[Service Date March 12, 2007]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:	)	DOCKET UT-063006
LEVEL 3 COMMUNICATIONS, LLC,	)	ORDER 10
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	)	ARBITRATOR'S REPORT AND DECISION
. . . . .	)	

1 ***Synopsis.*** *The Arbitrator recommends resolution of the primary, or Tier 1, disputed issues that the parties to this arbitration presented for decision, as follows:*

- *Adopting Qwest's definition of VNXX traffic, but rejecting language both parties propose concerning compensation for VNXX and ISP-bound traffic.*
- *Rejecting Qwest's and Level 3's language concerning relative use factors.*
- *Adopting, in part, Qwest's definition of VoIP, and providing a bill and keep compensation method for VoIP.*
- *Adopting Qwest's proposed language for combining traffic on Feature Group D trunks.*
- *Adopting, in part, Qwest's proposed language concerning points of interconnection.*

The Arbitrator resolves the remaining issues, referred to by the parties as Tier 2 issues, in Qwest's favor, with the exception of language concerning access to high capacity UNEs. The Arbitrator recommends adopting, in part, Level 3's proposed language.

I. BACKGROUND

A. Nature of Proceeding

2 This proceeding involves a request by Level 3 Communications, LLC (Level 3), to arbitrate an interconnection agreement with Qwest Corporation (Qwest) under 47 U.S.C. § 252(b), Section 252(b) of the Telecommunications Act of 1996 (the Act). [1]

B. Appearances

3 Erik Cecil, Regulatory Counsel, Broomfield, Colorado, and Scott Porter, Regulatory Counsel, Tulsa, Oklahoma, represent Level 3. Lisa A. Anderl, Associate General Counsel, Seattle, Washington, Thomas M. Dethlefs, Senior Attorney, Denver, Colorado, and Ted Smith, Stoel Rives LLP, Salt Lake City, Utah, represent Qwest.

C. Procedural History

4 On January 26, 2006, Level 3, a competitive local exchange carrier (CLEC) filed with the Washington Utilities and Transportation Commission (Commission) a request for arbitration of an interconnection agreement with Qwest, an incumbent local exchange carrier (ILEC).

5 The Commission entered an Order on Arbitration Procedure on February 1, 2006, appointing Administrative Law Judge Ann E. Rendahl as arbitrator. The procedural order is consistent with the Commission's procedural rules governing arbitration proceedings under the Act, as well as the Commission's rules for conducting such arbitrations.[2]

6 Qwest filed a response to Level 3's petition on February 21, 2006.

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[1] Public Law No. 104-104, 101 Stat. 56 (1996).
[2] WAC 480-07-630 and WAC 480-07-640.

7 After convening a prehearing conference in this docket on March 3, 2006, the Arbitrator entered Order 02, a prehearing conference order establishing a procedural schedule for the arbitration, and Order 03, a protective order. At the prehearing conference, the parties waived the statutory deadlines for arbitration, subject to setting a specific schedule in the proceeding.

8 The Arbitrator resolved a discovery dispute between the parties in Order 04, granting in part and denying in part Level 3's motion to compel.

9 The Arbitrator held several prehearing conferences to discuss scheduling and a possible conflict involving a Commission staff member, Bob Williamson, acting in an advisory capacity in this proceeding and in an advocacy role in another proceeding involving Qwest and Level 3, Docket UT-063038. Following the conference, the parties submitted letters to the Commission waiving their objection to possible ex parte communications resulting from Mr. Williamson's efforts in the two proceedings.

10 The Commission held a technical conference in Olympia, Washington, on August 24, 2006, before Arbitrator Rendahl after the parties had filed direct and supplemental direct testimony with the Commission.

11 The Commission held three days of evidentiary hearings from October 24 to October 26, 2006, in Olympia, Washington.

12 Despite negotiations, the parties have failed to reach agreement on a number of terms in their proposed interconnection agreement. The parties filed a joint issues list on December 20, 2006, identifying three primary issues, and numerous subissues that remain to be resolved in this arbitration. The parties filed simultaneous initial briefs on December 12, 2006, and reply briefs on January 23, 2007.

