Decision No. C07-0184

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 05B-210T

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS, AND CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION.

INITIAL COMMISSION DECISION

Mailed Date: March 6, 2007
Adopted Date: February 22, 2007

Appearances:

Richard Thayer, Esq., Victoria A. Mandel, Esq., and Erik Cecil, Esq., Broomfield, Colorado, for Level 3 Communications LLC; and

Thomas M. Dethlefs, Esq., Denver, Colorado, and Ted D. Smith, Esq., Salt Lake City, Utah, for Qwest Corporation.

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I. BY THE COMMISSION

A. Statement of the Case

1. On May 13, 2005, Level 3 Communications, LLC (Level 3) filed a Notice of Petition for Arbitration (Petition) with the Colorado Public Utilities Commission (Commission) pursuant to 4 *Code of Colorado Regulations* 723-46 and § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. The Petition requests that we arbitrate unresolved issues in a successor Interconnection Agreement (ICA) with Qwest Corporation (Qwest) pursuant to § 252(b) of the Telecommunications Act of 1996 (Act), 47 U.S.C. § 252(b).[1]

2. Public notice of the Petition was given on May 13, 2005. Qwest filed its Response to the Petition on June 7, 2005.

[1] The Commission has approved two prior ICAs between Level 3 and Qwest. *See,* Decision Nos. C99-653 and C01-312. It has also approved three amendments to the currently effective ICA. *See,* Decision Nos. C02-950, C03-0371 and C05-0552.

3. We referred the matter to an Administrative Law Judge (ALJ) by Minute Entry for hearing and for an Initial Commission Decision pursuant to § 40-6-109(6), C.R.S. *See,* Decision No. C05-0634. Pursuant to the provisions of that statute, we find that due and timely execution of our functions requires that the recommended decision of the ALJ be omitted and that we render an initial decision.

4. On June 7, 2005, the ALJ approved an initial procedural schedule proposed by the parties which, among other things, established deadlines for the submission of prepared testimony and set the matter for hearing on August 16 through 19, 2005. *See,* Decision No. R05-0684-I. The procedural schedule was modified on several occasions at the request of the parties with the final procedural schedule calling for the hearing to be conducted on January 24 through 27, 2006. *See,* Decision Nos. R05-0946-I, R05-1002-I, R05-1276-I and R06-0014-I. Level 3 and Qwest expressly waived the nine-month arbitration timeframe contained in § 252(b)(4)(C) of the Act in order to facilitate the extended deadlines established by these procedural orders.[2]

5. The hearing commenced as scheduled on January 24, 2006. The parties appeared through their respective counsel. Initially, several preliminary matters were resolved. A Verified Motion Requesting *Pro Hac Vice* Admission submitted by Qwest's out-of-state counsel Ted D. Smith was granted. Various notices submitted by Level 3 relating to the amendment of Section 7.2.2.6.1 of the ICA, the submission of omitted exhibits to the pre-filed testimony of Rogier R. Ducloo, the submission of omitted exhibits to the pre-filed testimony of Timothy J. Gates, and

[2] The Petition indicates that Qwest received Level 3's request to negotiate the terms of the subject ICA on December 4, 2004. Therefore, but for the parties' waiver of § 252(b)(4)(C), the nine-month decision deadline would have expired on August 31, 2005. The waivers agreed to by the parties extended this deadline to October 31, 2005 (Decision No. R05-0684-I), then to February 10, 2006 (Decision No. R05-1002-I), and then to April 7, 2006 (Decision No. R05-1276-I). At the conclusion of the hearing, the parties agreed to waive the decision deadline indefinitely. The Commission has previously approved this waiver procedure in order to extend the decision deadline imposed by § 252(b)(4)(C) of the Act. *See,* Decision Nos. C01-312 and R00-487-I.

the adoption by Mack D. Greene of the pre-filed testimony submitted by Rogier R. Ducloo and Ron Vidal were acknowledged and approved without objection by Qwest.

6. Oral opening statements were presented by the parties' counsel. During the course of the hearing Level 3 presented testimony from two witnesses, Timothy J. Gates, a consultant with QSI Consulting, and Mack D. Greene, Level 3's Director of Interconnection Services.[3] Qwest presented testimony from three witnesses, Larry R. Brotherson, Qwest's Director-Wholesale Advocacy, William R. Easton, Qwest's Director-Wholesale Advocacy, and Philip Linse, Qwest's Director-Technical Regulatory. Exhibits 1A, 2A, 3, 4, and 6 through 42 were marked for identification, offered and admitted into evidence. Exhibit 5 was withdrawn and Exhibit 43 was rejected.

7. The procedural schedule in effect at the conclusion of the hearing called for the parties to submit initial post-hearing statements of position on February 10, 2006, and responsive statements of position on February 17, 2006. These deadlines were subsequently extended to March 8 and March 28, 2006. *See,* Decision Nos. R06-0157-I and R06-0261-I.[4] The parties filed statements of position in accordance with this amended schedule.

8. On April 5, 2006, the parties requested permission to submit a revised Joint Issues Matrix correcting certain inaccuracies contained in the Joint Issues Matrix previously filed on January 6, 2006. That request was granted and a revised Joint Issues Matrix (Issues Matrix) was filed on April 5, 2006. *See,* Decision No. R06-0369-I.

[3] As indicated previously, Mr. Greene adopted the pre-filed testimony submitted in this matter by Level 3 witnesses Rogier R. Ducloo and Ron Vidal (Exhibits 7, 8 and 9).

[4] Decision No. R06-0261-I also granted the parties' motions to waive that provision of the Commission's procedural rules limiting the length of their statements of position to 30 pages.

9. On December 22, 2006, in response to an email sent by ALJ Isley requesting an update as to "whether there has been a resolution, in whole or in part, of any of the issues summarized in the revised Joint Issues Matrix," Level 3 filed a Motion to Reopen the Record. Qwest opposed this Motion in its responsive filing on January 5, 2007. Level 3's Motion was denied on January 16, 2007. *See* Decision No. R07-0047-I.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

10. Under the Act, parties seeking to implement an interconnection agreement relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntary resolve interconnection issues. This Commission's authority to arbitrate issues arises only arises when the parties are unable to resolve them on their own. Level 3 and Qwest began negotiating the terms of the ICA in December 2004 and such negotiations resulted in the resolution of several issues. However, they now request that we resolve the outstanding issues that are summarized in the Issues Matrix.

11. In arbitrating an interconnection agreement, the Commission seeks to arbitrate an agreement consistent with the provisions of § 251 of the Act. Applying these criteria, the Commission will order the following resolution to the issues in dispute:[5]

[5] The Petition identifies Issues 1 through 4 as "Tier I Issues." Level 3 describes these as the most fundamental interconnection issues to be resolved. The Issues Matrix then divides some of the Tier I Issues into sub-issues. For example, Issue 1 is divided into sub-issues A through J. The Petition originally identified eighteen "Tier II Issues." These were described as derivative of the Tier I Issues since a Commission determination to adopt a particular party's contractual language relating to a Tier I issue would likely result in its adoption of the same party's language for the corresponding Tier II issue. Original Tier II Issues 6 and 9 were resolved after the Petition was filed and, as a result, the Issues Matrix now identifies sixteen unresolved Tier II Issues.

TIER I ISSUES.

A. Issue 1 (Sections 7.1.1, 7.1.1.1, 7.1.1.2, 7.1.1.3, 7.1.1.4, 7.1.1.4.1, 7.1.2, 7.2.2.1.1, 7.2.2.1.2.2, 7.2.2.1.4, 7.2.2.6.1.1, 7.2.2.6.1.2, 7.2.2.6.1.3, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, 7.3.2.2.1, 7.2.2.9.6, 7.3.3.1 and 7.3.3.2).[6]

Level 3's Statement of the Issue: Whether Level 3 may exchange traffic at a single point of interconnection (SPOI) within a LATA in a manner whereby each party bears the cost of interconnection on their side of the point of interconnection.[7]

Qwest's Statement of the Issue: Whether Qwest is entitled to be compensated by Level 3 for costs incurred by Qwest to provide the use of its network in offering interconnection services Level 3 has ordered.

Additional Issue Raised by Qwest: Should the Commission order operation verification audits related to VoIP traffic and require CLEC certification of VoIP traffic prior to the use of Local Interconnection Services in Connection with VoIP traffic?

(1) Level 3's Position.

12. Level 3 contends that § 251(c)(2) of the Act permits it to establish a single Point of Interconnection (POI) at any technically feasible point on Qwest's network for the exchange of all traffic, including interexchange traffic.[8] *See also,* 47 C.F.R. § 51.100. It also contends that this section of the Act requires each carrier to bear its own costs to bring its originated traffic to

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[6] The Section numbers referred to in the parenthetical following each issue relate to the specific parts of the ICA wherein the parties propose different contractual language. The language proposed by each party is set forth in the Joint Issues Matrix.

[7] The statements of each party relating to the issues to be resolved are taken from the Petition and the Response. The parties' statements of the issues contained in the Issues Matrix may be somewhat different.

[8] Section 251(c)(2) provides as follows:

> In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:
>
> (2) Interconnection
>
> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network.

the POI. *See also,* 47 C.F.R. § 51.703(b). It points to various FCC or court decisions or orders which it contends apply § 251(c)(2) for the purpose of preventing ILECs from increasing a CLEC's costs by requiring multiple POIs, or by ILEC efforts to shift costs to CLECs in exchange for obtaining the right to establish POIs.[9]

13. Level 3 contends that the ICA language proposed by Qwest relating to Issue 1 does not provide any simple or direct statement that it may, in fact, use a single POI per LATA to exchange traffic. It believes that Qwest's language may require it to establish multiple POIs within a LATA, or, at a minimum, that Qwest may retain the right to claim that more than one POI is needed in some circumstances. It suggests that the rationale behind Qwest's proposed language is an illegitimate desire to impose unreasonably discriminatory costs and operational inefficiencies on Level 3.

