*.

As emphasized above, the FCC has repeatedly declined to classify VoIP service as either an “information service” or a “telephone service.” Furthermore, the FCC has never indicated that VoIP providers should be considered enhanced service providers. In fact, ESPs are a category of information service providers, but information services are broader and may not include enhanced services.³³ Thus, even if the FCC ultimately determines that interconnected VoIP service is an “information service,” it does not follow that it will conclude that VoIP providers are also enhanced service providers.

Qwest’s proposal that VoIP providers maintain a point of presence within the local calling area to avoid imposition of access charges is consistent with the FCC’s existing treatment of ESPs, but it is not at all clear that VoIP service will be treated in this manner. Qwest’s plan offers VoIP providers the choice of paying access charges³⁴ or incurring costs necessary to maintain a physical presence within the LCA.³⁵ Both scenarios impose significant costs upon VoIP providers and may inhibit the growth of interconnected VoIP service contrary to national policy goals. Such a result would not only run afoul of the Congressional objectives noted above, it would also conflict with the FCC’s expectation that the “great majority” of IP-enabled Services “should remain unregulated.”³⁶

4. Level 3 proposes that it receive compensation for terminating VoIP traffic at the \$.0007/minute rate established for terminating dial-up ISP-bound traffic under the interim rate regime in the FCC’s *ISP Remand Order*.³⁷ While it is reasonable to expect the FCC may require some payment for terminating VoIP traffic, it has yet to determine the precise manner in which carriers should be compensated. As it is, there is no reason to presume that the FCC intends to treat interconnected VoIP service in the same manner as dial-up ISP-bound traffic. As emphasized above, intercarrier

³³ Although the FCC “has determined that ‘enhanced services’ and ‘information services’ should be interpreted to extend to the same functions,” it has also stated that “all enhanced services are information services, but information services are broader and may not be enhanced services.” *Vonage Order* at ¶21, fn. 77.

³⁴ To date, the FCC has declined to address whether access charges apply to IP-enabled services under existing law. *IP-enabled services NPRM* at ¶32.

³⁵ A further complication with Qwest’s proposal is the lack of specificity regarding what type of physical presence a VoIP provider would have to establish within the LCA to be exempt from payment of access charges.

³⁶ *IP-enabled services NPRM* at ¶35.

³⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, CC Docket No. 01-92, FCC 01-131, rel. April 27, 2001, *remanded sub nom, WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh’g en banc denied* D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). (Hereafter, *ISP Remand Order*.)

compensation arrangements for VoIP traffic are currently under consideration in the FCC's *IP-Enabled Services Docket*.³⁸

Resolution – VoIP Issues. The FCC's orders leave no room for doubt that it intends to take the lead in resolving important regulatory issues relating to IP-Enabled Services, including interconnected VoIP services. It has emphasized that the public interest demands a comprehensive national approach to the treatment of IP-Enabled Services without the imposition of state regulations that could potentially inhibit the growth of such services.³⁹ Issues relating to the definition and classification of VoIP service, as well as intercarrier compensation arrangements for such service are currently under consideration in the FCC's *IP-Enabled Services docket*. The FCC has stated that it intends to address these issues as soon as possible,⁴⁰ including "the extent to which states have a role in such matters."⁴¹ In the interim, it has made clear that it will preempt any state regulatory action that can be construed to interfere with the flow of VoIP traffic.⁴²

Given the FCC's clear intention to establish a comprehensive regulatory framework for IP-enabled services, it is not productive for this Commission to attempt to resolve the VoIP-related issues presented by the parties in this arbitration. Effectively, the parties are asking the Commission to second-guess the FCC by defining, classifying, and establishing intercarrier compensation arrangements for VoIP traffic. Deciding these issues prior to the conclusion of the FCC's *IP-enabled Services docket* would not only invite federal preemption, but would create additional confusion for purposes of implementing the parties' interconnection agreement. Indeed, both parties emphasize the current uncertainty surrounding the treatment of VoIP traffic.⁴³ Under the circumstances, the most reasonable approach is for the Commission to refrain from addressing VoIP-related issues pending the conclusion of the federal proceeding.

As a result of the decision to defer VoIP-related issues to the FCC, it is unnecessary to resolve disputes concerning those sections of the ICA that relate to VoIP

³⁸ The FCC has also initiated an Intercarrier Compensation Docket to examine all forms of intercarrier compensation. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, Notice of Proposed Rulemaking (rel. April 27, 2001) (*Intercarrier Compensation NRPM*).

³⁹ See, e.g., *Vonage Order* at ¶¶14-15, 36-37, 41, 43.

⁴⁰ *Id.* at ¶44.

⁴¹ *Id.* at ¶14, fn. 46.

⁴² *Id.* at ¶46.

⁴³ Level 3 Op. Br. at 34 ("The regulatory status of VoIP calls remains highly ambiguous"); Tr. Vol. II at 135-136.

traffic.⁴⁴ The Commission expects that the parties will continue to exchange VoIP traffic under voluntary arrangements until the FCC can finalize its review of these issues. The record shows that Level 3 has entered into similar agreements with other ILECs.⁴⁵

Issue 3 –VNXX Arrangements

The next major issue in this case concerns whether Level 3’s method of provisioning service to ISP customers constitutes “Virtual” NXX, or “VNXX” arrangements. VNXX arrangements have generated substantial controversy in Oregon and throughout the nation. The regulatory treatment of VNXX traffic has been addressed in a number of recent judicial and regulatory commission decisions.

VNXX Traffic. In September, 2006, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued an opinion in *Verizon California v. Peevey, et al.*,⁴⁶ describing VNXX as follows:

Telephone numbers generally consist of ten digits in the form of NPA-NXX-XXXX. The first three digits indicated the Numbering Plan Area (or NPA), commonly known as the area code, and the next three digits refer to the exchange code. Under standard industry practice, area codes and exchange codes generally correspond to a particular geographic area served by an LEC. These codes serve two functions: the routing of calls to their intended destinations, and the rating of calls for purposes of charging consumers. Each NPA-NXX code is assigned to a rate center, and calls are rated as local or toll based on the rate center locations of the calling and called parties. When the NPA-NXX codes of each party are assigned to the same local calling area, the call is rated to the calling party as local; otherwise it is a toll call, for which the calling party must normally pay a premium.

⁴⁴ These include Section 7.1.1.1 (Issue 1A-Operation audits); Section 7.1.1.2 (Issue 1A-Certification of VoIP traffic); Section 7.1.1.3 (Issue 1A-Designation of VoIP traffic as “local”); Section 7.1.1.4 (Issue 1A-Cost responsibility); Sections 7.3.1.1.3 and 7.3.1.1.3.1 (Issue 1G-Relative Use Factor-entrance facilities); Sections 7.3.2.2 and 7.3.2.2.1 (Issue 1H-Relative Use Factor-DTT facilities); Section 7.3.3.2 (Issue 1J-Nonrecurring charges); Section 7.3.6.3 (Issue 3A-POI location and compensation); Section 4, Definitions (Issue 3B-VoIP calls not included in VNXX definition); Section 7.3.6.1 (Issue 3C-VoIP compensation); Section 7.3.4.1 (Issue 4-VoIP compensation); Section 7.3.9.1.1 (Issue 18-Jurisdictional factor for VoIP traffic); Section 4, Definitions; and Sections 7.2.2.12 and 7.2.2.12.1 (Issue 16-VoIP definition); and Section 7.3.8 (Issue 20-IP-originated call information).

⁴⁵ Tr. Vol. 1 at 131.

⁴⁶ *Verizon California v. Peevey, et al.*, 462 F.3d.1142, 2006 U.S. App. LEXIS 22742 at 1148 (9th Cir. September 7, 2006) at 1148.

VNXX, or ‘Virtual Local’ codes are NPA-NXX codes that correspond to a particular rate center, but which are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different calling area.

* * * * *

VNXX numbers are often assigned to ISP customers by CLECs, thus allowing the ISP to serve internet users outside the ISP’s local calling area without subjecting such users to toll charges.⁴⁷

The Oregon Commission has described VNXX traffic in a similar manner. In docket UM 1058, the Commission found:

A ‘Virtual NXX’ (VNXX) occurs when a CLEC assigns a ‘local’ rate center code to a customer physically located in a ‘foreign’ rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer’s phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer’s physical location in Portland is a distance of some 50 miles. Thus, under a CLEC’s VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC’s Portland customer. When those same customers call the ILEC’s Portland customers, served out of the same central office as the CLEC’s Portland customer, they are charged intraLATA toll charges.⁴⁸

The practice of assigning telephone numbers to customers in a manner that allows them to obtain a “virtual” local calling presence and thereby avoid toll charges has created regulatory dilemma. This is particularly true in the case of CLECs such as Level 3, who devote a significant portion their operation to serving ISPs. Typically, the CLEC will request and obtain blocks of telephone numbers from NANPA for different local calling areas. As noted by the Ninth Circuit in *Peevey*, the CLEC will then assign VNXX numbers to ISPs. This, in turn, allows ISP customers situated outside

⁴⁷ *Id.* at 1148.

⁴⁸ Order No. 04-504 at 2.

of the local calling area where the ISP's equipment is located to receive Internet service from the ISP without incurring toll charges. Since the ISP's customers are usually also ILEC customers, the ILEC is denied access charge (toll) revenues that it would otherwise have received under its tariff but for the CLEC's decision to employ VNXX number assignments.

In addition, ILEC customers using ISP services generate one-way traffic streams that must be transported by the ILEC outside of the LCA to the remotely situated ISP.⁴⁹ Typically, the traffic is transported to a single point of interconnection (SPOI) maintained by the CLEC within the LATA. Since ISP-bound traffic is all one-way, and the cost of the transport facilities between the ILEC and CLEC are normally assigned on the basis of relative use, the ILEC ends up bearing the entire cost of transporting ISP-bound traffic.

Level 3 assigns "virtual" numbers to its ISP customers in the manner described by the Ninth Circuit in *Peevey* and the Commission in docket UM 1058. Specifically, Level 3 provides ISP customers with phone numbers that are local to the LCAs in which their end-user customers reside, even though the ISPs themselves do not maintain equipment or any other physical presence within the LCA. Notwithstanding this fact, Level 3 argues that its network and routing architecture is very different from typical VNXX routing arrangements where a CLEC offers a LATA-wide "virtual presence" for its ISP customers and leaves the ILEC with the financial and operational responsibility for delivering all traffic from within the LATA to the CLEC's SPOI. In contrast, Level 3 states that it is willing to assume responsibility for transporting ISP-bound traffic from its Primary and Secondary POIs to Level 3's facilities.

Consistent with this position, Level 3 proposes contract language that classifies ISP-bound traffic as "local" in nature. Under this arrangement, Level 3 would be compensated for delivering dial-up traffic to ISPs at the \$.0007/minute terminating compensation rate established by the FCC in the *ISP Remand Order*. In return, Level 3 agrees to bear financial and operational responsibility for transporting ISP-bound traffic from the LCA of the end-user ISP customer originating the Internet call to the ISP facilities connecting the end user to the Internet; an arrangement Level 3 refers to as "Transport Assumed IP."⁵⁰ Any ISP-bound traffic that Level 3 does not pick up and

⁴⁹ *Global NAPs, Inc. v. Verizon New England, Inc., d/b/a Verizon Massachusetts, et. al.*, 444 F.3d 59, 64, 2006 U.S. App. LEXIS 8805 (CA 1, April 11, 2006) (hereafter *Global NAPs I*) ("Calls to ISPs tend to be long and generally go exclusively from the ISP customer to the ISP.")