13 The parties filed an updated template interconnection agreement with the Commission on February 15, 2007.

14 Also on February 15, Qwest filed as supplemental authority a recent decision by the arbitrator in a similar proceeding before the Oregon Public Utilities Commission.

15 On February 1 and 22, the Arbitrator entered orders modifying the procedural schedule after the parties agreed to extend the schedule time for an Arbitrator's Report and Decision.

16 On March 8, 2007, Qwest filed as supplemental authority a recent decision in a similar proceeding before the Colorado Pubic Utilities Commission.

D. Resolution of Disputes and Contract Language Issues

17 This Arbitrator's Report is limited to the disputed issues presented for arbitration. *47 U.S.C. § 252(b)(4*). The parties were required to present proposed contract language on all disputed issues to the extent possible, and the Arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. Each decision by the Arbitrator is qualified by discussion of the issue. Contract language adopted pursuant to arbitration remains subject to Commission approval. *47 U.S.C. § 252(e).*

18 This Report is issued in compliance with the procedural requirements of the Act, and it resolves all issues that the parties submitted to the Commission for arbitration. The parties are directed to resolve all other existing issues consistent with the Arbitrator's decisions. In Section II. F.1., this Order requires parties to file a complete amendment to the parties' interconnection agreements with the Commission by **April 20, 2007**. In the alternative, if the parties are unable to submit a complete amendment to the parties' interconnection agreements due to lack of agreement on amendment language, the parties may request an extension of time to file, at least 10 days prior to the filing date. At the conclusion of this Report, the Arbitrator addresses procedures for review to be followed prior to entry of a Commission order approving an amendment to the interconnection agreements between the parties.

II. MEMORANDUM

A. The Commission's Duty under the Telecommunications Act of 1996

19 Two central goals of the Act are the nondiscriminatory treatment of carriers and the promotion of competition. The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. *47 U.S.C. § 251(c)(1).* Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part. *47 U.S.C. § 252(d).* The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251 and 252 and RCW 80.36.610.

B. Standards for Arbitration

20 The Act provides that in arbitrating interconnection agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. *47 U.S.C. § 252(c).*

C. Background

21 Level 3 is registered with the Commission as a competitive local exchange company, or CLEC, as defined in 47 U.S.C. § 251(h). Level 3 is one of the largest providers of wholesale dial-up service to Internet Service Provider (ISPs) in North America, and operates one of the world's largest broadband fiber optic, or Internet backbone, networks.[3] Level 3 is also a primary provider of Internet connectivity through its cable and digital subscriber line DSL) partners.[4] Through its all-Internet Protocol (IP)

[3] Greene, Exh. 31-T at 3:7-8, 5:1-3.
[4] *Id.*, 3:9-10.

network, Level 3 offers a wide range of communications services over this network, including Internet access, managed modem dial-up services, Voice over Internet Protocol or VoIP,[5] broadband transport, packet switching services, collocation, and dark fiber services.[6]

22 In order to provide dial-up ISP access, VoIP, and other services in Washington, Level 3 must be able to connect its IP network to traditional wireline circuit switched networks, referred to as the Public Switched Telephone Network (PSTN).[7] Level 3's Media Gateway and connected softswitch in Seattle provides this service by translating between Time Division Multiplexing, or TDM, a digital protocol used on the PSTN and Internet Protocol (IP), a packet protocol used on the Internet.[8]

23 Qwest is an incumbent provider of local exchange telecommunications services in Washington State. Qwest is a "telecommunications company" and a "public service company," as those terms are defined in RCW 80.04.010, and an incumbent local exchange carrier, or ILEC, under 47 U.S.C. § 251(h).

24 Level 3 has operated under the terms of an interconnection agreement with Qwest since initiating operations in Washington in 1998.[9] The parties are currently operating under the terms and conditions of an interconnection agreement arbitrated in Docket UT-023042, and filed with the Commission on March 7, 2003.