14. Level 3 points to Qwest's proposed relative use factor (RUF) formula as a key aspect of its effort to undermine the use of a POI as a financial demarcation point between the two networks.[10] It contends that the purpose and effect of Qwest's proposed RUF is to shift to Level 3 some or all of the costs that Qwest incurs in bringing Qwest-originated traffic to the POI.

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[9] *See, MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3rd Cir. 2001); *US West Communications, Inc. v. Jennings*, 304 F.3d 950, 960-961 (9th Cir. 2002); *In the Matter of Developing a Unified Intercarrier Compensation Mechanism, Notice of Proposed Rulemaking*, CC Docket No. 01-92 (rel. April 27, 2001) at ¶ 112; *Texas Qwest 271 Proceeding*; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78; *Notice of Proposed Rulemaking*, CC Docket No. 01-92 (released April 27, 2001) at ¶ 112; *FCC Memorandum Opinion and Order*, CC Docket Nos. 00-218, 00-249, 00-251; Released: July 17, 2002; at ¶52.

[10] A RUF is used to apportion transport costs related to two-way trunking. Qwest proposes that a RUF calculation be used to apportion transport costs between it and Level 3 and that ISP traffic be excluded from the calculation. Level 3 contends that both parties should bear all costs on its side of the POI and, therefore, does not support use of a RUF.

Level 3 cites several FCC decisions in support of its contention that this is directly contrary to FCC rules governing charges for inter-network facilities.[11]

15. Level 3 believes it is critical that the ICA clearly state its right to use a single POI per LATA as well as each carrier's obligation to bear its own costs on its respective side of the POI. It contends that its proposed language in Sections 7.1.1.1 and 7.1.1.2 makes these rights and obligations clear.

16. Concerning Qwest's additional issue, Level 3 states that Qwest's proposed language is aimed at impeding Level 3's ability to use interconnection trunks to transport Voice over Internet Protocol (VoIP) traffic. Level 3's proposal to resolve Issue 2 would allow the parties to exchange all types of traffic over a common set of interconnection trunks and rely upon jurisdictional factors to determine compensation.

(2) Qwest's Position.

17. Qwest contends that Issue 1 is not about a single POI within a LATA but, rather, about Level 3 paying for the use of Qwest's network. Qwest agrees that it has a duty to provide interconnection with its local exchange network under the Act but only on rates, terms and conditions that are just, reasonable, and nondiscriminatory. *See,* 47 U.S.C. § 251(c)(2)(D). It points out that Section 252(d)(1) provides that determinations by a state commission of the just and reasonable rate for interconnection shall be based on the cost of providing the interconnection, be nondiscriminatory, and may include a reasonable profit. It submits that these provisions make it clear that CLECs must compensate incumbent LECs for the costs the LECs

[11] *See, In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection,* 17 FCC Rcd 27039 (2002); *Qwest v. Universal Telecom,* 2004 WL 2958421, and *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCCR 11166, 11189, ¶ 40 (2000). *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 881 (4th Cir. 2003).

incur to provide interconnection. Accordingly, Qwest contends that Level 3 should be responsible for compensating it for the interconnection costs it incurs in honoring Level 3's interconnection requests, even when such costs are incurred on Qwest's side of the POI. It cites various legal authorities in support of this proposition.[12]

18. Qwest submits that there is no statutory provision or FCC rule that denies it the right to recover the costs of interconnection it incurs to provide the interconnection requested by Level 3. For example, it argues that Level 3's reliance on 47 C.F.R. § 51.703(b) is in error since that regulation only prohibits a LEC from assessing charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network. It points out that the FCC has defined "telecommunications traffic" to exclude "information access traffic" and has further determined that ISP-bound traffic (which Qwest defines as traffic destined for the Internet where the ISP server is located in the same local calling area as the originating caller) is information access traffic. Since virtually all Levels 3 traffic is ISP-bound, Qwest submits that 47 C.F.R. § 51.703(b) is not applicable. For the same reason, it contends that none of the decisions applying 47 C.F.R. § 51.703(b) that Level 3 relies on are on point.

19. Regarding its additional issue, Qwest contends that it is critical to properly determine if traffic legitimately qualifies as VoIP traffic in order to assure that the ESP exemption and the proper intercarrier compensation regime is properly applied to traffic claimed to be VoIP. It is, therefore, essential that Level 3 certify its levels of VoIP traffic and be subject to operational audits to verify the accuracy of its reporting.

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[12] *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶ 209, 11 FCC Rec. 15499 (August 8, 1996), *aff'd in part and rev'd in part, Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999)(*Local Competition Order*); *U S WEST Communications, Inc. v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002); *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3rd Cir. 2003).

(3) Commission Resolution of Issue 1.

20. The Commission adopts Qwest's proposed language for the sections of the ICA enumerated above, with respect to this Issue 1. Qwest's language and its testimony are clear that it allows interconnection at a single point in a LATA. Qwest's language also allows for additional flexibility should Level 3 choose to have more than one POI per LATA.

21. None of Level 3's legal arguments convince us that its language should be adopted. The cases and FCC decisions cited by Level 3 are not applicable to this issue. We do not agree that the federal case law that Level 3 cites, *i.e.*, Level 3 may exchange traffic at a single point of interconnection within a LATA in a manner whereby each party bears the costs of interconnection on their side of the point of interconnection, is applicable in this instance. We agree with Level 3 that it is entitled to interconnect at a single technically feasible point per LATA. However, Level 3's language would impose the requirement that each party bear the costs of constructing, maintaining, and operating all facilities on its side of the SPOI. In addition, Level 3's proposal inserts language that misreads 47 C.F.R. § 51.703(b). We believe that its language would be contrary to law. We agree with Qwest, that the *Local Competition Order* provides that "a requesting carrier that wishes a technically feasible but expensive interconnection would pursuant to Section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit."[13] We believe that Qwest has the better reading of the *Virginia Arbitration Order*, *Qwest v. Universal Telecom*, *TSR Wireless*, and *MCImetro*, cases cited by Level 3 to buttress its interpretation of 47 C.F.R. § 51.703(b). The rule is as follows:

§ 51.703 Reciprocal compensation obligation of LECs.

[13] First Report and Order, *In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶199 (1996).

> (a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.
>
> (b) A LEC may not assess charges on any other telecommunications carrier for **telecommunications** traffic that originates on the LEC's network. (*Emphasis added*).

However, 47 C.F.R. § 51.701(b) defines telecommunications traffic to exclude information access traffic. Thus information access traffic is not subject to 47 C.F.R. § 51.703(a) and (b). In the *ISP Remand Order*, the FCC sets forth the reasoning behind its conclusion that ISP-bound traffic "falls under the rubric of 'information access,' a legacy term imported into the 1996 Act from the MFJ, but not expressly defined in the Communications Act."[14] We agree with Qwest that the D.C. Circuit's opinion in *WorldCom v. FCC* did not change the FCC's characterization of ISP-bound traffic.[15] Because ISP-bound traffic is not telecommunications traffic for the purposes of 47 C.F.R. § 51.703(b), and because this renders Level 3's case citations inapplicable, we adopt Qwest's language.

22. Further, as we have found in previous arbitration proceedings, we continue to assert that Qwest and Level 3 should not include either VNXX or ISP-bound traffic in the calculations of relative use factors (RUF).[16] The RUF is used to apportion transport costs related to two-way local trunking. As neither ISP-bound traffic nor VNXX traffic are local traffic, they should not be included in the RUF. Qwest's language adheres to this position and is adopted.

23. As for Qwest's additional issue concerning the verification audits related to VoIP traffic, this issue is addressed by our decisions on Issues 2 and 4, below.

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[14] *Remand Order* at ¶ 42.

[15] *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir 2002) specifically stated that it did not overturn the FCC's Order on Remand because there is likely a rational basis for its decision.

[16] *See* Decision Nos. C01-0312 and C03-1189.

B. Issue 2 (Sections 7.2.2.9.3.1, 7.2.2.9.3.2 and 7.2.2.9.3.2.1)

Level 3's Statement of the Issue: Whether Level 3 may exchange all traffic over the interconnection trunks established under the Agreement.

Qwest's Statement of the Issue: Whether Level 3 is entitled to commingle switched access traffic with other types of traffic on local interconnection trunks established under the Agreement.

(4) Level 3's Position.

24. As indicated above, Level 3 contends that the Act and the FCC's rules permit it to interconnect with Qwest at a single POI per LATA. It asks that the Commission confirm its right to use its existing Local Interconnection Service (LIS) trunking infrastructure to exchange all forms of traffic, including local TDM, VoIP, ISP-bound, and interexchange traffic with Qwest. It contends that this is technically feasible but that Qwest nonetheless asserts that it must order and provision Feature Group D (FGD) trunks to each POI as well as separate interconnection trunk groups for local and intraLATA traffic based solely on Qwest's billing concerns. Level 3 argues that reliance on a single set of LIS trunks is more efficient and less expensive than Qwest's proposed network. It believes that Qwest should not be allowed to force it to construct duplicative, inefficient and unnecessary interconnection trunk arrangements (FGD trunks) at every tandem and end office of Qwest's network. Level 3 states that there is no reasonable basis for distinguishing differently rated traffic by placing it on different trunk groups as Qwest proposes.

25. Level 3 contends that Qwest is attempting to create economic and regulatory barriers by distinguishing between FGD trunks and LIS trunks. Level 3 submits that Qwest's unwillingness to permit "switched access" and enhanced VoIP traffic to be exchanged over LIS trunking infrastructure will force it to build out a parallel, expensive, duplicative interconnection network based solely on Qwest's antiquated billing systems. Level 3 believes that there is no

sound reason to set up separate, distinct trunking networks based on regulatory call classifications that are irrelevant to technical network considerations. Accordingly, Level 3's proposed language allows all traffic types to be exchanged over a single trunking network.

26. Level 3 contends that Qwest's proposed terms have nothing to do with technical trunking requirements or network design concerns but, rather, require that Level 3 exchange interstate traffic over FGD trunks so that Qwest can obtain access charges on all traffic that rides through those trunks, including ISP-bound and VoIP traffic. Level 3 contends that Qwest may not force it to interconnect in such a manner based solely on Qwest desire to collect access charges. Level 3's submits that its proposed language will permit it and Qwest to exchange all traffic over a common set of interconnection trunks, and then rely on allocation factors to determine the compensation due. It cites various authorities in support of its contention that ILECs may not force CLECs to use multiple trunk groups as a way to govern the compensation that relates to the traffic that flows through the trunks.[17]

(5) Qwest's Position.