⁵⁰ Level 3's proposed Section 7.1.1.3 states that "[w]here Level 3 maintains a POI in a local calling area, the Parties agree that VoIP and ISP-bound traffic exchanged via such POI will be rated as Local. Where Level 3 does not have a POI in the local calling area from which the ISP-bound or VoIP call originated, but Level 3 pays Qwest's TELRIC costs for transporting such call from such local calling area to Level 3 facilities, the Parties agree to rate such traffic as Local." Level 3 refers to this as "Transport Assumed IP Traffic."

transport at the originating LCA (of the end user seeking to access the ISP) will be exchanged with Qwest on a bill and keep basis.⁵¹

Level 3 characterizes its contract proposal as a “fair compromise solution,” emphasizing that, under FCC rules, it could insist that Qwest bear the entire responsibility for transporting ISP-bound traffic to a SPOI within each LATA.⁵² Level 3 states that a similar solution has been approved by both the Arizona Corporation Commission and the Ninth Circuit in the *Peevey* case.

Resolution – VNXX Issues. The Oregon Commission has considered VNXX traffic in several dockets, the most recent being ARB 671, an arbitration proceeding between Universal Telecom and Qwest. Commission Order No. 06-190, entered in that case, held that the VNXX arrangements offered by Universal to its ISP customers are prohibited in Oregon. For purposes of reviewing Level 3’s petition, the ARB 671 decision must be considered the prevailing law in this state.

Level 3 disputes the Commission’s regulatory treatment of VNXX issues, including its authority to prohibit VNXX arrangements. Level 3 argues that its willingness to pay the cost of transporting ISP-bound traffic, together with other facts presented in this case, differentiate its proposal from the traditional VNXX arrangements rejected by the Commission in ARB 671. The legal and policy arguments advanced by Level 3 regarding VNXX are addressed below:

1. State Authority to Define LCAs. Historically, calls in Oregon have been rated as “local” or “interexchange” based on the physical [or geographical] location of the parties to the call.⁵³ According to the Ninth Circuit, “local traffic stays within the boundaries of a local calling area. Interexchange (or ‘non-local’) traffic crosses the boundaries of a local calling area and is generally subject to toll or long-distance charges paid by the calling party.”⁵⁴ The Commission has held that VNXX traffic is not “local” because the ISP is not physically located in the same calling area as the customer making the Internet call.⁵⁵

⁵¹ Level 3 notes that there are a few LCAs in Oregon where traffic volumes are so low that Level 3 does not maintain either a Primary or Secondary POI. In those LCAs, an end-user customer of an ISP served by Level 3 could call the ISP using a local number, and Qwest would be required to transport the call out of the LCA to Level 3’s POI. Level 3 contends that this does not impose any additional transport costs beyond those already imposed by local traffic, because FCC rules already require Qwest to transport all ILEC-originated traffic to a CLEC SPOI. Level 3 Op. Br. at 11.

⁵² This argument is addressed *infra*.

⁵³ See, e.g., Qwest Exhibit 28, Brotherson/14-19; Order No. 04-262 (ARB 527).

⁵⁴ (*Peevey* at 1157, fn. 1, quoting *Global NAPs I* at 62-63.) The Court’s definition of VNXX, quoted above, incorporates the same concept. Note that interexchange traffic is also sometimes referred to as “toll traffic” or “long distance traffic.”

⁵⁵ See, e.g., Order Nos. 06-037, 06-190.

Level 3 contends that, because ISP-bound traffic is “interstate in nature so the Commission’s policies regarding intrastate services don’t really apply.”⁵⁶ This argument is without merit. The authority of state commissions to define local calling areas is well-established. As Qwest points out,

It is true that the FCC has held that ISP traffic is jurisdictionally interstate, but it does not follow that Oregon LCAs and call rating rules do not govern compensation for such traffic. Indeed, this precise issue was addressed in *Global NAPs II*. There, the CLEC argued that the FCC had preempted the states on all issues related to ISP traffic, including LCAs and rating rules. The Second Circuit, however, noted that the FCC, in the *Local Competition Order*, had concluded that state commissions have authority over call rating and LCAs. The court then stated that, although many parts of the *Local Competition Order* had been superseded, there was nothing in the thousands of pages of later FCC orders upon which a credible argument could be made that the FCC had preempted states on LCAs and call rating. The court thus held that ‘the FCC has not disturbed the states’ traditional authority to define local calling areas.’ 454 F.3d at 99. In other words, it is Oregon statutes, Commission rules, and Commission decisions that govern LCAs. Those authorities mandate that the physical location of the parties to a call govern the definition and classification of the traffic as local or interexchange.⁵⁷

The First, Second, and Ninth Circuit Courts all concur with the Commission’s determination that VNXX-routed ISP-bound traffic is “interexchange” in nature.⁵⁸ As discussed below, this regulatory classification has significant implications for the compensation arrangements appropriate for this traffic.

⁵⁶ Level 3 Op. Br. at 28-30.

⁵⁷ Qwest Reply Br. at 15-16; *Global NAPs II*, 454 F.3d at 98, quoting *Local Competition Order*, ¶549, and fn. 1824. Furthermore, as discussed elsewhere in this decision, the FCC has acknowledged, and the Second Circuit has affirmed, the authority of state commissions to disallow VNXX arrangements. *Inter-carrier Compensation NPRM* at ¶115. *Global NAPs II* at 102-103.

⁵⁸ *Peevey* at 1157-1159; *Global NAPs I* at 72-74; *Global NAPs II* at 95-96. The Oregon federal district court reached the same conclusion. *Universal* at 21-22. Level 3 notes that the *Peevey* decision approved the California PUC’s “compromise approach” to the treatment of VNXX traffic wherein ISP calls were treated as local. But it would be incorrect to construe the Ninth Circuit’s holding as requiring that result. In fact, as noted below, the Court recognized that the “relevant end point for purposes of determining whether the call is local or VNXX” is “where the call is picked up by the customer.” Furthermore, the Court clearly recognized that VNXX is interexchange traffic. *Peevey* at 1159.

2. Definition of VNXX. In a related argument, Level 3 contends that the definition of VNXX traffic adopted by the Commission⁵⁹ – which focuses on the geographic locations of the parties to the call – is not appropriate for ISP-bound traffic, because “it makes no sense to try to define either a specific ‘customer’ to whom the call is being placed or a specific place where the call ‘ends.’”⁶⁰ The short answer to this argument is that the Commission’s definition of VNXX is virtually the same as that adopted by the Ninth Circuit in *Peavey*, set forth above, as well as the definitions used by the First and Second Circuit Courts of Appeal in recent decisions addressing VNXX-routed ISP-bound traffic.⁶¹ All of these decisions describe VNXX arrangements by focusing on the geographic location of the parties to the call.

The VNXX definition proposed by Qwest in Section 4 of the ICA (Issue 3B) is consistent with the Commission’s decisions and the federal case law noted above. It is therefore adopted.

3. Call Rating/Compensation. Level 3 maintains that its Primary and Secondary POI locations should be used as the relevant point for call rating and compensation purposes because ISP-bound traffic has no “normal end point.” Thus, under its “Transport Assumed IP” concept, all Internet-bound calls routed through a Level 3 POI located in the same LCA as the calling party would be considered “local” calls eligible for the \$.0007/minute terminating compensation rate approved in the *ISP Remand Order*. There are a number of flaws with Level 3’s proposal.

To begin with, there is no logical, historical, or legal justification to support Level 3’s theory that having a POI within an LCA somehow makes a call “local” for call rating purposes. A POI is simply the point at which two carriers connect their networks to exchange traffic. It has never been used as the basis for determining whether a call is local or long distance. As emphasized elsewhere in this decision, the applicable Commission, FCC, and judicial decisions all recognize that the controlling factor for call rating purposes is the location of the calling and called parties.⁶²

⁵⁹ The VNXX definition adopted in Order No. 04-504 in docket UM 1058 was affirmed by the Commission in subsequent decisions. See, e.g., Order Nos. 05-874 at 34-35, 06-037 (affirming ALJ Ruling at 2-3), and 06-190, App. A at 8.

⁶⁰ Level 3 Op. Br. at 25. Level 3 further argues that “it is simply irrational to try to assign any particular end point” (or termination point) to Internet calls. *Id.* at 26.

⁶¹ *Global NAPs, Inc., v. Verizon New England, Inc., d/b/a Verizon Massachusetts, et al.*, 444 F.3d 59, 64 2006 U.S. App. LEXIS 8805 (CA 1, April 11, 2006) (hereafter *Global NAPs I*); *Global NAPs II* at 96; See also, *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA at 21-22 (D. OR, Dec. 15, 2004) (*Universal*)

⁶² Qwest Exhibit 28, Brotherson/12-23; Qwest Exhibit 37, Brotherson/2-6. Level 3’s POI theory is also internally inconsistent. If a POI is considered a customer location for call rating purposes, it undermines Level 3’s claim that it is entitled to terminating compensation, because Qwest (rather than Level 3) would

Furthermore, Level 3's proposal to rate calls based on the location of its POIs rather than an ISP's actual physical location, disregards the law governing ISP-bound traffic. The FCC,⁶³ the Commission⁶⁴ and four federal circuit courts⁶⁵ have all held that the compensation regime established in the *ISP Remand Order* applies only "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."⁶⁶ As Qwest points out, the FCC has clearly found that ISP-bound traffic is delivered to ISP equipment at specific, identifiable locations.⁶⁷ Indeed, the Ninth Circuit has confirmed that "the relevant end point of the call for purposes of determining whether the call is local or VNXX" (*i.e.*, interexchange) is the point at which "the call is picked up by the customer."⁶⁸ The record in this case demonstrates that Level 3's Oregon POIs are not locations where ISP-bound traffic is "picked up" by Level 3's ISP customers.⁶⁹ Indeed, because the Internet-bound traffic transported by Level 3 is delivered to ISP servers located outside the State of Oregon, it must be regarded as interexchange traffic, not local traffic as Level 3 suggests.

In advancing its POI theory, Level 3 also refuses to acknowledge recent Commission decisions holding that because VNXX-routed ISP-bound traffic is interexchange traffic it is not encompassed by the interim compensation regime in the FCC's *ISP Remand Order*.⁷⁰ This determination has been confirmed by every federal Circuit Court to consider the issue, including the Ninth Circuit in *Peevey*.⁷¹ The state of the law was succinctly summarized by the Second Circuit in *Global NAPs II*:

terminate the traffic by delivering it directly to the customer location (the POI). Qwest Exhibit 21, Brotherson/29; Qwest Exhibit 23, Easton/14.

⁶³ *ISP Remand Order* at ¶¶10, 13. See also, Qwest Reply Br. at 10-11, *ftn.* 10.

⁶⁴ Order Nos. 05-1219, 06-037, and 06-190.

⁶⁵ *Peevey* at 1157-1159; *Global NAPs I* at 74; *Global NAPs II* at 99; *WorldCom Inc. v. FCC*, 288 F.3d 429, 430-431 (D.C. Cir., 2002) (*WorldCom*). See also, *Qwest Corporation v. Universal Telecom, Inc., et al.*, Civil No. 04-6047-AA at 2 (D. OR, Sept. 22, 2005) (*Universal Supp. Op.*). The same authorities have held that ISP-bound traffic is not subject to reciprocal compensation under §251(b)(5). See *e.g.*, *ISP Remand Order* at ¶¶1, 52; *Peevey* at 1158; *Global NAPs I* at 74; *Global NAPs II* at 99; *WorldCom* at 430-431, Commission Order Nos. 05- 1219, 06-037, and 06-190.