25 Level 3 interconnects with Qwest's wireline network in Washington through points of interconnection, or POIs, collocated in Qwest central offices.[10] Level 3 has built fiber, purchased private lines from CLECs and leased trunked transport from ILECs

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[5] The definition of VoIP is a disputed issue in this proceeding, and the FCC has not yet adopted a formal definition of VoIP. However, as this Order discusses below, VoIP is a service that enables persons with specialized customer premises equipment to originate and receive voice communications over the Internet.
[6] Greene, Exh. 31-T at 3:14-24.
[7] *Id*., 7:3-13.
[8] *Id*., 8:23 – 9:4; TR 96:21 – 100:6; *see also* Exh. 33.
[9] *In the Matter of the Petition of Level 3 Communications, L.L.C., for Classification as a Competitive Telecommunications Company*, Docket UT-980578, Final Order (Oct. 14, 1998).
[10] Level 3 also has secondary points of interconnection by leasing transport from Qwest through Direct End Office Trunking, or DEOTs, to extend its presence on Qwest's network to more remote end offices. *See* Ex. 32; *see also* Greene, TR 90:21-25.

to move traffic between its media gateway and these POIs.[11] Where a Qwest customer initiates a call, for example to an ISP using dial-up Internet service, Qwest delivers the call to the POI using shared transport or direct trunk transport which Level 3 leases from Qwest. Level 3 takes the call from the POI and transports it over fiber circuits Level 3 has built or purchased as a private line, and delivers the traffic to its media gateway in Seattle. Level 3's media gateway then converts the information from TDM to IP and determines whether the call is a VoIP call or a dial-up data call to an ISP. Level 3 then delivers the information through packet switching to the appropriate destination through its IP network. [12]

26 Level 3 and Qwest exchange local, ISP, VoIP and long distance traffic under their current interconnection agreement. The majority of the traffic that Level 3 and Qwest exchange, however, is traffic originated by Qwest customers to ISP customers of Level 3.[13]

D. Issues, Discussion, and Decisions

27 The disputed issues in this proceeding arise from Level 3 and Qwest's different network architectures and the nature of the traffic the parties exchange under their agreement. The primary issues arise from services Level 3 provides to ISPs and enhanced service providers that "stand at the crossroads of technology and regulation,"[14] i.e., virtual NXX, or VNXX traffic[15] and Voice over Internet Protocol, or VoIP. Specifically the parties do not agree on the terms, conditions and intercarrier compensation for exchanging VNXX and VoIP traffic. The parties also dispute the type of facilities Level 3 may use to exchange traffic, the terms and conditions for using the facilities, and who bears the cost of the facilities. The parties dispute

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[11] Exh. 33; Greene, TR 90:25 – 91:6.
[12] Greene, TR 103:9 – 105:12, 109:9 – 113:1; *see also* TR: 126:23 – 129:7.
[13] Greene, TR 433:15-20.
[14] *Global Naps, Inc. v. Verizon new England, Inc. f/ka/ new England Telephone and Telegraph Co., d/b/a Bell-Atlantic Vermont, Inc*., et al., 454 F.3d 91, 94-95 (2nd Cir. 2006).
[15] As with VoIP, the definition of VNXX traffic is one of the disputed issues in this proceeding. This Commission has previously described VNXX arrangements as "a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number." *See Level 3 Communications, LLP v. Qwest Corporation*, Docket UT-053039, Order 06, Order Denying Petition for Reconsideration, n.1 (June 9, 2006) [Hereinafter *Level 3 Reconsideration Order*].

whether Level 3 may use Qwest trunking facilities designated for local interconnection traffic to combine, not just local exchange, but interexchange traffic as well, or whether Level 3 must use other Qwest trunking facilities, known as Feature Group D, or FGD, trunks. The parties dispute their obligations under the Act when interconnecting their networks. The parties also dispute a number of other issues, some of which are ancillary to the primary issues.

28 This Order addresses the major disputed issues first, out of numerical sequence.[16]

1. Definition, Terms and Conditions and Compensation for VNXX and ISP-Bound Traffic (Issue Nos. 1A, 3A-C, 4, 19)[17]

29 The most contested issue in this arbitration concerns whether VNXX traffic should be allowed under the parties' interconnection agreement, and if so, what terms, conditions and intercarrier compensation should apply to this traffic.