27. Qwest contends that it has no obligation to permit Level 3 to commingle switched access traffic with other types of traffic on the interconnection trunks created under the ICA. Indeed, it submits that it is required to provide interconnection for the exchange of switched access traffic in the same manner that it provided interconnection for such traffic prior to passage of the Act. *See,* 49 U.S.C. § 251(g) and *Local Competition Order*, ¶1034. Nonetheless, Qwest indicates that it has offered to allow Level 3 to exchange traffic over the FGD trunks that it uses

[17] *See, Virginia Arbitration Order* at ¶ 57; *In the Matter of the Application of Sprint Communications Company, L.P. for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan*, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997, pp. 4-5; *US West Communications v. MFS Intelenet, Inc.*, 193 F3d 1112, 1124-25 (9th Cir 1999).

to exchange long distance calls with interexchange carriers. It contends that Level 3 has rejected this option in order to facilitate its ability to mask interexchange calls as local calls.

28. Qwest argues that nothing in the Act or the FCC's regulations give Level 3 the right to mix switched access traffic with local traffic over local interconnection trunks between its network and Qwest's. Although the Act and applicable FCC's regulations refer to interconnection at any "technically feasible point within the incumbent LEC's network", Qwest contends that this obligation does not apply to interexchange traffic carried by Level 3. It submits that any other interpretation would obviate Qwest's switched access tariffs and would allow Level 3 to avoid the tracking and measuring of interexchange traffic offered by FGD trunks. Contrary to Level 3's assertion, Qwest argues that Section 251(c)(2) does not give Level 3 the right to choose the manner in which its long distance calls originate and terminate with other carriers. Qwest contends that this is something that is described in Qwest's switched access tariffs and is not affected by the Act.

29. Qwest argues that Level 3's reliance on the *Virginia Arbitration Order* to support its contention that the FCC has rejected the use of separate trunk groups is in error. It contends that the order does not constitute a determination by the FCC that separate trunk groups could not be justified. Instead, it merely notes that Verizon failed to show the harm that would result without separate trunk groups. It deems it significant that Verizon did not assert that AT&T's proposal would disrupt Verizon's billing systems or cause it to incur additional costs to bill access charges. By way of contrast, Qwest submits that the additional cost and disruption to its switched access traffic recording, billing and validation system that would result from Level 3's proposal justifies either (1) the segregation of traffic onto separate LIS and FGD trunk groups or

(2) the use of FGD trunking as the single trunk group that should support the full complement of combined terminating traffic types.

30. Qwest submits that the real dispute with respect to Issue 2 is not the ability to combine traffic types over the same interconnection trunks but, rather, Level 3's insistence that switched access traffic be sent over LIS trunks which were designed to carry local traffic and which do not have the capability to properly record switched access traffic. It points out that FGD trunks have the capability to record switched access traffic but LIS trunks do not. Qwest states that its proposed language will allow Level 3 to combine all traffic types that it sends to Qwest, including switched access traffic, over FGD trunks.

31. Qwest believes that switched access traffic should be carried over FGD trunks for three reasons. First, in order to allow Qwest to provide industry standard terminating records to Independent Telephone Companies (ICOs) and CLECs. Without these records ICOs and CLECs will not be able to bill Level 3 for interexchange traffic it delivers. It argues that Level 3's proposal to use an entirely new system of billing factors does not address this problem. Second, by routing all traffic over FGD trunks, Level 3 will achieve the trunk efficiencies it seeks, but without the disadvantage of disabling the appropriate exchange of records with other carriers or Qwest's billing systems. Finally, Qwest believes there is no rational basis for requiring it to enable its LIS trunks to perform exactly the same recording functions that its FGD trunks now perform. Qwest submits that Level 3's insistence that all traffic types be sent over LIS trunks is simply an attempt to evade access charges applicable to switched access traffic.

32. Qwest contends that virtually all CLECs interconnected with it have interconnection agreements that either provide for the segregation of traffic onto separate trunk

groups or the combining of terminating traffic onto a FGD trunk group. It submits that there is no valid reason to give Level 3 special treatment in this regard.

(6) Commission Resolution of Issue 2.

33. We agree with Level 3 (and Qwest) that Qwest must provide a technically feasible single point of interconnection in each LATA. We disagree, however, with Level 3's argument that statute and FCC rules require that Qwest allow Level 3 to use LIS trunks for the exchange of all types of traffic, and believe that the cases it cites are inapplicable. Furthermore, the use of FGD trunks will allow for the use of a single trunking system for all types of traffic, negating Level 3's argument that Qwest requires a multiple trunking arrangement.

34. Qwest's FGD trunks allow for the capture and recording of billing information in a standard industry format for use not only by Qwest, but also by other ILECs, CLECs and wireless providers that might be terminating Level 3's traffic. It is clear in the record that the LIS trunks do not have this same capability. It is not proper or legal for us to make a decision in an arbitration of an interconnection agreement between two parties that would have the probable effect of increasing costs and/or changing processes of other carriers. We decline to do so here.

35. The situation here is not the same as in the *Virginia Arbitration Order* where the FCC determined that there would be 'minimal call volumes' of busy line verification or emergency interrupt calls between Verizon and WorldCom.[18] This is not a situation where the costs are disproportionate to the problem to be solved, and we are not requiring separate trunking as asserted in the *Virginia Arbitration Order*.[19] Level 3 has the right to make a business decision

[18] *Virginia Arbitration Order* at ¶ 182.
[19] *Id.*

whether to maintain two trunk groups, one for local traffic and one for interexchange traffic or to use Qwest's FGD trunks for the exchange of all traffic.

36. We believe that the use of trunk groups that accurately record traffic, as opposed to the use of sampling and factors of traffic, is important in negating the problem of arbitrage. We also agree with Qwest that the cases cited by Level 3 pertaining to this part of the issue, are not applicable. The *Virginia Arbitration Order* is discussed above, and the use of FGD trunks will allow for all types of traffic to flow over one type of trunk group. Level 3's reasoning behind the Michigan case is unpersuasive because we assert that it is always preferable, when possible, to measure actual data rather than percentage-of-use factors from data sampling.

37. We are cognizant that there will be increased costs to Level 3 to convert its LIS trunks to FGD trunks should it choose to do so. Qwest's access tariffs include a non-recurring change for this conversion as well as a non-traffic sensitive trunking rate for the FGD trunks. However, to allow Level 3 to avoid these costs would open Qwest up to claims of discrimination from all other interexchange carriers that are required to pay those access rates. It would be unfair to allow one carrier, Level 3, to receive different treatment.

C. Issue 3 (Sections 7.3.6.1, 7.3.6.3 and Section 4 Definitions)

Level 3's Statement of the Issue: Whether Qwest's election to be subject to the *ISP Remand Order* for the exchange of ISP-bound traffic requires Qwest to compensate Level 3 for ISP-bound traffic at the rate of $0.0007 per minute.

Qwest's Statement of the Issue: Whether Qwest is required to pay intercarrier compensation on ISP traffic that does not originate and terminate at physical locations within the same local calling area (LCA) established by the Commission.

(7) Level 3's Position.

38. Level 3 contends that the *ISP Remand Order*[20] establishes a separate FCC mandated compensation regime for ISP-bound traffic that requires all such traffic to be exchanged at the rate of $0.0007 per minute of use (MOU) regardless of the geographic location of the origination or termination of the call.[21] It contends that the FCC expressly rejected use of the term "local" as relevant to intercarrier compensation for ISP-bound calls and found that its initial reliance on that term had been "mistaken," and had created "ambiguities". It submits that one purpose of the *ISP Remand Order* was for the FCC to correct that mistake by recognizing that ISP-bound traffic is jurisdictionally interstate in nature and by establishing a uniform rule for compensation of all "information access traffic," which includes ISP-bound traffic.

39. Under its interpretation of the *ISP Remand Order,* neither "bill and keep" nor access charges apply to ISP-bound traffic, even if the traffic is considered to be VNXX ISP-

[20] *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 (2001) ("ISP Remand Order"). In the *ISP Remand Order*, the FCC ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of 49 U.S.C. § 251(b)(5) by operation of 49 U.S.C. § 251(g). This aspect of the *ISP Remand Order* was rejected though not vacated by the D.C. Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

[21] The legal authorities cited by Level 3 in support of this proposition include the following: *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-11-045, A.01-12-026, Opinion Adopting Final Arbitrator's Report With Modification (Cal. PUC July 5, 2002); *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906, Declaratory Order (Ala. PSC Apr. 29, 2004); *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9; *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002) *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2; *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order on Reciprocal Compensation, Phases II and IIA, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sept. 10, 2002).

bound.[22] Level 3 asserts that the FCC has assumed exclusive jurisdiction over compensation rates for ISP-bound traffic and, therefore, the Commission lacks authority to prescribe any different compensation scheme for the exchange of such traffic. It contends that Qwest has opted into the FCC's *ISP Remand Order* compensation regime and, therefore, is required to compensate Level 3 at the rate of $0.0007 per MOU for all ISP-bound traffic. It contends that the language it proposes in Section 7.3.1.1.3.1 of the ICA clearly sets out this requirement and should be adopted by the Commission.

40. Level 3 contends that its proposal relating to compensation for ISP-bound traffic should be adopted even if one were to assume that the $0.0007 per MOU rate set forth in the *ISP Remand Order* is not mandatory since Qwest's costs and obligations in terminating its customers' traffic is the same, regardless of the physical location of the terminating ISP. It submits that Qwest incurs no additional costs for completing an FX or VNXX ISP-bound call than it would any other type of call terminated at the Level 3 POI.[23] Because Qwest's costs to bring a call to the POI are the same regardless of the nature of the call, Level 3 contends that there is no economic justification for treating these calls differently from any other locally dialed call.