⁶⁶ *ISP Remand Order* at ¶13.

⁶⁷ See, *e.g.*, *ISP Remand Order* at ¶¶10, 24, 58, 61; Qwest Exhibit 37, Brotherson/5-6.

⁶⁸ *Peevey* at 1159.

⁶⁹ Tr. Vol. I at 148.

⁷⁰ Order No. 06-037 at 4-5; Order No. 06-190 at 4 ("The decision in *Qwest v. Universal* unequivocally states that VNXX traffic is not compensable under the terms of the FCC's *ISP Remand Order*.")

⁷¹ These judicial decisions clearly recognize that the *ISP Remand Order* applies only to "local" ISP-bound traffic and does not encompass interexchange VNXX-routed ISP-bound traffic. *Peevey* at 1157-1159;

[T]he [2001 Remand Order] also indicates that, in establishing the new compensation scheme for ISP-bound calls, the [FCC] was considering only calls placed to ISPs in the same local calling area as the caller. The [FCC] itself has not addressed the application of the [2001 Remand Order] to ISP-bound calls outside a local calling area. Although the 2001 Remand Order states explicitly that ISPs are exempt from reciprocal compensation for intra-local calling area calls, it sheds little light on inter-local calling area calls or access fees.⁷²

4. 47 C.F.R. §253. In addition to the foregoing arguments, Level 3 relies on §253 of the Act to contend that the Commission’s authority to arbitrate interconnection agreements under the Act does not empower it to ban the provision of interstate services, including interstate VNXX or VNXX-like services.⁷³ In advancing this claim, Level 3 fails to acknowledge that the FCC has delegated authority to state public utility commissions to reclaim NXX codes where the state concludes that those codes are being used to provide “unauthorized interexchange service” through VNXX arrangements.⁷⁴ Level 3 also fails to mention that the Second Circuit has rejected the argument that states cannot ban VNXX because it is an interstate service. In *Global NAPs II*, the Court held:

Global NAPs I at 74; *Global NAPs II* at 99; See also, *Universal*, Supp. Order at 2. Inexplicably, Level 3 fails to acknowledge these holdings. Instead, it relies upon decisions from other state commissions or courts of inferior jurisdiction, including *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (D. Conn., 2005) (hereafter, *SNET*). These decisions were reviewed by the Commission in prior dockets and found to be unpersuasive. See Order No. 06-037 at 3; Order No. 06-190 at 3-4. Furthermore, the *SNET* decision was summarily rejected by the First Circuit in *Global NAPs I* at 75, fn. 17.

⁷² *Global NAPs II* at 99, quoting *Global NAPs I* at 74. Again, Level 3 disregards these decisions, and instead points to an amicus brief filed by the FCC in *Global NAPs I*. Level 3 Op. Br. at 2, fn. 6; Reply Br. at 24. But, Level 3 unaccountably omits that portion of the FCC’s brief that states “in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller,” and “the Commission itself has not addressed application of the ISP Remand Order to ISP-bound calls outside a local calling area.” As illustrated above, the Second Circuit specifically relied on these statements to conclude that the FCC’s interim compensation regime does not encompass VNXX traffic. *Global NAPs II* at 99. The First Circuit did likewise. *Global NAPs I* at 74.

⁷³ Level 3 Op. Br. at 28; Reply Br. at 20, fn. 47.

⁷⁴ The FCC observed that it has “delegated some of its authority to state public utility commissions . . . to reclaim NXX codes that are not used in accordance with Central Office Code Assignment Guidelines.” It cited a decision by the Maine Public Utility Commission directing the North American Numbering Plan Administrator to reclaim NXX codes improperly used by Brooks Fiber to provide unauthorized VNXX service. *Inter-carrier Compensation NPRM* at ¶115. See also, Order No. 06-190 at 5.

Global, to support its view that the FCC intended to preempt state commissions with respect to ISP-bound traffic, relies on language in the *2001 Remand Order* that classifies ISP-bound traffic as interstate traffic. Since federal law generally governs interstate communication, Global continues, states lack jurisdiction over ISP-bound traffic. This argument, which other courts have analyzed and found wanting, is unpersuasive.⁷⁵

Having determined that the classification of ISP-bound traffic as interstate does not in itself remove ISP-bound traffic from the jurisdiction of the state commissions, the Second Circuit went on to hold that the Vermont Public Service Board's decision to prohibit VNXX arrangements did not violate any federal requirements, including §253 of the Act.⁷⁶ In its decision, the Court specifically rejected the assertion that the Board's prohibition of VNXX blocked access to interstate communications.⁷⁷

5. 47 C.F.R. §51.703(b). In the event its “compromise” proposal for VNXX-routed ISP-bound traffic is rejected, Level 3 asserts that FCC rules require Qwest to bear the cost of transporting ISP-bound traffic from the originating local calling area to a single, central POI within the LATA. Level 3's argument is based on FCC rule 47 C.F.R. §51.703(b), which provides that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.”

Again, Level 3's argument fails to take into account the prevailing case law regarding this issue. As explained above, the Ninth Circuit in *Peevey* specifically recognized that: (a) VNXX traffic is interexchange traffic, and (b) “the FCC has expressly excluded interexchange traffic from the reach of §703(b).”⁷⁸ Level 3 also overlooks the *Universal* decision, wherein the Oregon federal district court likewise concluded that VNXX traffic is interexchange in nature.⁷⁹

⁷⁵ *Global NAPs II* at 100.

⁷⁶ The Court emphasized that “[c]ontrary to Global's contentions, neither 47 U.S.C. §253 nor 47 C.F.R. §63.01 confers blanket authority on carriers to provide any interstate service in any manner unfettered by state regulation.” *Global NAPs II* at 102. The First Circuit reached a similar conclusion in *Global NAPs I*, holding that states were not preempted from imposing access charges on interexchange VNXX traffic. *Global NAPs I* at 72-73.

⁷⁷ *Id.* at 102, fn. 9.

⁷⁸ *Peevey* at 1157. As mentioned, the First and Second Circuits concur that VNXX is interexchange traffic. *Global NAPs I* at 72-74; *Global NAPs II* at 95-96.

⁷⁹ *Universal* at 24. Specifically, the Court held that “VNXX traffic does not meet the definition of local [exchange] traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs.”

In addition, Level 3 fails to acknowledge that the FCC's Part 51 rules, including §51.703(b), apply only to "telecommunications."⁸⁰ In the *ISP Remand Order*, the FCC revised its Part 51 rules to classify ISP-bound traffic as "information access," rather than "telecommunications." As emphasized by the Ninth Circuit, the revised rules adopted in the *ISP Remand Order* "remain binding."⁸¹ Thus, contrary to Level 3's assertion, Rule §51.703(b) does not apply to ISP-bound traffic, including VNXX-routed ISP-bound traffic.⁸²

6. QCC's Wholesale Dial Service. Level 3 argues that, if the Commission disallows Level 3's proposal for handling ISP-bound calls, it cannot permit QCC to continue providing Internet service without discriminating in favor of Qwest:

A [QCC] ISP customer does not have to have any equipment or facilities in a local calling area in order for customers to be able to call the ISP on a 'local' basis. Also, the [QCC] ISP customer does not have to pay access charges to receive the calls. With [QCC]'s 'Wholesale Dial' service, the ISP customer is assigned phone numbers in the LCAs in which the ISP's end user customers reside – even though the ISP has no equipment or other physical presence there. Locally-dialed ISP-bound calls from these end users are directed by the originating switch to a trunk port attached to an interoffice transport trunk, and then routed [to] the ISP for further delivery to the Internet sites the end user is trying to reach. This is just like Level 3's arrangement, where the locally-dialed ISP-bound calls are directed to a trunk port attached to the DEOTs/DTTs for which Level 3 pays.⁸³

⁸⁰ See, e.g., *Pac-West Telecomm, Inc. v. Qwest Corporation*, docket IC 9, Order No. 05-1219 at 5-6; also, Order No. 06-190, Appendix A at 7.

⁸¹ *Peevey* at 1147, fn. 1.

⁸² Level 3 cites paragraph 91 of the *Further Notice of Proposed Rulemaking* issued in the FCC's *Intercarrier Compensation Proceeding* to support its claim that §51.703(b) applies to ISP-bound traffic. Level 3 Reply Br. at 9, fn. 28. This argument, however, ignores that the FCC's discussion was directed toward telecommunications carriers. The FCC's current Part 51 rules apply only to telecommunications, which does not include ISP-bound traffic. See, *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket 01-92, FCC 05-33, 20 FCC Rcd. 4685, ¶¶87-97 (2005) ("*Intercarrier Compensation Further Notice*"). See also, *Intercarrier Compensation NPRM*, FCC 01-132, 16 FCC Rcd. at 9637, ¶¶112-114. Furthermore, any possible uncertainty created by the FCC's discussion in the *Further Notice* is eliminated by the Ninth Circuit's decision in *Peevey*. That decision makes clear that §51.703(b) does not apply to interexchange VNXX-routed ISP-bound traffic, the only type of ISP-bound traffic carried by Level 3. *Peevey* at 1157-1158.

⁸³ Level 3's Op. Br. at 31.

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The record makes clear that the PRI ports [QCC] uses to provide connectivity for ISPs are technically and functionally the same as the DEOT/DTT ports Level 3 uses. Both PRI and DTT/DEOT ports provide basic connectivity from one central office to another. The trunk groups connected to those ports are engineered in the same way, based on the same traffic considerations. And both are connected to end office switching functionality to allow end users to call a local number and to connect to the Internet through the ISP. As a matter of physical network engineering, trunk ports for DTTs and PRIs are provisioned on the same type of trunk port “cards,” using slightly different software settings. While PRI trunks use ISDN PRI protocol, and DTT trunks use SS7 protocol, ISDN PRI protocol is based on SS7 protocol and both provide basically the same functions. (Footnotes omitted.)

In these circumstances it would be plainly and blatantly discriminatory to allow [QCC]’s arrangements for serving ISPs to remain in place while not approving Level 3’s proposal.⁸⁴

The issues raised by Level 3 concerning QCC’s method of operation have not been addressed by the Commission to date. Although QCC is certified to operate in Oregon as a CLEC, Qwest states that QCC acts in the capacity of an ISP rather than as a carrier when it provides Wholesale Dial service to ISPs. QCC purchases ISDN PRI trunks that, under the terms of Qwest’s tariff, allow it to assign local numbers to customers. QCC then assigns these numbers to ISPs even though the ISPs do not maintain any actual physical presence within the LCA. Qwest takes the position that QCC’s purchase of ISDN PRI trunks provides it with a local presence within the LCA sufficient to qualify for the FCC’s ESP exemption⁸⁵ and thereby avoid the imposition of access charges.⁸⁶

Although there does not appear to be any controversy over QCC functioning in the capacity of an ISP, the more difficult question is whether the mere purchase of a tariffed service offering (*i.e.*, ISDN PRI trunks) provides QCC with a local presence sufficient to qualify for the FCC’s ESP exemption. On first impression, this argument does not seem persuasive, particularly when one considers the position that

⁸⁴ Level 3’s Op. Br. at 32.

⁸⁵ See fn. 32, *supra*, for discussion of the ESP exemption.

⁸⁶ Level 3 Exhibit 700, Greene/26; Level 3 Exhibit 716, Greene/17.