30 VNXX traffic is traffic that appears local based on the assigned telephone number. As background, ten-digit telephone numbers on the PSTN use what is referred to as the NPA/NXX format, in which the NPA is the area code and the NXX is the 3-digit prefix, or number, that identifies a specific geographic area served by a local exchange company. The NXX code identifies where a call is to be terminated, and determines whether a caller incurs local or toll charges. VNXX numbers have the same NXX prefix as the local calling area of an end-user customer, but may terminate in a different calling area, local access and transport area (LATA), or state.

31 This issue of VNXX traffic is not new to the Commission, and is currently the subject of two cases involving Qwest and Level 3 before the Commission and one on appeal in federal district court.[18] The issue is also the subject of the Federal Communications Commission's (FCC) pending rulemaking concerning intercarrier compensation.[19]

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[16] This Order does not address Issue No. 5, references to Qwest's Statement of Generally Acceptable Terms (SGAT), as the parties appear to have resolved this issue. Level 3 does not address the issue in brief, and Qwest identifies the issue as resolved. Qwest Initial Brief, ¶ 115.
[17] The issue numbers correspond to those designated by the parties in their Joint Issues List and briefs.
[18] Qwest and Level 3 are currently arguing the issue of VNXX traffic before the Commission in this arbitration proceeding and a complaint Qwest filed against nine CLECs in Docket UT-

32 This issue first arose in a petition Level 3 filed with the Commission against Qwest to enforce the terms of its interconnection agreement. Level 3 sought to enforce terms in the agreement for compensation for exchanging traffic bound to Internet Service Providers or ISPs. Qwest claimed that the traffic at issue was VNXX traffic, i.e., not local traffic, and was not eligible for compensation as ISP-bound traffic under the FCC's *ISP Remand Order*.[20] Qwest filed counterclaims asserting that the Commission ban VNXX traffic as illegal and contrary to public policy. The Commission found that the *ISP-Remand Order* established a compensation scheme for all ISP-bound traffic, no matter whether it is local, toll or long distance, and that Level 3 was entitled to compensation under the agreement.[21] Further, the Commission dismissed Qwest's counterclaims, and directed Qwest to file a complaint specifically addressing the propriety of VNXX traffic.[22] Qwest appealed the Commission's decision to federal district court.

33 On May 23, 2006, after Level 3 initiated this arbitration proceeding, Qwest filed a formal complaint with the Commission in Docket UT-063038 against nine individual CLECs, including Level 3, asserting the carriers' use of VNXX arrangements is a violation of state and federal law. Qwest requests the Commission prohibit the use of VNXX arrangements in Washington. Rebuttal testimony in that proceeding is due to be filed on March 16, with hearings during the week of April 23, 2007, and an initial order likely to be entered by the end of the summer.

063038. Qwest sought judicial review of the Commission's Order in Docket UT-053039, the *Level 3 Reconsideration Order,* and a companion order in Docket UT-053036, in the United States District Court for Western Washington.

[19] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, 16 FCC Rcd. 9610 ¶ 115 (2001)[Hereinafter *Intercarrier Compensation NPRM*].

[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, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd. 9151 (2001) [Hereinafter "*ISP Remand Order*"].

[21] *Level 3 Communications, LLP v. Qwest Corporation*, Docket UT-053039, Order 05, Final Order Accepting Interlocutory Review; Granting, In Part, And Denying, In Part, Level 3's Petition For Interlocutory Review (Feb. 10, 2006) ¶¶ 19, 25 – 30. [Hereinafter *Level 3 Final Order*].

[22] *Id*.

34 Another wrinkle in the VNXX issue is that Level 3 uses VNXX arrangements solely for ISP-bound traffic in providing service to dial-up ISPs and other carriers referred to as "enhanced service providers," or ESPs.[23] Level 3 explains that, to ensure that dial-up Internet access remains affordable, an end-user's dial-up phone call to an ISP must be a local call. Level 3 uses VNXX arrangements to bring dial-up datatraffic to the ISP, which is usually located in one central location, rather than every local calling area.[24] These VNXX arrangements make the call appear to the end-user as a local call, without incurring toll charges for long distance service to the ISP.