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[22] Level 3 cited the following authorities in support of its proposition that "bill and keep" is not an appropriately sanctioned compensation scheme for ISP-bound traffic: *AT&T Communications of Illinois v. Illinois Bell Telephone Company*, 2005 WL 820412 (2005); *Virginia Arbitration Order* at ¶ 286; *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the* ISP Remand Order, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (*Core Forbearance Order*), at ¶ 24; *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order, at 7 (Ky. PSC Mar. 14, 2001); *MCI Recommended Arbitration Order* at 67-74.

[23] VNXX describes a situation wherein a CLEC obtains local numbers from the North American Numbering Plan Administrator (NANPA) in various parts of a state that are assigned to its ISP customers with no physical presence in the local calling areas (LCAs) associated with those telephone numbers. The traffic directed to those numbers is routed to one of the "POIs" of the CLEC and is then delivered to the CLEC's ISP customer at a physical location in another LCA or even in another state.

41. In addition, Level 3 contends that it maintains a local presence in Qwest's end offices since it currently pays the costs of establishing the trunks and facilities from its POIs to Qwest's end offices. Level 3 submits that it is entitled to receive compensation at the rate of $0.0007 per MOU for ISP-traffic by virtue of this local presence.

(8) Qwest's Position.

42. Qwest acknowledges that the *ISP Remand Order* governs the exchange of compensation for ISP-bound traffic. However, it contends the FCC's rule establishing a rate of $0.0007 per MOU only applies to "local" ISP-bound traffic; i.e., traffic that physically originates and terminates in the same LCA. It believes, therefore, that the Commission is free to adopt its own policy (including bill and keep) for the exchange of ISP-bound traffic that crosses local exchange boundary lines. It submits that the issue of intercarrier compensation for VNXX traffic has been litigated before many state commissions and, contrary to Level 3's assertions, the majority have ruled that traffic that does not physically originate and terminate in the same LCA is not subject to reciprocal compensation under existing interconnection agreements. It submits that Level 3 is asking the Commission to deviate from its policy that reciprocal compensation is recoverable only for the termination of "local" traffic as defined by state commission tariffs.

43. In contrast to Level 3's arguments, Qwest contends that the FCC's *ISP Remand Order* and the *Core Forbearance Order* address only compensation for local ISP traffic where the ISP is physically located in the same LCA as the customer placing the call. It submits that neither address the situation where a CLEC's ISP-customers servers or modems are located outside the LCA of the calling party. It contends that such traffic is interexchange traffic and remains subject to access charges. While it acknowledges that the FCC characterizes ISP-bound

traffic as interstate in nature, for intercarrier compensation purposes it contends that the relevant end points are the physical location of the calling party and the physical location of the ISP's servers or modem banks. It cites a number of decisions by other state commissions in support of this position.[24]

44. Qwest contends that several of our prior decisions also support its position on this issue. In 2003, we addressed issues relating to VNXX in an arbitration proceeding involving Qwest and AT&T.[25] In that case, we adopted Qwest's proposal that "local exchange traffic" be defined as "traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission." We rejected AT&T's proposed language by which local calling would have been determined by the calling and called NPA-NXXs, regardless of the actual origination and termination points.[26] Citing our holding in a recent arbitration between Level 3 and CenturyTel, Qwest contends that telephone calls, including calls to an ISP, that do not originate and terminate in the same LCA are long distance calls under Colorado law. In that proceeding we found that Level 3 was not seeking "interconnection" within the meaning of § 251(c) of the Act because it was seeking to serve ISP customers that were not located in the

[24] *See,* Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement,* IC 12 (Oreg. PUC, ALJ Petrillo, August 16, 2005); *In the Matter of Pac-West Telecomm, Inc. vs. Qwest Corporation, Complaint for Enforcement of Interconnection Agreement,* Docket IC 9, Order No. 05-1219, at 8 (Ore. PUC, November 18, 2005); *In the Matter of Qwest Corporation's Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.,* Docket ARB 671 (February 2, 2006); *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic,* 3-2500-16646-2 P-421/C-05-721 (Minnesota Office of Admin. Hearing, Jan. 18, 2006).

[25] Initial Commission Decision, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado,* Docket No. 03B-287T, Decision No. C03-1189 ¶ 28 (Colo. PUC, October 17, 2003).

[26] On a related issue, we also determined that ISP-bound traffic should be excluded from the relative use factor used to assign financial responsibility for interconnection services provided by Qwest. *In the Matter of Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Docket No. 00B-601T, C01-312 ¶ 9 (Colo. PUC, March 16, 2001). A Colorado Federal District Court upheld this decision on appeal. *See, Level 3 Communications v. Public Utilities Comm'n,* 300 F.Supp.2d 1069 (D. Colo. 2003).

LCAs served by CenturyTel. In our decision we stated that "...calls by CenturyTel's customers to Level 3's ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls."[27]

45. Qwest contends that the distinction between long distance calls and local calls is historically well-established under Colorado law and is based on the geographic proximity of the calling and called parties. As a result, it argues that Colorado law does not support Level 3's argument that local calling is based on the NPA-NXXs of the parties to the call. It submits that by assigning telephone numbers to ISPs that are not physically located in the LCA associated with those numbers, Level 3 purposely undermines the proper rating of telephone calls such that long distance calls to ISPs appear to be local. Qwest contends that this practice deprives it of the access charges it should receive for originating those calls. For this reason, Qwest argues that VNXX should not be permitted and that we should ban its use in Colorado.

[27]Decision Denying Exceptions, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rate, Terms, and Condition for Interconnection,* Docket No. 02B-4087, Decision No. CO3-0117, ¶ 36 (Colo. P.U.C. Jan. 17, 2003) ("*CenturyTel Decision*")

46. Qwest contends that our prior decisions clearly establish a terminating compensation rate of $.0000 (i.e., "bill and keep") for local ISP traffic.[28] It submits that its proposed language is consistent with these decisions and with the FCC's *ISP Remand Order*.[29] While Qwest agrees that the *ISP Remand Order* limits state authority regarding compensation for local ISP traffic, it contends that its only real mandate is that the rates established by the states should not exceed the FCC rates. *See, ISP Remand Order;* ¶ 80 and footnote 152.[30]

47. Qwest contends that Level 3's argument that a rate of $0.0007 per MOU must be charged for the termination of ISP-bound traffic was addressed recently and rejected by a Colorado federal district court in an arbitration proceeding involving AT&T Communications

[28] *See* Decision Denying Application for Rehearing, Reargument, or Reconsideration, *Petition of Sprint Communications Company, L.P. for Arbitration Pursuant to U.S.C. § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Docket No. 00B-011T, Decision No. C00-685, (Colo. P.U.C. June 23, 2000); Initial Commission Decision, *Petition of Sprint Communications Company, L.P. for Arbitration Pursuant to U.S. Code § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Docket No. 00B-011T, Decision No. C00-479 (Colo. P.U.C. May 5, 2000); Decision Denying Application for Rehearing, Reargument, or Reconsideration, *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc. Pursuant to U.S.C. § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Docket No. 00B-011T, Decision No. C00-1071 (Colo. P.U.C. Sept. 27, 2000); Initial Commission Decision, *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc. Pursuant to U.S.C. § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.*, Docket. No. 00B-011T, Decision No. C00-858 (Colo. P.U.C. Aug. 7, 2000); Decision on Applications for Rehearing, Reargument, or Reconsideration, *Petition of Level 3 Communications LLC for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996*, Docket No. 00B-601T, Decision No. C01-477 (Colo. P.U.C. Sept. 27, 2000); Initial Commission Decision, *Petition of Level 3 Communications LLC for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Docket. No. 00B-601T, Decision No. C01-312 (Colo. P.U.C. Mar. 16, 2001).

[29] In the *ISP Remand Order* the FCC adopted a set of rate caps applicable to ISP-bound traffic. The compensation rate cap for such traffic was designed to go through a series of reductions to the current $.0007 MOU rate. In its contemporaneous *Unified Intercarrier Compensation NPRM* proceeding, the FCC concluded that bill-and-keep for all ISP-bound traffic is the correct policy. However, it has not taken action to alter the compensation regime of the *ISP Remand Order* and, as a result, the FCC's interim rate cap remains at $.0007 per MOU.

[30] In paragraph 80 of the *ISP Remand Order* the FCC states that: "We also clarify that, because the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic)." In footnote 152 of the *ISP Remand Order* the FCC states that: "...if a state has ordered all LECs to exchange ISP-bound traffic on a bill and keep basis, or if a state has ordered bill and keep for ISP-bound traffic in a particular arbitration, those LECs subject to the state order would continue to exchange ISP-bound traffic on a bill and keep basis."

and Qwest. *See, AT&T Communications v. Qwest Corporation,* Civil Action No. 04-CV-00532-EWN-OES (D. Colo., June 10, 2005). In that case, AT&T challenged the Commission's adoption of a zero ($.0000) rate for ISP traffic by arguing that since the language of paragraph 80 and footnote 152 of the *ISP Remand Order* are phrased in the past tense the exception for state action only applies to state commission decisions issued prior to the *ISP Remand Order.* Since Colorado set a zero rate for ISP traffic after the *ISP Remand Order*, AT&T contended the Commission's rulings were preempted. However, the federal district court rejected that argument by ruling that the rates in the *ISP Remand Order* are caps and that the Colorado Commission was authorized to adopt a compensation regime for ISP traffic at a rate lower than the FCC rate, including adopting a zero rate.

48. Qwest argues that sound public policy counsels against permitting Level 3 to recover intercarrier compensation on VNXX traffic. It points out that the customer who places a call to an ISP is acting as a customer of the ISP on Level 3's network. According to Qwest, allowing Level 3 to collect intercarrier compensation for its own toll traffic will result in regulatory arbitrage since Level 3 will profit at Qwest's expense by collecting revenue primarily from other carriers rather than its own customers. Qwest submits that this will create incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended in the Act. Moreover, it submits that the large one-way flows of cash make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. In short, Qwest submits that intercarrier payments for ISP traffic have the potential of creating severe market distortions.

(9) Commission Resolution of Issue 3.