Qwest has taken with respect to the “physical presence” requirement in this case. Specifically, Qwest has argued that the ESP exemption applies only to ISPs who maintain actual facilities (*i.e.*, modems or servers) within the same LCA as the customer originating the Internet call.⁸⁷

The apparent inconsistency in Qwest’s position merits further Commission investigation of QCC’s Wholesale Dial service. That said, this arbitration docket is not the proper forum in which to conduct that inquiry. Even if it were, there is simply not enough evidence in the record regarding the specifics of QCC’s method of provisioning service to resolve the issues presented.

7. Docket ARB 671. As emphasized above, the Commission’s decision in ARB 671 prohibited the VNXX arrangements proposed by Universal Telecom in its arbitration proceeding with Qwest. Order No. 06-190, entered in that case, focuses on three major problems with Universal’s VNXX proposal: (1) the improper assignment of transport costs to Qwest; (2) the potential deprivation of access revenues; and (3) the violation of the numbering assignment conditions set forth in Universal’s certificate of authority to operate as a competitive provider.

Level 3 emphasizes that its proposed method of serving ISP customers is substantially different than the traditional VNXX arrangements considered by the Commission in ARB 671 and does not impose unreasonable transport burdens upon Qwest. Unlike Universal Telecom’s proposal in that case, Level 3 is willing to pay all of the costs associated with transporting ISP-bound traffic from the Internet caller’s local calling area to the centralized location where ISP functions are performed (*i.e.*, Level 3’s media gateway). For this reason, Level 3 contends that its proposal should not be viewed in the same manner as the VNXX arrangements that were rejected in ARB 671.

Second, Level 3 insists that the Commission’s concern with the potential loss of toll revenues does not apply in the case of ISP-bound traffic. According to Level 3 witness, Mack Greene, consumers are unlikely to use dial-up Internet services if they are forced to pay per-minute toll charges for Internet calls, thus effectively eliminating the possibility that ISP-bound traffic will generate significant access revenues for Qwest.⁸⁸ Qwest does not appear to seriously contest this fact and, indeed, has affirmed that it does not seek to collect access charges for VNXX-routed ISP-bound traffic.⁸⁹ For these reasons, Level 3 contends that the deprivation of toll revenues is not a valid concern with respect to its proposed operations.

While the specific VNXX arrangements proposed by Level 3 may minimize concerns relating to transport costs and the loss of toll revenues, they do not

⁸⁷ See e.g., Qwest Reply Br. at 10-14.

⁸⁸ Tr. Vol. I at 35

⁸⁹ Tr. Vol. II at 36:18-37:8, 61:10-16; Qwest Op. Br. at 28.

address the remaining issue addressed by the Commission in ARB 671 – the improper assignment of numbering resources. Specifically, the Commission concluded that VNXX arrangements violate the following two conditions included in all competitive provider certificates issued in Oregon:

7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.
8. When applicant is assigned one or more NXX codes, applicant shall limit each of its NXX codes to a single local exchange and shall establish a toll rate center in each exchange that is proximate to the toll rate center established by the telecommunications utility serving the exchange.⁹⁰

In Order No. 06-190, the Commission emphasized that compliance with the foregoing conditions is a prerequisite to obtaining a competitive provider certificate:

In applying for a competitive provider certificate, Universal represented that it would provide intrastate telecommunications services. It obtained its Certificate and obtained telephone numbers from NANPA because the Commission relied upon on [sic] that representation. Universal cannot now claim that the conditions set forth in its certificate are no longer applicable because it is not providing the services requested in its Certificate. Put another way, Universal cannot assert that it may use its telephone numbers for any purpose notwithstanding the conditions in its certificate.

The Arbitrator was also correct to conclude that VNXX arrangements are prohibited in Oregon. Given that VNXX arrangements violate state laws and regulations that have not been preempted by the federal government, Universal's arguments regarding the type of traffic carried pursuant to those illegal arrangements are moot.⁹¹

⁹⁰ Order No. 06-190 at 6; *see also*, Order No. 04-504 at 4-5.

⁹¹ *Id.* at 7.

As discussed above, the Commission was clearly within its authority to prohibit VNXX arrangements because of the misuse of numbering resources. At the same time, the Commission's order in ARB 671 did not discuss the effect that technological developments in the provisioning of dial-up Internet service have had upon the use of numbering resources. The testimony in this case explores that issue, and, in my view, warrants revisiting the question of whether VNXX arrangements should be banned under all circumstances.

In particular, the record discloses that the technology used to provide dial-up Internet service has changed substantially from that envisioned by the FCC when the 2001 *ISP Remand Order* was issued. At that time, the FCC contemplated that ISPs would locate their modem banks or servers in the same LCA as the end-user customers making Internet calls. In the six years that have lapsed since the FCC's decision, dial-up Internet service has evolved to the point where ISPs no longer utilize modem banks and almost never locate facilities and equipment within the same LCA as their end-user customers.⁹² Instead, ISP traffic is routed to remote, centralized locations such as the Level 3's Seattle media gateway, where modem functionality and other Internet-related processes are performed by the carrier on behalf of the ISP before calls are routed onto the Internet.

The technological changes in the provision of dial-up Internet service effectively mean that the "local" ISP-bound traffic paradigm used by the FCC in the *ISP Remand Order* no longer applies. Instead, virtually all dial-up ISP-bound traffic is interexchange in nature. Thus, CLECs serving ISP customers basically find themselves on the horns of a regulatory dilemma. On the one hand, their technologically advanced networks necessitate the transport of interexchange VNXX traffic that requires payment of access charges under existing regulatory rules. On the other hand, it is generally understood that consumers will not utilize dial-up Internet services if they are forced to pay for those services on a per-minute basis.⁹³

The position advocated by Qwest does not provide carriers like Level 3, who serve dial-up ISPs, with any relief from the predicament in which they find themselves. Although Qwest does not seek to impose access charges on dial-up Internet traffic – in apparent acknowledgment that customers will not pay per-minute rates – it recommends that the Commission maintain its existing ban upon VNXX arrangements in Oregon.⁹⁴ At the same time, Qwest effectively concedes that Level 3 must employ

⁹² The record indicates that there are a few remaining "Mom and Pop" ISPs that continue to locate modem equipment within the LCA. Technical Conference, May 23, 2006, Tr. at 86-87.

⁹³ Tr. Vol. II at 36-37.

⁹⁴ Qwest Op. Br. at 29-30.

interexchange VNXX arrangements if it is to continue using its existing network architecture to serve ISPs as a co-carrier.⁹⁵

As a practical matter, the only way that Level 3 can continue serving ISPs as a carrier without relying upon VNXX arrangements would be for it to locate its media gateways in every LCA where dial-up Internet customers reside.⁹⁶ As Qwest points out, only that method of provisioning service makes Level 3 eligible for the compensation regime established in the *ISP Remand Order*. While that may be true, forcing Level 3 to utilize antiquated technology to provision Internet service is neither logical nor financially viable.⁹⁷ Regulation should not stand as an obstacle to economic efficiency and technological advancement. If technology has developed to a point where it makes more sense to use nongeographically correlated telephone numbers to provision certain services, the better approach is to attempt to accommodate those advancements by reexamining the existing regulatory construct.

For this reason, the Commission should allow a limited exception to its existing ban on VNXX arrangements, provided the following conditions are met:

1. Level 3 may make VNXX number assignments only for the purpose of assigning numbers to ISP customers to facilitate the exchange of dial-up ISP-bound traffic; and
2. Level 3 assumes responsibility for paying all of the costs associated with transporting VNXX-routed ISP-bound traffic from its primary and secondary POIs in Oregon to its media gateway. This traffic is both interexchange and interstate in nature. The compensation paid by Level 3 to Qwest should be based on the transport rates set forth in applicable Qwest tariffs, rather than the TELRIC rates proposed by Level 3.

The net effect of these conditions is similar to the approach adopted by the California PUC and upheld by the Ninth Circuit in *Peevey*. Level 3 will be allowed to continue providing service to ISPs using its advanced network architecture, but Qwest will not have to absorb the cost of transporting interexchange VNXX traffic, nor will it be

⁹⁵ Tr. Vol. II at 56-61.

⁹⁶ Another possibility would be for Level 3 to adopt the approach taken by QCC and function as an ISP instead of a carrier. But, as discussed above, it is by no means certain that QCC's purchase of ISDN-PRI service provides the physical presence necessary for it to qualify for the ESP exemption under existing law. See discussion, *supra*. Moreover, such an approach would effectively require Level 3 to abandon its existing network. Still another possibility would be for Level 3 to resell Qwest's retail services to Level 3's ISP customers. But again, Level 3 would not utilize its existing network under those circumstances. Qwest concedes that resale is not "necessarily a very viable alternative to Level 3." *Id.* at 53-65.

⁹⁷ Qwest acknowledges that it would not be financially viable for Level 3 to situate media gateways or equivalent devices in rural areas, for example. Tr. Vol. II at 58-59.

limited to charging lower TELRIC rates reserved for local interconnection and exchange of traffic.

Before deciding whether to allow VNXX arrangements under the conditions outlined above, the Commission must reconsider its finding in Order No. 06-190 that “VNXX arrangements violate state laws and regulations that have not been preempted by the federal government.”⁹⁸ Notwithstanding that statement, my review does not disclose any specific Oregon statutes or regulations dealing with VNXX service. In fact, the only proscription against VNXX appears to derive from the conditions included in competitive provider certificates and the various Commission orders interpreting those conditions.⁹⁹ Thus, if the Commission is persuaded, based on the facts in this record, that Level 3 should be permitted to provide VNXX number assignments, its decision will be predicated on regulatory policy grounds rather than upon state statutes or administrative rules.¹⁰⁰

If the Commission approves the proposed exception as a matter of state regulatory policy, it must also be confident that VNXX numbering assignments do not violate any federal laws or regulations. Again, my review of FCC and federal judicial decisions does not disclose any bar on such arrangements. The Ninth Circuit in *Peevey* upheld the California PUC’s decision allowing VNXX-routed ISP-bound traffic without identifying any federal proscription against VNXX numbering assignments.¹⁰¹ Likewise, the FCC’s *Intercarrier Compensation NPRM* acknowledges the authority of state commissions to determine whether VNXX arrangements should be permitted.¹⁰² Again,

⁹⁸ Order No. 06-190 at 7.

⁹⁹ In 1983, the Commission also placed a freeze on new Foreign Exchange (FX) service. Existing FX customers were grandfathered. See, *In the Matter of Access Provisions and Charges of Telephone Utility Companies in Oregon*, docket UT 5, Order No. 83-869.

¹⁰⁰ This means, of course, that the Commission would be granting a limited exception to the conditions in Level 3’s competitive provider certificate. Since the Commission has found that issues relating to the provision of VNXX service should be addressed in the context of a complaint or arbitration docket, this proceeding is an appropriate forum in which to consider whether the proposed exception should be granted. Order No. 04-504 at 5. It is possible that other carriers may wish to follow in Level 3’s footsteps and seek to include provisions in their interconnection agreements consistent with the limited exception approved in this docket for Level 3.

¹⁰¹ As mentioned above, the Ninth Circuit also upheld the California Commission’s decision to require the CLEC using VNXX arrangements to compensate the ILEC for the cost of transporting VNXX-routed ISP-bound traffic.

¹⁰² *Intercarrier Compensation NPRM* at ¶115. Noting that some LECs were using VNXX to force ILECs to transport traffic outside the LCA, the FCC authorized state commissions to order NANPA to reclaim NXX codes not used in accordance with Central Office Code (COC) Assignment Guidelines. Section 2.14 of the COC Guidelines provides:

It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer’s premise[s] physically located in the same rate

the FCC did not give any indication that VNXX arrangements violate federal laws or regulations.