35 The effect of Level 3's use of VNXX arrangements for ISP-bound service is that Qwest is responsible for compensating Level 3 for terminating calls from Qwest end-users to Level 3's customers, i.e., dial-up ISPs, and Level 3 pays Qwest very little for terminating Level 3's traffic on Qwest's network. Qwest asserts that Level 3's VNXX arrangements allow it to avoid paying toll and access charges for traffic it exchanges with Qwest.[25]

36 With this background concerning VNXX traffic, the appropriate issue to address first is the definition.

37 ***Definition of VNXX.*** The parties propose different definitions for VNXX traffic in Section 4 of the proposed agreement.[26] In language that is confusing, Level 3's proposal defines VNXX traffic in terms of how it should be compensated, rather than describing the characteristics of the traffic:

> "VNXX traffic" is traffic that the Washington Utilities and Transportation Commission determines should be compensated at the WUTC approved local reciprocal compensation rate ($0.00161/MOU) where Level 3 does not have facilities in the same Local Calling Area as the end user customer making an ISP-bound or VoIP call to or receiving a VoIP call routed over such Level 3 facilities. ISP-bound and VoIP Traffic that is exchanged at a compensation rate of $0.0007 is not VNXX so long as Level 3 facilities are located within the same

[23] Exh. 121 (Level 3's response to Bench Request No. 1).
[24] Greene, Exh. 31-T at 7:22 – 8:10.
[25] Qwest Initial Brief, ¶ 4.
[26] The parties dispute the definition of VNXX traffic in Issue No. 3B.

> LATA as the end user customer making an ISP-bound or VoIP call to or receiving a VoIP call from Level 3's facilities located in the same LATA as that customer.[27]

38 Level 3 argues in brief that the definition should focus on the location of Level 3's facilities rather than the location of the end user customer, and whether the traffic is local, interexchange or ISP-bound traffic for purposes of compensation.[28] Level 3 acknowledges in a footnote, however, that VNXX traffic is "a routing arrangement in which the calling party dials a number with an NXX code that is 'local' to that customer, but the call is physically delivered to the called party in a distant location."[29]

39 Qwest proposes a definition that describes the characteristics of VNXX traffic:

> "VNXX traffic" is all traffic originated by the Qwest End User Customer that is not terminated to CLEC's End User Customer physically located within the same Qwest Local Calling Area (as approved by the state Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether CLEC's End User Customer is assigned an NPA-NXX associated with a rate center in which the Qwest End User Customer is physically located.[30]

40 As Qwest notes, the FCC has described VNXX codes as "central office codes that correspond with a particular geographic area that are assigned to a customer located in a different geographic area."[31] This Commission has previously described VNXX arrangements as "a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area."[32] In these descriptions, the FCC and Commission were describing VNXX codes and arrangements, rather than VNXX traffic, the issue in this proceeding.

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[27] Exh. 4, § 4.
[28] Level 3 Reply Brief, App. at 1-2.
[29] Level 3 Opening Brief, n.5.
[30] Exh. 4, § 4.
[31] *Intercarrier Compensation NPRM*, ¶ 115, n.188.
[32] *Level 3 Reconsideration Order*, n.1.

41 It is not appropriate to mix terms and conditions for compensation with a description or definition of a service. While Qwest's proposed language also uses terminology related to compensation, i.e., origination and termination, it does not apply terms and conditions of service or rates. Qwest's language describes the flow of a VNXX call consistent with the FCC's and this Commission's description of VNXX arrangements. Qwest's definition should be included in the proposed agreement. Level 3's proposed language is rejected.

42 ***Terms and Conditions and Compensation for Exchanging VNXX and ISP-Bound Traffic***. Level 3 and Qwest dispute the terms and conditions for exchanging VNXX traffic and the applicable intercarrier compensation for VNXX and ISP-bound traffic in several sections of the proposed agreement.[33] The principal issues in dispute are what traffic is subject to compensation under the FCC's *ISP Remand Order*, and whether Qwest has complied with the requirements of the "mirroring rule" under the *ISP Remand Order*.