49. "It is Level 3's position that all ISP Bound traffic is to be compensated at a rate of $0.0007 per minute of use pursuant to the terms of the FCC's April 2001 *ISP Remand Order,* regardless of the physical location of the ISP server or modem bank."[31] In this statement and throughout its testimony, Level 3 attempts to make the same arguments that it made before us in its first arbitration with Qwest. Similarly, these arguments were presented by AT&T in its arbitration with Qwest.[32] As stated above in our synopsis of Qwest's position, the Colorado federal court upheld the Commission's decision to apply a bill and keep regime to ISP-bound traffic in both of these arbitrations.

50. The arguments presented by Level 3 on the rate at which ISP-bound traffic should be exchanged are insufficient to convince us that we should alter our position from previous decisions mandating a bill and keep mechanism, or a zero rate, for the exchange of this traffic. We find that Level 3's legal interpretation of the *ISP Remand Order* is flawed. The FCC's interim compensation regime sets rate *caps* with the goal of eliminating arbitrage altogether by moving to bill and keep.

51. It has been this Commission's position in arbitration cases that the disallowance of reciprocal compensation for ISP-bound traffic best comports with § 251(2)(2)(D) of the Act which requires that interconnection be on rates, terms and conditions that are just, reasonable and nondiscriminatory. By eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the local market. Thus, the outcome is pro-competitive and anti-subsidy. ISP users pay for what they use; competitors can serve them accordingly; and

[31] Level 3 Initial Statement of Position at 31.

[32] *See*, generally, Docket Nos. 00B-601T and 03B-287T.

non-ISP-users do not have to pay for services they do not use. We assert that our bill and keep regime continues to provide the correct market incentives and that it is legal. Therefore we adopt Qwest's language on this issue.

D. Issue 4 (Sections 7.3.4.1 and 7.3.4.2)

Level 3's Statement of the Issue: Whether Qwest and Level 3 compensate each other at the rate of $0.0007 per minute of use for the exchange of IP enabled or Voice over Internet Protocol traffic.

Qwest's Statement of the Issue: Whether Qwest and Level 3 are required to pay reciprocal compensation on VoIP traffic that does not originate and terminate at physical locations within the same LCA.

(10) Level 3's Position.

52. Level 3 seeks to use the interconnection network it has constructed and additional facilities it may construct in the future to exchange IP Enabled and VoIP Traffic between its network and Qwest's. Level 3 states that it has invested billions of dollars to build and optimize its network and that it provides a service to Qwest by terminating Qwest's originating VoIP traffic. As a result, it seeks compensation for terminating Qwest's originating VoIP traffic, including PSTN–IP and IP-PSTN traffic.

53. Level 3 submits that the FCC has consistently determined that, like ISP-bound traffic, IP-Enabled Services are "information services" that are interstate in nature. As a result, it contends that the functions involved in the "transport and termination" of such traffic is legally identical to those same functions when provided in the context of ISP-bound traffic. It concludes, therefore, that the FCC's $0.0007 per MOU rate applicable to ISP-bound traffic should apply to other information services traffic as well, including IP-Enabled Services traffic such as VoIP. It argues that the Commission must recognize that Qwest's decision to opt into the

ISP Remand Order compensation scheme for ISP-bound traffic (exchanging ISP-bound traffic at the rate of $0.0007 per MOU) obligates it to exchange VOIP traffic at $0.0007 per MOU.

54. Level 3 argues that Qwest's proposal to impose the same "bill and keep" compensation scheme for VoIP traffic that it seeks to impose for ISP-bound calls (unless the originating and terminating customers are located in the same LCA) would disadvantage IP-Enabled service providers and protect Qwest's dominance in its markets. It points out that new IP-Enabled services such as cable-based VoIP increasingly offer full substitutes for local calling services and that IP-Enabled services allow other delivery platforms, such as cable, to compete with ILECs' existing bundled local and long distance service offerings. Against this backdrop, it believes that Qwest's proposal to refuse intercarrier compensation for the exchange of such traffic is anticompetitive, unworkable and contrary to the goals and objectives of 47 U.S.C. § 251(b)(5), which establishes a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[33] It believes that restricting intercarrier compensation for the exchange of IP Enabled or VoIP traffic would subvert Congress's express goal of encouraging IP-based innovation.[34]

[33] Level 3 argues that even if information services traffic does not qualify as "telecommunications service" traffic, the definition of "information services," provides that such traffic is conveyed "via telecommunications." It also argues that since 47 U.S.C. § 251(b)(5) requires the establishment of reciprocal compensation, not for the transport and termination of "telecommunications services," but, rather, for the transport and termination of "telecommunications", it follows that reciprocal compensation obligations apply to the exchange of information services traffic such as VoIP traffic.

[34] *See, e.g.*, 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

55. Level 3 argues that the FCC's *Vonage Order* weighs significantly in favor of adopting Level 3's terms and conditions on intercarrier compensation for VoIP traffic.[35] It submits that the FCC has recognized in that order that the location of the calling and called parties in an IP-Enabled services world is essentially indeterminable, and that the NPA-NXX of the originating and terminating carrier should govern the compensation to be exchanged by the parties. It submits that for IP-Enabled voice services, the distinctions between local calling, intrastate long distance, interstate long distance, and international long distance disappear, making a unified intercarrier compensation scheme imperative. It further submits that Qwest's proposed terms, which require that the parties determine the physical path of a call, are not technically possible to apply because IP Enabled services, like VoIP, are borderless. This makes it impossible to follow the geographic path of the transmission.

56. It is for these reasons that Level 3 believes the Commission should adopt its proposed contract terms that would provide for the exchange of compensation at the rate of $0.0007 per MOU, the same rate that Level 3 contends applies to the exchange of ISP-bound traffic.

[35] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No. 03-211, FCC 04-267 (rel. November 12, 2004). The FCC issued the *Vonage Order* in response to Vonage's challenge to a ruling issued by the Minnesota Public Utilities Commission wherein that Commission asserted regulatory authority over Vonage as an entity providing "telephone service" under state law. In overturning that ruling, the FCC stated that a service that "harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they can find a broadband connection, and to manage their communications needs from any broadband connection, coupled with the "Internet's inherently global and open architecture removes the need for a correlation between Vonage's DigitalVoice service and its end-users' geographic locations."

(11) Qwest's Position.

57. Qwest's proposed language relating to the treatment of VoIP traffic maintains the distinction between local and interexchange calls. Thus, "local" VoIP calls (those originating and terminating within the same LCA) would be subject to reciprocal compensation, while "non-local" calls would remain subject to existing compensation mechanisms that govern interexchange calls. Qwest contends that determining whether a call is or is not local based on the physical location of the VoIP Provider's Point of Presence (POP) is consistent with the ESP exemption.

58. Qwest agrees that under certain circumstances it should pay reciprocal compensation to Level 3 for a VoIP call that is delivered by Qwest to Level 3 for termination with a Level 3 end user customer. Likewise, under certain circumstances, Level 3 should pay reciprocal compensation for VoIP traffic delivered from Level 3 that terminates on Qwest's network. However, Qwest opposes Level 3's proposed language that would mandate payment of reciprocal compensation for all VoIP traffic or based on the telephone numbers of the calling and called parties when the geographic locations of the called and calling parties are in different LCAs.

59. Qwest proposes that the end points of a VoIP call should be the determinative factor in deciding whether reciprocal compensation should be paid on a particular call. For example, for a VoIP call where the VoIP provider is served by Level 3, the end point should be the physical location of the VoIP provider's POP; *i.e.,* where the call enters the public switched telephone network (PSTN). On the Qwest side of the same call, the end point should be the physical location of the Qwest end user receiving the call. If the physical end points of a VoIP call are located within the same LCA, Qwest believes that reciprocal compensation should be

paid to the carrier terminating the call. If the physical end points are in different LCAs but the telephone numbers of the called (*i.e.*, the Qwest end user receiving the call) and calling (i.e., the VoIP provider's POP) parties are associated with the same LCA, the call is a VNXX call and Qwest believes that reciprocal compensation should not be paid. If the physical end points of the call are in different LCAs, the call is an interexchange call and the proper intercarrier compensation should be based on appropriate state or federal tariffs.

60. Qwest takes issue with Level 3's definition of "VoIP VNXX traffic" as telecommunications over which the FCC has exercised exclusive jurisdiction under 47 U.S.C. § 201. It also takes issue with Level 3's suggestion that VoIP traffic is in some manner related to the *ISP Remand Order.* Qwest submits that Level 3 provides no citation of authority for either of these propositions.

(12) Commission Resolution of Issue 4.

61. We decline to resolve the parties' dispute on this issue. Both parties in this arbitration are asking us to define VoIP traffic. Level 3 is requesting that we define VoIP traffic to be an information service and for intercarrier compensation purposes, to treat it like ISP-bound traffic. Qwest requests that we separate VoIP traffic into local and non-local (or interexchange) components based on the location of the VoIP provider's POP, then to apply bill and keep to the local traffic and access charges to the interexchange traffic.

62. The FCC indicated in the *Vonage* decision that the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to Digital Voice and other IP-enabled services having the same capabilities."[36]

[36] *Vonage* Decision at 2.

This statement is based upon the FCC's premise that it is impossible to separate the intrastate and interstate components of VoIP service, thereby declaring it a hybrid service subject to the jurisdiction of the FCC. According to the FCC, "[S]imlarly to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it is highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent."[37]

63. We believe that in this instance, although our jurisdiction has not been pre-empted on this intercarrier compensation issue, it is prudent to decline to address VoIP compensation because the FCC is in the middle of addressing these issues in its rulemaking proceeding.[38] The Oregon Commission similarly declined to address this issue, and we find its reasoning persuasive.

> "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...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."[39]

While we believe that we retain jurisdiction because the FCC has yet to publish its rules, deciding this issue in a state arbitration would only add to the uncertainty and disparate treatment of VoIP issues.

64. We do note that all carriers continue to have an obligation to exchange traffic whether it be local or interexchange, telecommunications or information service. We expect and

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[37] *Id.*

[38] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. (2004)

[39] In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act. Public Utilities Commission of Oregon, Decision No. ARB 665 (February 13, 2007), at 12.

encourage Qwest and Level 3 to negotiate a voluntary agreement separate from this ICA for the exchange of VoIP traffic.