8. VNXX Traffic – Terminating Compensation. Assuming the Commission agrees to allow Level 3 to offer VNXX arrangements under the conditions set forth above, it still does not resolve the outstanding dispute between the parties regarding compensation for terminating VNXX-routed ISP-bound traffic. Although Level 3 insists that it is entitled to receive \$.0007 per minute for dial-up ISP-bound traffic originated by Qwest customers pursuant to the compensation regime established in the *ISP Remand Order*, that position is contrary to the overwhelming weight of the law. As explained at length elsewhere in this decision, the *ISP Remand Order* encompasses only “local” ISP-bound traffic. Since VNXX-routed ISP-bound traffic is interexchange traffic, it is not eligible for the \$.0007/minute terminating compensation rate.

Because the FCC only envisioned “local” ISP-bound traffic when it issued the *ISP Remand Order*, there is no way to know whether it would approve extending the compensation regime established in that order to include modern methods of provisioning dial-up Internet service. Presumably, the FCC will address that issue in its *Intercarrier Compensation* proceeding, but until then, there is no basis for applying the \$.0007/minute terminating compensation rate to interexchange VNXX traffic.

Given that almost all dial-up Internet traffic is now provisioned on an interexchange basis through VNXX arrangements, and the additional fact that customers will not pay toll rates for Internet service, it is probably safe to assume that the FCC will not impose access charges on this traffic. Nevertheless, the FCC has recognized as a policy matter that the costs associated with the exchange of Internet traffic should be borne by ISPs and their Internet customers, rather than by the ILEC’s ratepayers.¹⁰³ As Qwest observes:

[T]he cost-causer for an ISP call is the dial-up customer. That customer acts as a customer of the ISP when it places a call to the ISP. The ISP, in turn, obtains a toll-free service from Level 3. Under sound economic theory, Level

center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service.

In a 2003 decision, the Iowa Department of Commerce concluded that Level 3’s VNXX arrangements violated Section 2.14. However, Level 3’s proposal in that case assumed that Qwest would pay for transporting VNXX-routed traffic. In contrast, the limited exception proposed in this case mandates that Level 3 pay such costs at the applicable tariffed rates, making it similar to the exception identified by the COC guidelines for FX service. *In Re Sprint Communications Company L.P. and Level 3 Communications LLC*, State of Iowa Department of Commerce Utilities Board, Docket Nos. SPU-02-11, SPU-02-13, *Final Decision and Order*, at pp. 19-20 (Issued June 6, 2003).

¹⁰³ *ISP Remand Order* at ¶87 (“There is no public policy rationale to support a subsidy running from all uses of basic telephone service to those end-users who employ dial-up Internet access”).

3 should pay Qwest for costs that Qwest incurs and then charge the ISP such that the ISP can correctly price its service to the dial-up customers.¹⁰⁴

The Second Circuit articulated a similar rationale in *Global NAPs II*:

Finally, Global's desired use of virtual NXX simply disguises traffic subject to access charges as something else and would force Verizon to subsidize Global's services. This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILECs in a purported quest to compete.¹⁰⁵

At present, the Commission can only speculate how the FCC will choose to deal with intercarrier compensation for terminating VNXX-routed ISP-bound traffic. If the FCC follows the cost causation principles articulated in the *ISP Remand Order*, however, there is a very good chance that it will agree with Qwest and arrive at the conclusion that any costs associated with terminating VNXX-routed ISP-bound traffic should be recovered from ISPs and their customers.¹⁰⁶

In view of the fact that Level 3 is not eligible for terminating compensation under the terms of the *ISP Remand Order* and the continuing uncertainty regarding FCC policy pertaining to the treatment of VNXX-routed ISP-bound traffic, the Commission should establish a compensation rate of zero cents per minute for VNXX-routed ISP-bound traffic terminated by Level 3. This rate should be subject to true-up based upon the terminating compensation rate established by the FCC for VNXX-routed ISP-bound traffic in its *Inter-carrier Compensation* proceeding. If, for some reason, the FCC fails to act upon this issue, the parties should petition the FCC for resolution of the matter.

¹⁰⁴ Qwest Reply Br. at 22. See also, Qwest Exhibit 21, Brotherson/16-17; Qwest Exhibit 30, Fitzsimmons/2-13.

¹⁰⁵ *Global NAPs II* at 103.

¹⁰⁶ It is not essential that those costs be passed along to customers through per minute charges; other pricing structures exist. For example, an ISP could increase the monthly flat rate now charged for dial-up Internet service. Although Level 3 suggests that price increases will have a devastating effect on dial-up Internet service, there is no evidence in the record to substantiate that assertion.

9. **Summary – VNXX Issues.** For the reasons set forth above, I find that:

1. The Commission should grant a limited exception to its existing ban on VNXX arrangements and permit Level 3 to provide VNXX numbering assignments to ISPs subject to the conditions set forth above;

2. The Commission should approve a compensation rate of zero cents per minute for terminating VNXX-routed ISP-bound traffic, subject to true-up, as discussed above;

3. Qwest’s proposed language for Section 4 (Issue 3B) and Section 7.3.6.1 (Issue 3C) of the ICA is adopted;

4. Level 3’s proposed language for Sections 7.1.1.3 and 7.1.1.4 (Issue 1A), Section 7.3.6.3 (Issue 3A), and Section 4 (Issue 3B) is not adopted; and

5. The remaining sections of the ICA relating to VNXX traffic shall be revised as necessary in accordance with this decision.

Issue 2 – Trunking Arrangements

Issue 2 deals with Level 3’s request to combine interexchange traffic with local traffic on the interconnection trunks established under the ICA.¹⁰⁷ Level 3 seeks “to use its interconnection network to terminate long distance traffic, in addition to using it for the Internet and VoIP traffic that is exchanged over that network today.”¹⁰⁸ It argues that combining all traffic types on the same interconnection trunks is more efficient. Qwest does not object to combining all traffic types on the same interconnection trunks so long as they are FGD interconnection trunks. It maintains that FGD interconnection trunks are necessary so that Qwest and carriers who depend upon Qwest for records can properly record and bill switched access charges applicable to interexchange traffic.¹⁰⁹ Level 3 rejects Qwest’s position and seeks to deliver switched access traffic to Qwest over LIS trunks.¹¹⁰

¹⁰⁷ Issue 2A involves Section 7.2.2.9.3.1 of the ICA. Issue 2B involves Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1 of the ICA.

¹⁰⁸ Level 3 Reply Br. at 10.

¹⁰⁹ Qwest Exhibit 23, Easton/37.

¹¹⁰ Level 3’s proposed Section 7.2.2.9.3.2 (Issue 2B) would allow Level 3 to combine all traffic types on LIS interconnection trunks. Level 3’s proposed Section 7.2.2.9.3.1 (Issue 2A) purports to adjust the rates for the LIS interconnection trunks so that Level 3 would pay LIS rates to the extent the interconnection trunks carry local traffic and tariffed rates to the extent the trunks carry intraLATA and/or interLATA traffic. Joint Exhibit 1 at 21- 24.

Level 3 advances several arguments in support of its position. First, it contends that Qwest wants the parties to establish separate trunk groups for switched access traffic and other traffic. It maintains that using separate trunk groups will force the parties to forgo the substantial network efficiencies associated with using large trunk groups between switches and will cost millions of dollars per month.¹¹¹ According to Level 3, building separate trunk groups for different types of traffic will “force Level 3 to order, build and provision additional trunk groups to each Qwest tandem and, over time, to each end office in Oregon,” resulting in a “needless duplication of both transport and switch facilities” and a degradation in service.¹¹²

Second, Level 3 maintains that Section 251(c)(2) of the Act requires Qwest to accommodate efficient interconnection by configuring its LIS trunks to handle all types of traffic, including switched access traffic. Specifically, it states that “[i]f Qwest has failed to properly configure its LIS trunks – again, the type of trunks it has supposedly set up for interconnection under the Act – to handle access traffic, there is no possible reason to penalize *Level 3* for Qwest’s plain failure to meet its legal obligations.”¹¹³

Third, Level 3 points out that it has been using single, combined trunking arrangements with Verizon in Oregon for over a year. It has also entered into similar arrangements with SBC and BellSouth in several other states without experiencing any problems. Pursuant to FCC Rule 47 C.F.R. 305(c) and (d), the existence of these trunking arrangements create a presumption that it is technically feasible for Qwest to enter into the same arrangements. Level 3 claims that the billing and recording concerns raised by Qwest are insufficient to overcome the presumption.

Level 3 maintains that there are a number of straightforward solutions that resolve the technical concerns raised by Qwest with billing and recording traffic and at the same time avoid the inefficiencies associated with separate trunk groups. It argues that Qwest’s billing concerns can be resolved by using “factors” to allocate traffic exchanged over a combined trunk group into different billing categories. Using standard industry practices, Level 3 is able to calculate and report the Percent Local Usage (PLU) and Percent Interstate Usage (PIU) applicable to the traffic exchanged between the parties. This is the approach currently used by Level 3 with Verizon, SBC, and Bellsouth.¹¹⁴

¹¹¹ Level 3 Op. Br. at 38.

¹¹² *Id.*, Level 3 Exhibit 300, Greene (Ducloo)/14-19.

¹¹³ Level 3 Op. Br. at 39-40. Level 3 also reads paragraph 191 of the *Local Competition Order*, quoted above, as compelling the conclusion that “access traffic and ‘Section 251(c)(2)’ traffic may be combined on the same trunks.” Level 3 Reply Br. at 13.

¹¹⁴ Level 3 notes that Qwest used the same process with AT&T when AT&T’s CLEC affiliates began carrying local traffic and wanted it to be combined with long distance traffic on FGD trunks. Level 3 Op. Br. at 40.

Level 3 asserts that its factor proposal will actually save Qwest money by eliminating the need to review detailed records. Qwest currently employs several people to review exceptions to IXC bills and to re-run bills when the billing systems provide incorrect data. If the parties can agree upon reliable and verifiable factors, Level 3 maintains that there is no need for the mechanized billing that Qwest prefers.

As a second alternative, Level 3 argues that Qwest could provide LIS trunks with the same billing capability as FGD trunks by reprogramming its switches to treat LIS trunks as FGD trunks for purposes of recording information. This could be done by simply “turning on” the correct feature in the switch and in the recording equipment. No software or hardware development would be required.¹¹⁵ Level 3 maintains that the reprogramming costs cited by Qwest are insignificant compared to the amount it will cost Level 3 every month to comply with Qwest’s plan.¹¹⁶

A third option would be for Level 3 to provide Qwest with call detail records (CDRs) covering the traffic exchanged by the parties. Level 3 states that the Ordering and Billing Forum of the Alliance for Telecommunications Industry Solutions (ATIS) has developed an industry standard governing how carriers should exchange CDRs. In the case of switched access, Form 110101 provides all of the information required to measure and rate a call.¹¹⁷ Level 3 is willing to provide these records to Qwest to pass along to its Jointly Provided Switched Access (JPSA) and wholesale customers who require detailed call information.

Level 3 discounts Qwest’s concern that it will encounter difficulty with IXCs and other CLECs that expect to receive recording data from the Qwest tandem switch when an IXC terminates traffic to those carriers through Qwest’s network. To get around the problem, Level 3 agrees that it will not send toll traffic to Qwest end office switches that do not terminate to Qwest end users or UNE/resale customers. Section 7.2.2.3.5 of the ICA – referred to as the “transit limitation” –, states that Level 3 will terminate traffic only to Qwest; no third party carriers would be involved.¹¹⁸

¹¹⁵ Except for their recording ability, FGD trunks and LIS trunks are functionally identical. Tr. Vol. I at 146. FGD trunks, however, are priced higher than LIS trunks. Level 3 claims that LIS trunks could be enabled with FGD recording ability by simply changing the designation on the switch to which the trunk is attached, and could accurately reflect the lower LIS trunk price by simple ratios on the billing spreadsheet. Level 3 Op. Br. at 40-41.

¹¹⁶ In this context, Level 3 also argues that Qwest’s proposal violates Section 251(c)(2) because it seeks to impose upon Level 3 inefficient interconnection terms and conditions that are neither “just” nor “reasonable.” *Id.* at 41, fn. 127.

¹¹⁷ According to Level 3, the information includes originating and terminating numbers, the time and duration of the call, and whether or not the call was delivered using an ESP. Level 3 Op. Br. at 42.

¹¹⁸*Id.*, Level 3 Exhibit 108.

Level 3 argues that its proposed trunking arrangements will also produce other benefits. Currently, much of Level 3's capacity is idle during the day when people are at work and not using the Internet. Dial-up Internet usage is also declining as people gravitate to broadband. Level 3 wants to make better use of its network by using this available capacity to terminate long distance calls. It anticipates that it will terminate an increased amount of IXC traffic as the telecommunications industry continues to consolidate.

Qwest does not oppose combining all types of traffic on a single trunk group, but insists that only FGD trunks should be used for this purpose. It argues that its proposal is superior for three reasons. First, it allows Qwest to continue using its mechanized systems for recording and billing switched access traffic. Allowing Level 3 to combine switched access traffic on LIS trunks would effectively disable the systems that Qwest and carriers who depend upon records from Qwest currently use to bill switched access.¹¹⁹

Additionally, Qwest states that it would incur significant additional costs to implement Level 3's factors system.¹²⁰ Qwest argues that its existing mechanized systems use actual traffic data and are therefore clearly superior to a manual system that relies upon past data to estimate current volumes of switched access traffic. Moreover, if Level 3's plans to increase its volume of interexchange traffic materialize, its factors method will consistently underestimate the amount of interexchange traffic because it will be based on data from prior periods when volumes were less.¹²¹

Qwest discounts Level 3's contention that other ILECs have agreed to use a factors system, noting that Level 3 made significant concessions, such as reducing the rate charged for ISP-bound traffic and capping the number of ISP-bound minutes, in order to obtain agreement on the factors proposal.¹²² Furthermore, Qwest notes that Level 3 entered into these agreements at a time when Level 3 claimed it would not be carrying significant amounts of interexchange traffic.¹²³ That situation changed with Level 3's recent acquisition of WilTel, a major interexchange carrier, and Level 3's

¹¹⁹ See, e.g., Qwest Exhibit 23, Easton/39-40; Tr. Vol. II at 104.

¹²⁰ Tr. Vol. II at 101-02.

¹²¹ *Id.*

¹²² Qwest Exhibit 23, Easton/42-44; Qwest Exhibit 25, §7.2. Qwest also emphasizes that the carriers that have entered into factor agreements with Level 3 may not be similarly situated to Qwest. Qwest Exhibit 38, Linse/5.

¹²³ Level 3 Exhibit 500, Greene/16.

announcement that it intends to significantly increase the amount of interexchange traffic that it carries.¹²⁴

Second, Qwest maintains that Level 3's factors proposal would not allow Qwest to prepare records for wholesale customers who purchase Qwest's Platform Plus (QPP™) product.¹²⁵ As part of the QPP™ offering, Qwest provides switched access billing records that allow CLECs to bill for switched access related to their QPP™ lines. If Level 3 is allowed to send switched access traffic over LIS trunks, Qwest will be unable to provide these records, and CLECs using the service would therefore be unable to bill for switched access. There are approximately 103,000 QPP™ lines in Oregon.¹²⁶

Third, Qwest asserts that Level 3's proposal would not allow Qwest to provide industry-standard jointly provided switched access records in circumstances in which Qwest and a CLEC or an Independent Telephone Company jointly provide switched access to Level 3.¹²⁷ Today, these records are produced mechanically, using the information recorded on FGD interconnection trunks. If Qwest does not record this traffic as FGD, neither Qwest nor the collaborating CLEC or LEC can bill the IXC that originated the call.¹²⁸

Qwest maintains that Level 3's proposed method of resolving this problem – the transit limitation set forth in Section 7.2.2.3.5 – is not an adequate solution. Under this section, “Level 3 agrees to route over [LIS] trunks only such IntraLATA Toll Traffic, InterLATA Traffic and VoIP traffic that would route to NPA-NXX codes homed to Qwest switches.” However, Qwest explains that the proposed transit limitation would be difficult for Qwest to enforce without FGD recording capabilities. Moreover, even if Level 3 fully complied with Section 7.2.2.3.5, it would not resolve the problem because other carriers who depend upon records from Qwest have switches that are homed to Qwest's tandems. Furthermore, traffic destined for customers who have ported their numbers from Qwest to another carrier would also be sent to Qwest's switches. Thus, even under Level 3's proposed language, Level 3 would be permitted to send switched access traffic through Qwest destined for customers of other carriers for which switched access records could not then be produced.¹²⁹

¹²⁴ Tr. Vol. I at 102. Qwest contrasts Level 3's current plans with its statements at the beginning of this case, where it claimed there would only be a small amount of switched access traffic. Qwest Reply Br. at 7, Level 3 Exhibit 500, Greene/15. Tr. Vol. I at 102.

¹²⁵ Qwest Exhibit 23, Easton/41.

¹²⁶ Tr. Vol. II at 117.

¹²⁷ Qwest Exhibit 23, Easton/39-40.

¹²⁸ *Id.* at 40; Qwest Exhibit 32, Linse/23-24.

¹²⁹ Qwest Exhibit 38, Linse/7-8.

In summary, Qwest stresses that, if traffic is to be combined, it should only be done on FGD. It contends that Level 3 objects to the use of FGD trunks because it does not want to pay tariffed rates for those trunks. Currently, all other carriers either segregate their switched access traffic onto separate trunks or combine traffic on FGD interconnection trunks.¹³⁰ Qwest asserts that Level 3 is not entitled to special treatment and should be required to pay the same tariffed rates as all other carriers.

Resolution – Issues 2A and 2B. The dispute surrounding trunking arrangements appears to have been complicated by initial confusion on Level 3's part regarding Qwest's contract proposal for trunking arrangements. In its opening brief, Level 3 argued that Qwest was requesting that different types of traffic be carried on separate trunk groups.¹³¹ In fact, Qwest agrees that all traffic may be combined on a single trunk as long as FGD trunk groups are used. Level 3's reply brief correctly reflects Qwest's position on the matter. That said, I agree with Qwest that switched access traffic should not be carried on LIS trunks for the following reasons:

1. Level 3's proposal does not accommodate the interests of Qwest's JPSA and Wholesale QPP customers who require detailed switched access records. The record indicates that Qwest has independent obligations to those customers to provide certain types of information necessary for billing purposes. It would be unreasonable to modify those arrangements as a result of decisions made in this docket. Indeed, because Level 3's proposal has implications for a wide range of telecommunications carriers and customers, the Commission should not attempt to resolve this issue without a more comprehensive understanding of the recordkeeping requirements of other telecommunications carriers and wholesale customers. In my view, the appropriate forum for such an inquiry would be an industry forum or an investigation initiated by the Commission.

2. Level 3 asserts that it can provide the call detail records – CDRs – required by Qwest using the Form 110101 developed by ATIS. But, the record does not contain sufficient information describing the manner in which this information would be provided or the costs associated with using this process. Nor does it address the specific data requirements of Qwest's JPSA and Wholesale QPP customers. Furthermore, Level 3 has not offered any contract language obligating it to provide CDRs to Qwest. While it is conceivable that CDRs might prove adequate, the Commission would be ill-advised to arrive at that conclusion without hearing from a broader range of interests.

3. Likewise, I am not persuaded that Level 3's proposed transit limitation is an adequate remedy to Qwest's concern over providing switched access records in circumstances in which Qwest and a CLEC or an Independent Telephone Company jointly provide switched access to Level 3. In addition to potential enforcement

¹³⁰ Qwest Exhibit 23, Easton/42.

¹³¹ Level 3 Op. Br. at 37-38.

problems, there is a significant possibility that the transit limitation would not be effective for the reasons cited by Qwest.¹³² Again, these are precisely the types of issues that are more properly addressed in an industry forum or a Commission-initiated investigation.¹³³

4. The same conclusion must prevail for the factors proposal offered by Level 3. The fact that Level 3 has voluntarily entered into such arrangements with other carriers is evidence that factors can be used. However, it does not address the fact that Qwest has obligated itself to provide certain detailed data to its customers. For a variety of reasons, those customers may be unwilling or unable to utilize data based on the use of factors. In addition, the record shows that Level 3 entered into factors agreements at a time when it terminated very little interexchange traffic. Level 3's acquisition of Wiltel changes that equation substantially and raises questions regarding the feasibility of using factors when a significant amount of interexchange traffic is terminated under the ICA.

5. Level 3's recommendation that Qwest simply reprogram its switches to provide LIS trunks with additional recording capability cannot be regarded as a serious proposal. Essentially, Level 3 is asking Qwest to convert its LIS trunks to FGD trunks without paying the cost associated with FGD.¹³⁴ Currently, all other carriers that combine traffic on Qwest trunks utilize FGD arrangements. By this proposal, Level 3 is basically asking that it receive preferential treatment by obtaining the same functionality at a lower price.

6. Qwest estimates that the cost of reprogramming its switches to accommodate Level 3's proposal will be roughly \$1 million. Level 3 questions this estimate and, in its reply brief, opines that the allocated cost for Oregon would only be a fraction of that amount.¹³⁵ Assuming Level 3 is correct, it does not acknowledge that Qwest will incur a significant uncompensated cost to modify its network for Level 3's sole benefit. It also disregards the FCC's holding that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit."¹³⁶

¹³² See, Qwest Exhibit 32, Linse/28-32; Qwest Exhibit 38, Linse/7-8.

¹³³ The Joint Matrix submitted by the parties also indicates that the dispute surrounding the transit limitation is a new issue. If, in fact, this issue was not set forth in Level 3's petition, it cannot be arbitrated by the Commission. See discussion below.

¹³⁴ Tr. Vol. II at 143-144.

¹³⁵ Level 3 suggests Qwest's Oregon-allocated cost would be \$100,000-\$150,000. Since the assertion was made for the first time in Level 3's reply brief, Qwest did not have an opportunity to respond. Level 3 Reply Br. at 12.

¹³⁶ *Local Competition Order* at ¶199.

7. Level 3 claim that it will cost “millions of dollars per month” to “comply with Qwest’s plan” is not supported by the record. In its opening brief, Level 3 argued that this cost resulted from inefficiencies associated with Qwest’s requirement that different types of traffic must be carried on separate trunk groups.¹³⁷ In its reply brief, Level 3 argued that the same cost resulted from combining traffic on FGD trunks.¹³⁸ In both instances Level 3 relies on Confidential Exhibit 712, but in fact, that exhibit supports neither contention. Instead, Exhibit 712 deals with an entirely different issue – the amount Level 3 would have to pay if *access charges* are assessed on the traffic carried by Level 3.¹³⁹

8. Contrary to Level 3’s claim, the position taken by Qwest does not violate Section 251(c)(2) of the Act. Qwest does not claim that Level 3’s proposal is technically infeasible. Instead, Qwest maintains – and I agree – that the proposal entails substantial billing and cost concerns that have not been adequately addressed by Level 3.¹⁴⁰ Thus, even if Level 3 is correct that Section 251(c)(2) and FCC Rules §51.305(b) and (c) create a presumption in support of combining traffic on LIS trunks, that presumption has been adequately rebutted by the evidence presented by Qwest.¹⁴¹

For the reasons set forth above, Qwest’s proposed contract language for Section 7.2.2.9.3.1 (Issue 2A) and Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1 (Issue 2B) is adopted.