65. Therefore, we do not adopt either party's language on this issue. Rather, we direct the parties to remove all language concerning VoIP traffic from this local ICA until such time as the FCC releases a decision that requires states to revisit this issue.

TIER II ISSUES.[40]

E. Issue 5 (Sections 5.8.1, 5.8.2, 5.12.1, 5.12.2, 5.13, 5.15.1, 5.16.9.1.1, 5.16.10, 5.18.3, 5.18.9, 5.23.1, 5.27.1, 5.30.1., 6.2.2.5,6.2.2.6, 6.2.2.7, 6.2.2.9.2, 6.2.3.1a, 6.2.3.1c, 6.2.3.1c, 6.2.3.1d, 6.2.3.2a, 6.2.3.2d, 6.2.14, 6.4.1, 7.1.2.1, etc.)

Level 3's Statement of the Issue: Whether the Agreement should incorporate by reference, interconnection terms and conditions that conflict with the specific terms of the Interconnection Agreement at issue in this proceeding.

Qwest's Statement of the Issue: Whether state-specific language approved by the Commission should be used in the Agreement instead of Qwest's template language.

(13) Level 3's Position.

66. Level 3 contends that throughout Qwest's proposed draft of the ICA it attempts to incorporate by reference, without consent by Level 3, varying and undefined terms into the ICA by making reference to the Statement of Generally Available Terms (SGAT) on file with the Commission. It believes that this serves to modify the provisions of the ICA by incorporating terms and conditions from the SGAT that may change the agreement. It requests that the Commission strike from the ICA any attempt by Qwest to incorporate into it unspecified provisions of the SGAT.

[40] As noted in footnote 5, *supra*, and on page 7 of Level 3's Statement of Position, the Tier II Issues were described as primarily derivative of the law and policy established by our decisions on the Tier I Issues, since a determination to adopt a particular party's contractual language relating to a Tier I issue would likely result in its adoption of the same party's language for the corresponding Tier II issue. Therefore, our discussion on the resolution of these Tier II Issues is limited so as not to be repetitive.

(14) Qwest's Position.

67. Qwest submits that Level 3 has misinterpreted the cross-references that it included in its template interconnection agreement. It indicates that references in the template agreement to Qwest's SGAT indicate when the Commission has approved state-specific language that is different than the generic language used in the fourteen state template. It states that the ICA contains the state specific language Qwest has proposed and contains no cross-references to the SGAT.

(15) Commission Resolution of Issue 5.

68. In Level 3's Statement of Position, it claims that the "Commission should strike from the Agreement any attempt by Qwest to incorporate into this Agreement, unspecified provisions of the SGAT." *See* page 85. As Qwest explained both in written and oral testimony, the references to the SGAT in various sections of the template Agreement were replaced with the actual language from those references in the ICA attached to Qwest's response to the Petition for Arbitration. Level 3 has proposed no alternative language for these sections, but rather states that the sections should be deleted.

69. Qwest's standard Colorado SGAT language adds clarity to the Agreement and is approved.

F. Issue 7 (Section 4 Definitions)

Level 3's Statement of the Issue: Whether the Agreement should provide that End User Customers are those customers that are on the public switched telecommunications network, and that end users only exchange calls to or from the public switched telecommunications network.

Qwest's Statement of the Issue: Should the parties use the Commission approved definition of "Basic Exchange Telecommunications Service"?

(16) Level 3's Position.

70. Level 3 states that it provides IP Enabled services whereby its customers complete VoIP calls. It contends that Qwest's proposed definition of "Basic Exchange Telecommunications Service" would describe the services subject to the ICA as only those communications where an end user obtains service from the PSTN, or places calls to, or receive calls from, other stations on the PSTN. Level 3 believes that this definition is unnecessary and serves to exclude the types of IP Enabled traffic that is exchanged with Level 3. Therefore, it opposes inclusion of this definition in the ICA.

(17) Qwest's Position.

71. Qwest states that its proposed definition of "Basic Exchange Telecommunications Service" has been approved by every commission in Qwest's region in Qwest's SGAT proceedings. It states that this definition, by its terms, is used only if the Commission does not have a different definition for "Basic Exchange Telecommunications Service." It submits that, contrary to Level 3's assertion, the term "end user" in the definition does not exclude IP-enabled services.

(18) Commission Resolution of Issue 7.

72. Given our decision on Issue 4, ordering the parties not to included VoIP traffic in this ICA, and because Qwest's language is standard and accepted, we adopt Qwest's definition of "Basic Exchange Telecommunications Service."

G. Issue 8 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the parties' be permitted to agree on the types of call record information?

Qwest's Statement of the Issue: Should the parties use the Commission approved definition for "call record?

(19) Level 3's Position.

73. Level 3 states that this issue is directly linked with its proposals for the exchange of intercarrier compensation. It proposes that the parties use "Call Records" in exchanging billing information since, in its opinion, this allows for more flexibility for the parties to agree to new or different technologies in recording. It believes that Qwest's proposed "CPN" reference limits the parties to only that form of technology. Further, it contends that the technology allowing for "CPN" to be included in the call flow of IP-Enabled Traffic does not exist. It submits that Qwest's proposed definition of "Call Record" locks in place the types of information the parties will exchange to track calls, monitor compensation, and establish billing records. It points out that under Qwest's proposal a "Call Record" would only include the charge number, Calling Party Number (CPN), Other Carrier Number (OCN), or Automatic Number Identifier (ANI), and Originating Line Indicator (OLI). Level 3 proposes that the parties leave open the option to exchange additional information that may be relevant and useful. Level 3 argues that Qwest's proposal cannot be sustained in light of the FCC's *Vonage Order* which addresses and defines VoIP services. It believes that Qwest's proposal would result in the adoption of billing and record standards that cannot apply to IP-PSTN traffic. Level 3 submits that it's terms merely allow the parties the ability to be flexible in the exchange of call records and formats thereby allowing them to easily adapt to changing circumstances.

(20) Qwest's Position.

74. Qwest points out that Level 3 has requested interconnection with Qwest's telecommunications network and it is the requirements of that interconnection that should be memorialized in the ICA. It submits that Level 3 uses terms that are undefined in the ICA, by the telecommunications industry, or that are defined differently by the industry. It contends that

Level 3's language also omits essential information needed to determine the time sensitive nature of exchanging traffic.

75. Qwest also believes that Level 3's proposed language stating expressly that the parties can agree to include other information in a "call record" is implied in any definition. It states that the parties are always free to agree to something different than what is included in the ICA by amending it. It objects to Level 3's proposed language since it might be interpreted to permit agreement other than in accordance with the terms of the ICA which requires that amendments be in writing and signed by the parties.

(21) Commission Resolution of Issue 8.

76. In accordance with our decision on Issue 2, we adopt Qwest's language.

H. Issue 10 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the definition of "Interconnection" include terms that would exclude the parties from exchanging VoIP traffic, and certain ISP-bound traffic?

Qwest's Statement of the Issue: Should the parties use a definition of "Interconnection" that most closely conforms to the Commission-approved definition?

(22) Level 3's Position.

77. Level 3 contends that Qwest's proposed definition of "Interconnection" excludes VoIP traffic from the types of traffic that may be exchanged by the parties. It submits that Qwest's proposed definition should be rejected since it is an attempt to regulate the types of traffic that may be exchanged. Level 3 submits that its definition of this term identifies all forms of traffic that may be exchanged between the parties and most closely matches the terms of the Act.

(23) Qwest's Position.

78. Qwest states that the specific service types set forth in its proposed definition of "Interconnection" are those that are defined in SGATs throughout its territory. It submits that there is no reason to add VoIP traffic to the definition. It argues that as IP-enabled traffic, VoIP traffic, like the voice traffic carried by other carriers, will fit into one of the categories already listed, depending on the nature of the specific VoIP traffic. It points out that even Level 3's approach, which it opposes, would effectively treat all VoIP traffic as Exchange Service traffic.

79. Qwest believes that Level 3's proposed language should be rejected because it is confusing and uses a statutory reference ("Section 251(b)(5) traffic") as part of the definition that is unclear. It also believes that Level 3's definition of "Section 251(b)(5) traffic" inappropriately includes interLATA traffic and IXC carried intraLATA traffic that is governed by Qwest's access service tariffs under 47 U.S.C. § 251(g).

(24) Commission Resolution of Issue 10.

80. In accordance with our decisions on Issues 2 and 4, we adopt Qwest's language.

I. Issue 11 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the definition of "Interexchange Carrier" be defined by relying on a type of traffic that is defined by the federal Communications Act?

Qwest's Statement of the Issue: Should the parties use a definition of "Interexchange Carrier" that is identical to the Commission-approved definition?

(25) Level 3's Position.

81. Level 3 defines an Interexchange Carrier as a carrier that provides Telephone Toll Service, a type of service that it contends is defined by the Act. It submits that Qwest's proposed definition of this term should be rejected because it relies on other ambiguous terms ("InterLATA or IntraLATA Toll services") that are not found in the Act. Qwest's objection to Level 3's

definition is unclear to Level 3 since, in its opinion, its definition most closely matches the terms of the Act.

(26) Qwest's Position.

82. Qwest disputes Level 3's contention that the terms "InterLATA or IntraLATA Toll services" are ambiguous and/or are not found in the Act. It points out that "interLATA service" is defined in 47 U.S.C. §153(21). It argues that "intraLATA" is a well-defined term referring to telecommunications between two points within the same LATA. It contends that Level 3's desire to use the term "telephone toll service" is an attempt to inject a definition into the agreement that, because it defines "toll service" as a call for which a separate bill is rendered, would require the payment of intercarrier compensation for ISP VNXX traffic. It submits that use of this term also facilitates Level 3's attempt to disguise FGD traffic.

(27) Commission Resolution of Issue 11.

83. In accordance with our decisions on Issues 2 and 3, we adopt Qwest's language.

J. Issue 12 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the Agreement define the term "IntraLATA Toll Traffic" using terms defined in the federal Communications Act?