¹³⁷ Level 3 Op. Br. at 37-38.

¹³⁸ Level 3 Reply Br. at 12.

¹³⁹ Page 1 of Confidential Exhibit 712 states, “[b]ased upon March 2006 traffic and existing network architecture, Commission adoption of Qwest’s interconnection proposals would result in Level 3 paying Qwest \$***** *in access charges* for that month versus Level 3 receiving \$***** in reciprocal compensation for the volume of traffic that Qwest sends to Level 3.” See, Level 3 Exhibit 712, page 1 of 2. (Emphasis added.)

¹⁴⁰ Level 3 also cites the *Local Competition Order* at ¶201 for the proposition that Qwest must make “some modification” to its facilities and equipment. As noted, the FCC contemplated that the CLEC would compensate the ILEC for such costs.

¹⁴¹ This discussion presumes that Level 3 offers telephone exchange service or exchange access. As discussed below, a carrier is not entitled to interconnection under Section 251(c)(2) at all if it interconnects solely for the purpose of originating or terminating interexchange traffic. See 47 C.F.R. §51.305(b), *Local Competition Order* at ¶191. Although Level 3 asserts that it offers telephone exchange and exchange access service, the record in this case focuses principally on the interexchange traffic handled by Level 3.

OTHER ISSUES

Issue 1A – Section 7.1.1. Level 3 proposes to add the language shown in bold to Section 7.1.1 of the ICA:

7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS/Local traffic), IntraLATA Toll carried solely by local exchange carriers and not by an IXC (IntraLATA LEC Toll), **IntraLATA Toll and InterLATA Traffic carried by an IXC for termination to a customer of Qwest.**, ISP-Bound traffic, and Jointly Provided Switched Access (InterLATA and IntraLATA traffic). Qwest will provide Interconnection at any Technically Feasible point within its network **consistent with Section 51.321 of the FCC rules and Applicable law.** Interconnection, which Qwest currently names "Local Interconnection Service" (LIS), is provided for the purpose of connecting End Office Switches to End Office Switches or End Office Switches to local or Access Tandem Switches for the exchange of Exchange Service (EAS/Local traffic); or End Office Switches to Access Tandem Switches for the exchange of Exchange Access (IntraLATA Toll carried solely by local exchange carriers) or Jointly Provided Switched Access traffic, **ISP-bound, VoIP, Exchange Service, and terminating IntraLATA Toll or interLATA Traffic carried by an IXC for termination to a customer of Qwest.** Qwest Tandem Switch to CLEC Tandem Switch connections will be provided where Technically Feasible. New or continued Qwest local Tandem Switch to Qwest Access Tandem Switch and Qwest Access Tandem Switch to Qwest Access Tandem Switch connections are not required where Qwest can demonstrate that such connections present a risk of Switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any Affiliate's End User Customers.

Qwest contends that the three additions to Section 7.1.1 proposed by Level 3 represent an unlawful attempt to expand Level 3's interconnection rights under Section 251(c) to encompass interexchange traffic delivered by Level 3 to Qwest. It contends that: (a) the first change purports to include "IntraLATA Toll and InterLATA Traffic carried by an IXC for termination to a customer of Qwest" among the types of traffic for which interconnection is governed by the ICA; (b) the second change attempts to extend the requirements of 47 C.F.R. §51.321, the FCC rule implementing

Section 251(c), to interexchange traffic; and (c) the third change seeks to expand interconnection under the ICA to include interexchange VoIP and ISP traffic.

Qwest further asserts that the rules applicable to local interconnection under Section 251(c) do not apply to interconnection for interexchange calls. Instead, interconnection for the exchange of long distance traffic is governed by Section 251(g) and Qwest's tariffs. Under Section 251(g), Qwest must provide interconnection to IXCs on a nondiscriminatory basis. Thus, Qwest is obligated to charge Level 3 the same tariffed recurring and nonrecurring rates for interconnection for interexchange calls that Qwest charges other IXCs. Otherwise, Level 3 would receive discriminatorily advantageous treatment in violation of the Act.

Level 3 responds that its proposed language is designed to prevent Qwest from blocking Internet traffic, VoIP traffic, or terminating access traffic on interconnection facilities. It emphasizes that Section 251(c)(2) requires that an incumbent must provide interconnection for the purpose of transmitting and routing telephone exchange traffic, exchange access traffic, or both. It further asserts that it is "affirmatively *entitled* to include terminating long distance traffic, as well as VoIP and Internet traffic, on its interconnection links with Qwest."¹⁴²

Level 3 rejects Qwest's reliance upon §251(g) of the Act. It states that §251(g) is merely a transitional provision to ensure that ILEC duties to provide access to long distance carriers and information service providers are not impaired. Moreover, since LEC to LEC interconnection duties did not exist prior to the Act, §251(g) has no bearing on the obligations between Qwest and Level 3.

Resolution. The dispute regarding Section 7.1.1 focuses on the scope of interconnection rights under Section 251(c)(2), particularly as it involves interexchange traffic. This issue was addressed at length in the FCC's *Local Compensation Order* at paragraphs 190-191:¹⁴³

190. We conclude that IXCs are telecommunications carriers under the 1996 Act, because they provide telecommunications services (*i.e.*, 'offer telecommunications for a fee directly to the public') by originating or terminating interexchange traffic. IXCs are permitted under the statute to obtain interconnection pursuant to section 251(c)(2) for the 'transmission and routing of telephone exchange service and exchange access.' Thus, all carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to

¹⁴² Level 3 Reply Br. at 6.

¹⁴³ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999).

section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (*i.e.*, non-interexchange calls).

191. We conclude, however, 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). Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers 'for the transmission and routing of telephone exchange service and exchange access.' A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only – for the purpose of providing interstate services only – fall within the scope of the phrase 'exchange access.' Such a would-be interconnector is not 'offering' access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel's position that IXCs are offering exchange access when they offer and provide exchange access as a part of long distance service. We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if it does not offer exchange access services to others. . . . (Footnotes omitted.)

I agree with Qwest that the first and third changes to Section 7.1.1 proposed by Level 3 could be interpreted to encompass interconnection that does not fall within the scope of Section 251(c)(2). Because of the potential for confusion, the proposed language should not be included in the ICA. To the extent that Level 3 encounters a situation where it believes Qwest has limited its interconnection rights under the Act, it may seek dispute resolution under the ICA.

The second change to Section 7.1.1 proposed by Level 3 would insert the words "consistent with Section 51.321 of the FCC rules and Applicable law." This

language is unnecessary as all actions taken by parties to the agreement must be consistent with applicable law.

Qwest's proposed language for Section 7.1.1 is adopted.

Issue 1B – Section 7.1.2. Level 3 proposes to add language to Section 7.1.2 requiring Qwest to provide interconnection “using OC-3 and/or higher speed optical facilities.” Qwest observes that it does not currently offer an optical facility connection because no carrier is currently using such connections. It points out that optical connections can be obtained through the ICA's bona fide request (BFR) process, whose purpose is to address unique requests.

Level 3 responds that the BFR process is “cumbersome.” It maintains that Section 251(c)(2) requires Qwest to allow Level 3 to interconnect using any technically feasible method, including optical interconnection.

Resolution. Qwest's proposed language for Section 7.1.2 is adopted for the following reasons:

1. Qwest does not claim that it is unwilling to provide OCn-level interconnection or that such interconnection is not technically feasible. Section 251(c)(2) is therefore not at issue.
2. The fact that Qwest does not currently offer OCn-level interconnection is significant because it means that the technical parameters and protocols for provisioning this service have not been determined. These details should be included in the ICA if Qwest is going to be obligated to offer OCn-level interconnection.
3. Level 3's contract language indicates that the parties will establish interconnection arrangements, including OCn-level interconnection, “through negotiations.” Given that Qwest does not currently offer OCn-level interconnection, it is very possible that issues relating to OCn-level interconnection can be resolved more expeditiously through the BFR process than through the open-ended negotiation process contemplated by Level 3's proposed language.¹⁴⁴

Issue 1D – Section 7.2.2.1.2.2. Level 3 proposes the following language (shown in bold) to this section:

Level 3 may purchase transport services from Qwest at TELRIC Rates, order private line or other facilities from Qwest's tariff or establish a POI via a third party,

¹⁴⁴ For example, Section 17.7 of the ICA requires Qwest to provide a quote and detailed specifications within 45 days of a BFR request.

including a third party that has leased the private line transport facility service from Qwest.

Qwest argues that the Commission should reject the proposed language because it could be interpreted to give Level 3 an unlimited right to purchase unbundled transport at TELRIC rates. Qwest states that its obligations under federal law to provide unbundled transport at TELRIC rates are set forth in the FCC's *Triennial Review Remand Order (TRRO)*.¹⁴⁵ Qwest also argues that Level 3's proposed language is unnecessary because it is already addressed in undisputed Section 7.1.2.1 of the ICA.

Level 3 responds that Qwest's reliance on the *TRRO* is "both wrong and beside the point." It states that Section 7.2.2.1.2.2:

relates to interconnection, not 'unbundled transport' or any other unbundled network element (UNE). Specifically, the section relates to the transport functionality needed for LIS trunks, which are used to exchange traffic under Sections 251(c)(2), 251(b)(5) and 251(a)(1). It has no application to UNEs, which is what the *Triennial Review Remand Order* was about.¹⁴⁶

Resolution. Ironically, Level 3's response demonstrates Qwest's point that the proposed language is subject to misinterpretation.¹⁴⁷ Moreover, the proposed language serves no useful purpose, as the respective rights of the parties are already prescribed by law. Level 3's proposed language for Section 7.2.2.1.2.2 is not adopted.

Issue 1F – Section 7.2.2.9.6. The purpose of Section 7.2.2.9.6 is to prevent the exhaustion of Qwest access tandems. It requires Level 3 to establish direct trunking to end offices when traffic volumes to those end offices reach certain levels. Direct end office trunking carries traffic past the access tandem so that ports are available on the tandem for other CLECs, IXC's, and Qwest.¹⁴⁸

Level 3 proposes to add language to Section 7.2.2.9.6 that appears to limit Qwest's ability to request direct trunking to circumstances where the request is "for purposes of network management and routing of traffic to or from the POI." Qwest

¹⁴⁵ Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C. Rcd. 2533, ¶5 (2005), *aff'd*, *Covad v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

¹⁴⁶ Level 3 Op. Br. at 9.

¹⁴⁷ See also, Qwest Exhibit 36, Easton/4.

¹⁴⁸ Qwest Exhibit 32, Linse/11-12, 15-17.

asserts that Level 3 has never explained the proposed limitation and maintains that it “makes no sense in the context of Section 7.2.2.9.6.”¹⁴⁹

This issue was not addressed in Level 3’s testimony or opening brief. In its reply brief, Level 3 agrees to withdraw its proposed language if its compromise proposal is adopted. If not, Level 3 “submits that its proposed language for Section 7.2.2.9.6 is a fair and reasonable clarification of the basis on which Qwest may appropriately request the establishment of a DEOT to a particular end office, and should be included in the contract.”¹⁵⁰

Resolution. While Level 3’s proposed language appears reasonable on its face, it is not clear that it encompasses all of the possible circumstances that might exist for establishing direct trunking. Absent further explanation, Level 3’s proposed language is not adopted.