Qwest's Statement of the Issue: Should the parties use a definition of "IntraLATA Toll Traffic" that is identical to the Commission-approved definition?

(28) Level 3's Position.

84. Level 3 states that its proposed language defines "IntraLATA Toll Traffic" by reference to a type of traffic, Telephone Toll, that is defined in the Act. It submits that Qwest's proposed definition of this term should be rejected because it relies on terms that are not found in the Act and is vague and ambiguous.

(29) Qwest's Position.

85. Qwest indicates that it opposes Level 3's definition of "IntraLATA Toll Traffic" on the same grounds that it opposes the definitions proposed by Level 3 in connection with Issue 11.

(30) Commission Resolution of Issue 12.

86. In accordance with our decisions on Issues 2 and 3, we adopt Qwest's language.

K. Issue 13 (Section 4 Definitions)

Level 3's Statement of the Issue: Whether the Agreement should contain a definition of a term that is used by Qwest to shift to Level 3 the costs of Qwest's facilities on Qwest's side of the point of interconnection?

Qwest's Statement of the Issue: Setting aside who bears the costs of interconnection, should the Agreement contain a definition of the trunk facility that connects Qwest's network to Level 3's network?

(31) Level 3's Position.

87. Level 3 contends that Qwest's definition of Local Interconnection Service is an attempt to shift to Level 3 the costs of Qwest's network on Qwest's side of the POI. It contends that Qwest has an obligation under 47 U.S.C. § 251 to interconnect its network for the exchange of traffic between the parties in a manner that allows Level 3 to exchange traffic at a single POI without having Qwest's costs of interconnection imposed on it.

(32) Qwest's Position.

88. Qwest submits that its definition of "Local Interconnection Service or 'LIS' Entrance Facility" is nothing more than a definition of the facility that connects its network to Level 3's network. It does not, according to Qwest, contain any language that determines who bears the cost of the facility. It submits that Level 3 provides no legitimate reason for not adopting this definition.

(33) Commission Resolution of Issue 13.

89. In accordance with our decisions on Issues 1, 2 and 3, we adopt Qwest's language.

L. Issue 14 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the definition of "Telephone Exchange Service" be defined based on the unknown geographic location of the originating and terminating caller, or should it mirror the terms of the Act?

Qwest's Statement of the Issue: Should the Commission adopt a definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" that means "traffic that is originated and terminated within the same Local Calling Area as determined by the Commission"? In addition to that, should the Commission also adopt a definition of "Telephone Exchange Service" that is substantially the same as the definition of that term proposed by Level 3?

(34) Level 3's Position.

90. Level 3's submits that its proposed definition of "Telephone Exchange Service" is derived from § 47 U.S.C. § 153. It contends that Qwest's proposed definition of "Exchange Service" is not derived from the Act and should be rejected by the Commission. It submits that Qwest's proposed definition of this term constitutes an attempt to regulate the types of traffic that may be exchanged between the parties.

(35) Qwest's Position.

91. Qwest contends that this issue has nothing to do with the definition of "Telephone Exchange Service" since the Level 3 and Qwest definitions of that term are nearly identical. It states that Level 3's addition of terms contained in subsections "(A)" and "(B)" is not a substantive change. It argues that its use of the term "End User Customers" is clearer and more understandable than Level 3's use of the term "subscribers." It also points out that this is a term defined in the ICA but that the term "subscriber" is not so defined. It states that its proposed

definition of "Telephone Exchange Service" has been previously approved by the Commission and, as a result, should also be approved in this proceeding.

92. Qwest contends that the real issue is Level 3's attempt to strike Qwest's proposed definition of "Exchange Service" or "Extended Area Service (EAS)/Local Traffic." According to Qwest, this constitutes an attempt by Level 3 to eliminate language from the ICA that defines local/EAS service as service originated and terminated within the LCAs established by the Commission.

93. Regarding Level 3's argument that local service should not be defined based on the "unknown" geographic location of the originating and terminating caller, Qwest contends that this is the commonly accepted method of defining local exchange traffic and should not be discarded because Level 3 wishes to collect intercarrier compensation on traffic that does not meet the definition. Regarding Level 3's second argument that Qwest is attempting to regulate the type of traffic being exchanged between the parties, Qwest counters that this issue has nothing to do with whether traffic will be exchanged but, instead, relates to whether the traffic will be subject to intercarrier compensation.

(36) Commission Resolution of Issue 14.

94. In accordance with our decisions on Issues 2 and 3, we adopt Qwest's language.

M. Issue 15 (Section 4 Definitions)

Level 3's Statement of the Issue: Should the definition of "Telephone Toll Service" be defined based on the Act's definition?

Qwest's Statement of the Issue: Is it necessary to have a separate definition of "Telephone Toll Service"?

(37) Level 3's Position.

95. Level 3's proposes to define the term "Telephone Toll Service," and to adopt the definition set forth in the Act. It submits that Qwest has offered no explanation for its opposition to so defining this term.

(38) Qwest's Position.

96. Qwest points out that none of its SGATs contain a definition of "Telephone Toll Service" and, given the existing definition of IntraLATA toll traffic, the inclusion of such a definition would merely create confusion. It believes there is no need for such a definition and that its inclusion might be used by Level 3 to justify the receipt of intercarrier compensation for VNXX calls and to require Qwest to allow the termination of separately tariffed Switched Access services via interconnection trunks.

(39) Commission Resolution of Issue 15.

97. In accordance with our decisions on Issues 2 and 3, we adopt Qwest's language.

N. Issue 16 (Section 4 Definitions)

Level 3's Statement of the Issue: Assuming that the Agreement will define "Voice over Internet Protocol" or "VoIP", should the definition of "VoIP" contain substantive terms that limit the circumstances in which the parties will exchange traffic, and the compensation that will be derived from the exchange of VoIP traffic?

Qwest's Statement of the Issue: Whether "VoIP Traffic" should be defined according to the standard industry definition that specifies the types of equipment involved, requires that the call originate in Internet Protocol ("IP"), and requires that the call be transmitted over a broadband connection to the VoIP Provider?

(40) Level 3's Position.

98. Level 3 wishes to adopt a definition of VoIP traffic that is reasonably related to the FCC's *Vonage Order* which recognizes that the location of the end users are not generally known. It contends that Qwest's proposed definition does not match the definition of VoIP

adopted by the FCC and goes far beyond just defining the traffic. It submits that Qwest's proposed definition of VoIP controls the substantive rights and obligations of the parties to exchange traffic based on the physical geographic location of the originating caller. It believes that Qwest's proposed definition seeks to create compensation terms and conditions and structures the routing obligations of this traffic and that this is an improper to attempt to govern the compensation and routing obligations of parties through definitions.

(41) Qwest Position.

99. Qwest points out that the first portions of its and Level 3's definitions of "VoIP Traffic" are substantially the same with two exceptions. First, the Qwest definition states that VoIP traffic must be "transmitted over a broadband connection to the VoIP provider," while the Level 3 definition states that it must be "transmitted over a broadband connection to **or from** the VoIP provider." Second, Qwest proposes that the origination point for the Level 3 side of the call be the "end user premises" while the Level 3 language does not contain that reference.

100. In addition, Qwest also proposes additional language to address other definitional issues related to "VoIP traffic." These include recognition that VoIP traffic is an "information service", that VoIP traffic is subject to interconnection and compensation based on the VoIP Provider's POP being treated as the premises of the end user, and that LIS trunks may be used to terminate VoIP traffic based on rules that apply to other end users, including the requirement that the VoIP Provider POP be physically located in the same LCA as the called party.

101. It is Qwest's position that only calls that are originated by the calling party in IP protocol and that are transmitted over a broadband connection to the VoIP provider are properly classified as VoIP calls. Qwest points out that Level 3 appears to agree with the proposition that

the call must originate in IP protocol, but then removes language intended to make it clear that it must originate in IP protocol at the premises of the calling party.

102. Qwest also points out that Level 3's language indicates that the call must be transmitted over a broadband connection "to **or from**" the VoIP provider. By eliminating the requirement that a VoIP call must originate on a broadband connection it contends that Level 3's definition may include traffic originated on an analog dial-up connection, so long as it is translated into IP when it goes to or comes from the VoIP provider. It believes that the precise implications of Level 3's proposed language are not entirely clear, but that it has the potential of transforming traffic that should not be considered as VoIP traffic into VoIP traffic for compensation purposes.

103. Qwest points out that Level 3's recognition that VoIP traffic is an information service supports adoption of Qwest's definition. Qwest's definition provides that the VoIP Provider POP is to be treated as the "end user premises" for interconnection and intercarrier compensation purposes. Qwest believes, therefore, that its proposal is consistent with the manner in which the VoIP provider's POP is treated for purposes of the ESP exemption. Qwest points to arguments it makes regarding its position on Issue 4 in support of its proposal that compensation should only be paid for "local" VoIP calls. Qwest's definition provides that LIS trunks may only be used to terminate VoIP traffic based on rules that apply to other end users, including the specific requirement that the VoIP Provider's POP be physically located in the same LCA as the called party. It believes that Level 3's use of LIS services should be under the same circumstances that other CLECs are able to use them.

(42) Commission Resolution of Issue 16.

104. In accordance with our decision on Issue 4, we order the parties not to include a definition of VoIP in this Agreement.

O. Issue 17 (Sections 7.2.2.8.4, 7.2.2.8.6.1, and 7.2.2.8.6.2)

Level 3's Statement of the Issue: Is Level 3 required to provide forecasts to Qwest and if so, should Level 3 be responsible for costs Qwest incurs to provide capacity to meet erroneous forecasts?

Qwest's Statement of the Issue: Should Level 3 be required to provide forecasts to Qwest and if so, should Level 3 be responsible for costs Qwest incurs to provide capacity to meet erroneous forecasts?

(43) Level 3's Position.

105. Level 3 observes that Qwest proposes a series of terms and conditions that would require it to assume costs for forecasting trunk capacity requirements for the interconnection and exchange of traffic. Level 3 contends that is should not be required to assume responsibility for Qwest's costs, especially for facilities and network requirements that are not on Level 3's side of the POI. It believes that Qwest's proposed terms would require it to assume costs for forecasting and managing trunks and facilities on Qwest's side of the POI. It also objects to Qwest's attempt to impose financial penalties and security deposit requirements if Level 3 does not properly advise Qwest how to manage its own interconnection facilities. It contends that Qwest improperly seeks to shift to Level 3 Qwest's own network costs.

(44) Qwest's Position.

106. Qwest observes that forecasts are necessary so that it can plan for future demands on its network. It believes that Level 3 has an incentive to overstate its capacity needs and that its proposed language requiring Level 3 to back up its forecasts with deposits will promote more

realistic estimates of Level 3's capacity needs and will discourage it from making inflated capacity forecasts.

(45) Commission Resolution of Issue 17.

107. In accordance with our decision on Issue 1, we adopt Qwest's language. Level 3, like all CLECs, has a requirement to forecast need for LIS trunks in order to ensure adequate capacity will be available in the network.

P. Issue 18 (Section 7.3.9)

Level 3's Statement of the Issue: May the parties rely on jurisdictional allocation factors to identify the compensation for the types of traffic exchanged?

Qwest's Statement of the Issue: Whether Qwest's mechanized billing systems and procedures should be replaced by a manual system based upon jurisdictional allocation factors.

(46) Level 3's Position.

108. Level 3 contends that the language it proposes in Section 7.3.9 of the ICA provides clear instructions on how the parties will measure and report Interexchange, ISP-bound and IP-Enabled traffic, irrespective of the rate of compensation established by the ICA. It believes that Qwest's proposed language is vague and ambiguous. Level 3 points out that allocation factors are regularly used to apportion compensation for the exchange of traffic and that the parties can establish Percent of Local Use (PLU) and Percent of Interstate Use (PIU) allocators to account for the calls exchanged between their networks. Level 3 proposes to create an additional allocation factor, Percent of IP Use, to measure the percent of IP-Enabled Traffic exchanged between the parties.

(47) Qwest's Position.

109. Qwest observes that Level 3 has proposed the creation of several new jurisdictional allocation factors that presuppose the Commission will adopt Level 3's traffic

definitions and interconnection proposal whereby switched access traffic is commingled with other types of traffic on the same interconnection trunks. It contends that Level 3's proposal should be rejected for the same reasons that Level 3's traffic definitions and commingling proposals should be rejected. It believes that Level 3's proposed jurisdictional factors serve no purpose if the Commission adopts Qwest's traffic definitions and proposed trunking arrangements.

110. Qwest believes that using Level 3's jurisdictional allocation factors would require it to create a large manual process that is completely dependent on data supplied by Level 3. It contends that Level 3 has not provided a reasonable basis for the extensive disruptions to Qwest's mechanized billing systems that the Level 3 proposal would cause.

(48) Commission Resolution of Issue 18.

111. In accordance with our decision on Issue 2, we adopt Qwest's language.

Q. Issue 19 (Section 7.3.6.2)

Level 3's Statement of the Issue: Whether the parties should use the FCC's 3:1 ratio to determine what traffic is ISP-bound traffic or whether they should use Qwest's method for tracking ISP-bound traffic where the Commission has previously ruled that Qwest's method is sufficient?

Qwest's Statement of the Issue: Whether the parties should use a Commission-approved method by which Qwest tracks ISP-bound traffic as the method for such tracking under the agreement and, in the alternative, whether the FCC's 3:1 ratio should be used in the event the Commission has not approved an alternative method.

(49) Level 3's Position.

112. Level 3 believes that ISP-bound traffic should be identified using the FCC's rebuttable presumption that traffic exceeding a 3:1 terminating to originating ratio is deemed to be ISP-bound traffic. It contends that Qwest's position on this issue is inappropriate since it has voluntarily opted into the FCC's ISP-bound compensation framework, a key aspect of which is

the 3:1 ratio. It also contends that Qwest's proposal, which refers to unspecified prior Commission rulings, is vague and ambiguous.

(50) Qwest's Position.

113. Qwest argues that rather than mandating use of the FCC's 3:1 ratio as the level at which a presumption is made that all traffic exceeding that level is ISP-bound, the ICA should adopt the methodology it uses to track ISP-bound traffic. It points out that the Commission has previously determined that method to be sufficient. It disputes Level 3's argument that the 3:1 ratio should be used as a result of Qwest opting into the FCC's ISP-bound compensation framework. Although Qwest acknowledges that it follows the interim regime of the *ISP Remand Order* to the extent applicable, it does not believe that it is precluded from suggesting alternative methods for determining and tracking ISP-bound traffic. It contends that the 3:1 ratio is designed as an estimate of levels of ISP-bound traffic but that its method of tracking ISP-bound traffic is more accurate. Qwest also contends that Level 3's argument that a reference to an unspecified prior Commission ruling is ambiguous and vague is illogical since such a ruling will be verifiable through reference to a specific Commission order.

(51) Commission Resolution of Issue 19.

114. In accordance with our decision on Issue 3, we adopt Qwest's language. The Commission has previously determined that Qwest's method of measuring ISP-bound traffic is sufficient. The FCC allowed in the *ISP Remand Order* for a party to propose an alternative to the 3:1 presumption when possible. Level 3 makes no supporting arguments as to why Qwest's method is inadequate. Further, Level 3's attempt to characterize all traffic that is not ISP-bound traffic as "Section 251(b)(5) traffic" is not consistent with law nor with our previous decisions in this arbitration.

R. Issue 20 (Section 7.3.8)

Level 3's Statement of the Issue: In identifying IP enabled traffic, should the parties allow for call records that will include information other than Calling Party Number?

Qwest's Statement of the Issue: What signaling information should the Agreement require the parties to provide to each other?

(52) Level 3's Position.

115. Level 3 proposes relying on the term "Call Record" to identify the data within the call records. It submits that its proposed terms and conditions will allow the parties to exchange records that may include additional information beyond the Calling Party Number of the originating caller. According to Level 3, this will provide more flexibility for it and Qwest to agree to new or different recording technologies. It believes that Qwest's proposed "CPN" reference limits the parties to only that form of technology.

(53) Qwest's Position.

116. Qwest submits that the parties should provide industry standard signaling information needed to issue bills in a complete and timely fashion. It points out that the intent of this section of the ICA is to establish the signaling requirements between telecommunications networks. It believes that Level 3's proposed language adds confusion to Section 7.3.8 by using terms that are not signaling protocol terms defined by the ICA or by telecommunications signaling standards. It also believes that Level 3's language further broadens the mitigation of traffic without calling party number to encompass arbitrarily defined non-standard signaling parameters. Qwest submits that its proposal provides specific language addressing the exchange of signaling information using industry defined signaling parameters.

117. Qwest points out that Section 7.3.8 addresses specific signaling parameters that are included in the SS7 signaling stream. It believes that Level 3's proposal introduces a

generalization referred to only as "calling record information" that may or may not be included in the signaling stream that is required to set up a call through the PSTN. It also submits that Level 3's Section 7.3.8 proposal does not provide flexibility that is not already available to the parties by agreeing to modify the signaling information that is exchanged as circumstances and industry standards change.

(54) Commission Resolution of Issue 20.

118. In accordance with our decision on Issue 2, we adopt Qwest's language.

S. Issue 21 (Section 7.4.1.1)

Level 3's Statement of the Issue: Whether, when ordering Interconnection, Level 3 could be deemed to implicitly agreeing to pay the costs of the trunks and facilities on Qwest's side of the POI?

Qwest's Statement of the Issue: Whether Level 3's proposed Section 7.4.1.1 is necessary when no provision in Section 7.4 allocated responsibility for the cost of interconnection.

(55) Level 3's Position.

119. Level 3 believes that Qwest's proposal contains terms that may imply that it is obligated to pay a portion of Qwest's costs incurred on the Qwest side of the POI. It believes that the language it proposed in Section 7.4.1.1. is necessary to clarify and confirm that Level 3 is not required to pay these costs.

(56) Qwest's Position.

120. Level 3 believes that Qwest's proposed Section 7.4.1.1 is unnecessary since the Commission will determine who pays the costs of interconnection in the sections of the ICA related to Issue 1. Since nothing in Section 7.4 requires Level 3 to pay interconnection costs, Qwest believes that Level 3's proposed Section 7.4.1.1 should be rejected.

(57) Commission Resolution of Issue 21.

121. In accordance with our decision on Issue 1, we adopt Qwest's language.

T. Issue 22 (Section 19.1.1)

Level 3's Statement of the Issue: Whether Qwest may compel Level 3 to incur special construction charges for work completed on Qwest's facilities and network on Qwest's side of the POI?

Qwest's Statement of the Issue: Whether Level 3's proposed Section 19.1.1 is appropriate when nothing in Section 19 allocates responsibility for payment of construction of facilities.

(58) Level 3's Position.

122. Level 3 believes that Qwest seeks to impose special construction charges on it for costs incurred by Qwest in building out its network for interconnection with Level 3. It believes that Section 19.1.1 is necessary to clarify that Qwest may not compel it to pay for costs on Qwest's side of the POI.

(59) Qwest's Position.

123. Qwest believes that Level 3's proposed Section 19.1.1 is unnecessary. It submits that nothing in Section 19 allocates responsibility for paying the costs of constructing interconnection or other facilities and, therefore, a disclaimer as to responsibility for paying the cost of new construction serves no purpose. It contends that proposed Section 19.1.1 underscores that Level 3 overreaches when it argues that it should not have to pay any of the interconnection costs Qwest incurs on its side of the POI. Qwest argues that when Level 3 requests that it build additional facilities for network interconnection designed to benefit Level 3 it is entitled to just and reasonable compensation for such costs.

(60) Commission Resolution of Issue 22.

124. In accordance with our decision on Issue 1, we adopt Qwest's language.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by Level 3 Communications, LLC on May 13, 2005 are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, Level 3 Communications, LLC and Qwest Corporation shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The 20-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the Mailed Date of this decision.

4. This Order is effective immediately upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING FEBRUARY 22, 2007.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RON BINZ

POLLY PAGE

CARL MILLER

Commissioners