Issue 1G – 7.3.1.1.3 and 7.3.1.1.3.1; Issue 1H – Sections 7.3.2.2 and 7.3.2.2.1; and Issue 1A – Section 7.1.1.4. Issues 1G and 1H address the relative use factor (RUF). Qwest points out that the RUF is designed to comply with the FCC’s *Local Competition Order*, which provides, first, that CLECs compensate ILECs for the costs they incur to provide interconnection,¹⁵¹ and, second, that “[t]he amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility.”¹⁵² The RUF for entrance facilities (Issue 1G) is contained in Qwest’s proposed Sections 7.3.1.1.3 and 7.3.1.1.3.1. The RUF for direct trunk transport (Issue 1H) is set forth in Qwest’s proposed Sections 7.3.2.2 and 7.3.2.2.1.

The RUF proposed by Qwest allocates only the cost of facilities used to provision exchange service (EAS/local) traffic. Qwest’s proposed language provides that “the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic.” Since the vast majority of traffic currently exchanged between Qwest and Level 3 is one-way, VNXX-routed ISP-bound traffic terminated by Level 3, it follows that Level 3 would be responsible for the cost of provisioning the facilities used to exchange that traffic.¹⁵³

Level 3 does not propose a RUF or other methodology for apportioning costs of shared interconnection facilities.¹⁵⁴ Instead, it proposes Sections 7.1.1.4

¹⁴⁹ *Id.*; Qwest Op. Br. at 5.

¹⁵⁰ Level 3 Reply Br. at 9.

¹⁵¹ *Local Competition Order* at ¶¶199-200; Qwest Exhibit 23, Easton/15.

¹⁵² *Local Competition Order* at ¶1062.

¹⁵³ Tr. Vol. 1 at 79-80. Again, this is interexchange traffic originated on Qwest’s network and destined for ISPs served by Level 3.

¹⁵⁴ Qwest Exhibit 36, Easton/3.

(Issue 1A), 7.3.1.1.3 (Issue 1G), and 7.3.2.2 (Issue 1H), which make Qwest responsible for all costs on its side of the POI, except for “Transport Assumed IP.”¹⁵⁵ However, Level 3 is willing to pay those transport costs only if its overall compromise is adopted.¹⁵⁶ If the Commission does not adopt the compromise, Level 3 insists that Qwest is legally responsible to pay costs associated with transporting IP traffic, including VNXX routed ISP-bound traffic, to Level 3’s facilities. Level 3 argues that “the *ISP Remand Order* and the *Intercarrier Compensation Further Notice*, FCC Rules §§51.703(b) and 51.709(b) and the *Local Competition Order* all compel the conclusion that the originating carrier must pay to transport traffic – including Internet traffic – to a point of interconnection (‘POI’) between the two carriers’ networks.”¹⁵⁷

Resolution. Qwest’s proposed language for Issues 1G and 1H require that Level 3 bear financial responsibility for transporting Internet traffic on Qwest-provided Direct Trunked Transport and Entrance Facilities on Qwest’s side of the POI. This approach is consistent with the Commission’s prior arbitration decisions. In the 2001 Level 3/Qwest arbitration, docket ARB 332, the Commission ruled that Internet traffic should not be attributed to the originating carrier when calculating the RUF:

The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier.¹⁵⁸

The ARB 332 decision was affirmed by the Oregon federal district court in *Level 3 Communications LLC v. Public Utility Commission of Oregon, et al.*¹⁵⁹ The Commission reaffirmed the ARB 332 decision in the 2004 AT&T/Qwest arbitration proceeding (ARB 527)¹⁶⁰ and again last year in the Qwest/Universal arbitration docket (ARB 671).¹⁶¹

¹⁵⁵ See fn. 50, *supra*.

¹⁵⁶ Level 3 Reply Br. at 10.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Re Petition of Level 3 for Arbitration*, docket ARB 332, Order No. 01-809 at 14 (September 13, 2001).

¹⁵⁹ *Level 3 Communications LLC v. Public Utility Commission of Oregon, et al.*, CV 01-1818-PA, mimeo at 6-7 (D. OR, November 25, 2002).

¹⁶⁰ *Re Petition of AT&T for Arbitration*, docket ARB 527, Order No. 04-262, Appendix A at 13 (May 17, 2004).

For reasons already discussed, Level 3's position does not find support in the FCC's rules or in the case law interpreting those rules. Fundamentally, Level 3 fails to recognize that the FCC's Part 51 reciprocal compensation rules apply only to the transport and termination of "telecommunications traffic."¹⁶² Both the FCC and the Courts have held that ISP-bound traffic is "information access," and is therefore excluded from the Part 51 rules, including Rules 703(b) and 709(b).¹⁶³ Furthermore, the Ninth Circuit has specifically held that *VNXX-routed ISP-bound traffic* is excluded from Rule 703(b) because it is interexchange traffic.¹⁶⁴

Qwest's proposed language for Sections 7.3.1.1.3 and 7.3.1.1.3.1 (Issue 1G) and 7.3.2.2 and 7.3.2.2.1 (Issue 1H) are adopted.

Issue 1J – Section 7.3.3.2. Qwest's Section 7.3.3.2 requires Level 3 to compensate Qwest for the nonrecurring costs (NRCs) that Qwest incurs to rearrange LIS trunks for Level 3. Qwest emphasizes that the FCC has held "to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers."¹⁶⁵

Level 3, on the other hand, proposes language that would bar Qwest from recovering NRCs for rearranging LIS trunk facilities. It asserts that "rearrangement costs are the responsibility for the carrier that has the cost responsibility for its side of the POI."¹⁶⁶

Resolution. As Qwest points out, the Commission has consistently held that an incumbent LEC may recover nonrecurring costs incurred to provision

¹⁶¹ *Re Petition of Universal Telecom for Arbitration*, docket ARB 671, Order No. 06-190 at 7-9, Appendix A at 6-11 (April 19, 2006).

¹⁶² See 47 C.F.R. §51.701(a) and (b); *Level 3 Communications v. Colorado PUC*, 300 F.Supp.2d 1069, 1075-81 (D. Colo., 2003). See also Order No. 05-1219 at 6-7.

¹⁶³ *ISP Remand Order* at ¶¶30, 39, 42 (ISP-bound traffic is "information access"); *Peevey* at 1146-1147, fn. 1 ("[t]he ISP Remand Order remains binding."); *Id.* at 1157 ("As §701(b)(i) provides, §703(b) does not apply to 'telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.'")

¹⁶⁴ *Peevey* at 1157-1159 (VNXX is interexchange traffic.). ("[A]s the CPUC and the district court recognized, the FCC has expressly excluded interexchange traffic from the reach of section 703(b)"). As noted above, both the First and Second Circuit Courts have also concluded that VNXX is interexchange traffic.

¹⁶⁵ *Local Competition Order* at ¶200.

¹⁶⁶ Level 3 Exhibit 801, Greene/8.

interconnection facilities.¹⁶⁷ The same rationale applies to nonrecurring costs incurred by an ILEC to rearrange such facilities. Level 3's position, as discussed above, is premised on an incorrect interpretation of the FCC Rule §51.703(b). Qwest's proposed language for Section 7.3.3.2 is adopted.

Issue 7 – Section 4. Level 3 proposes that the ICA include a definition of “telephone exchange service” as that term is defined in the Act. Alternatively, Qwest proposes that the ICA include a definition of “basic exchange telecommunications service.” This disputed issue was not discussed in the testimony filed by the parties. The joint matrix indicates that the matter would be addressed in the post-hearing briefs, but it was not.

Resolution. Level 3's proposed definition of “telephone exchange service” duplicates the definition in the Act and is therefore unnecessary. Qwest's definition of “basic exchange telecommunications service” mirrors the definition approved by the Commission for inclusion in Qwest's Statement of Generally Available Terms and Conditions filed pursuant to 47 C.F.R. §252(f). Qwest's proposed language is adopted.

Issue 18 – Sections 7.3.9, 7.3.9.1, 7.3.9.1.2, 7.3.9.1.3, 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. These contract sections relate to the jurisdictional factor proposal offered by Level 3 in conjunction with its request to combine all types of traffic on LIS trunks.

Resolution. Since Level 3's factor proposal has not been adopted, these contract sections should not be included in the ICA. As Qwest points out, factors are not required if switched access and other types of traffic are combined on FGD trunks. Qwest's position on this issue is adopted.

Issue 20 – Section 7.3.8. This issue relates to the signaling information that the parties provide to each other. The dispute concerns the ability to provide Calling Party Number (CPN) information for IP-originated, or VoIP traffic. Since this decision defers all VoIP-related issues to the FCC, it is unnecessary to resolve this dispute.

New Issue – Sections 7.2.2.6.1.1, 7.2.2.6.1.2, 7.2.2.6.1.3. In these sections, Level 3 proposes language relating to the provision of SS7 signaling information via Quad Links. Level 3's proposals allow it to provide a single set of Quad Links and also to establish a meet point between the two signaling networks. In its post-hearing brief, Level 3 emphasizes that it is important for the parties to agree upon how to connect their signaling networks.

¹⁶⁷ See, Docket IC 8/IC 9, Order No. 05-874 at 16-22; docket ARB 671, Order No. 06-190 at 9-10. The Oregon federal district court has also upheld contract language requiring payment of NRCs for the installation of interconnection facilities. *Universal* at 13-14.

Qwest responds that the three proposed sections were not included in Level 3's petition, but rather were submitted for the first time on June 26, 2006, in Level 3's testimony. Qwest contends that the proposed sections are unnecessary because Qwest's tariffs do not require more than a single set of Quad Links. It further asserts that "meet point signaling" is a new concept that Level 3 did not discuss in its testimony. Qwest also recommends that the Commission reject Section 7.2.2.6.1.1 because it duplicates the agreed-to language in Section 7.2.2.6.1. It further asserts that Sections 7.2.2.6.1.2 and 7.2.2.6.1.3 should be rejected because they are ambiguous and could be interpreted to obligate Qwest to provide signaling that is not required by FCC regulations or Qwest's tariffs.

Resolution. The Commission is without authority to arbitrate this matter because the dispute over the Quad Links issue is not set forth in Level 3's petition. Under Section 251(b)(4) of the Act, a state commission must limit its consideration to disputed issues raised in the petition and response. Even if the Commission were able to consider this dispute, however, there is not enough evidence in the record to resolve the matter. For example, Level 3's testimony does not address how its proposed meet point signaling arrangements should be established and provisioned.¹⁶⁸

ARBITRATOR'S DECISION

1. The interconnection agreement between Level 3 and Qwest shall incorporate the contract language adopted in this decision.
2. The interconnection agreement between Level 3 and Qwest shall include revised contract language incorporating the treatment of VNXX traffic set forth in this decision.
3. As provided in OAR 860-016-0030, any person may file written comments within 10 days of the date this arbitration decision is served. The Commission will accept or reject this decision within 30 days of the date it is served.

Dated at Salem, Oregon, this 13th day of February, 2007.

Samuel J. Petrillo
Arbitrator

¹⁶⁸ As Qwest Witness Linse observes, the proposed contract language, including the proposed meet point signaling requirement, is subject to different interpretations. Qwest Exhibit 32, Linse/41-43.