43 As discussed above in paragraph 31, this Commission has interpreted the *ISP Remand Order* as establishing a "separate compensation category for ISP-bound traffic, regardless of origination or termination of the traffic."[34] The Commission found the First Circuit's *Global Naps* decision not binding in Washington, and found the FCC's amicus brief, filed with the First Circuit, supported the Commission's interpretation of the FCC's order.[35] Since the Commission entered its order in Docket UT-053039, the Ninth Circuit has reviewed a decision of the California Public Utilities Commission concerning the use of VNXX arrangements and the FCC's *ISP Remand Order* in *Verizon California, Inc. v. Peevey*.[36]

44 The Commission has not previously addressed the mirroring rule. In its *ISP-Remand Order*, the FCC discussed the rate for ISP-bound traffic and provided:

> [T]he rate caps for ISP-bound traffic (or such lower rates as have been imposed by state commissions for the exchange of ISP-bound traffic)

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[33] Exh. 4, §§ 7.3.4.1, 7.3.4.2, 7.3.4.3, 7.3.6.3, 7.3.6.2, 7.3.6.1.
[34] *Level 3 Reconsideration Order*, ¶ 20.
[35] *Id*., ¶¶ 19-20; *Global Naps, Inc. v. Verizon New England, Inc., et al.*, 444 F.3d 59 (1st Cir. 2006) [Hereinafter *Global Naps I*].
[36] 462 F.3d 1142 (9th Cir. 2006).

> apply only if an incumbent LEC offers to exchange all traffic subject to Section 251(b)(5) at the same rates. An incumbent LEC that does not offer to exchange section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state–negotiated reciprocal compensation rates reflected in their contracts.[37]

Following this Commission's decision concerning compensation for ISP-bound traffic in Docket UT-053039, the Level 3 interprets the rule to require ILECs to offer to exchange both ISP-bound traffic and traffic subject to Section 251(b)(5) at the FCC's rate of $.00007 per minute of use (MOU).[38] Because Qwest disputes the Commission's decision, it argues that the rule requires it to offer to exchange local ISP-bound traffic and traffic subject to Section 251(b)(5) at the FCC's rate.[39] Qwest made this offer in prefiled testimony and at hearing.[40] Level 3 disputes that Qwest has complied with the FCC's rule in making its offer.[41]

45 Level 3 asserts that the use of VNXX arrangements is more appropriately addressed in the pending complaint proceeding.[42] Level 3 argues that this Commission has determined that the FCC's rate for ISP-bound traffic should be applied to VNXX ISP-bound traffic in the agreement.[43] Lastly, Level 3 asserts that Qwest has failed to comply with the FCC's mirroring rule, requiring Qwest to compensate Level 3 differently for ISP-bound traffic and all other traffic under Section 251(b)(5) of the Act.[44]

46 Qwest requests that the Commission prohibit or ban the use of VNXX arrangements.[45] Qwest further argues that VNXX arrangements are not ISP-bound calls under the FCC's *ISP Remand Order* if the calls terminate outside of the end-user's local calling area, the same argument Qwest made in the previous proceeding

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[37] *ISP Remand Order*, ¶8.
[38] Level 3 Reply Brief at 30-31.
[39] Qwest Opening Brief, ¶ 67.
[40] Brotherson, Exh. 51-T at 35-36; TR 335:16-25.
[41] Level 3 Opening Brief at 5-6; Level 3 Reply Brief at 31-34.
[42] Level 3 Reply Brief at 21.
[43] *Id*. at 12-14.
[44] Level 3 Opening Brief at 5-6; Level 3 Reply Brief at 31-34.
[45] Qwest Opening Brief, ¶ 60.

in Docket UT-053039.[46] Finally, Qwest asserts it has complied with the FCC's mirroring rule, and proposes rates for ISP bound traffic and reciprocal compensation consistent with the *ISP Remand Order*.[47]

47 First, the Arbitrator declines to prohibit or ban the use of VNXX arrangements in this proceeding. That issue is more appropriately addressed in the complaint proceeding pending before the Commission in Docket UT-063038. While this arbitration proceeding addresses VNXX traffic, nearly all of the VNXX traffic Level 3 exchanges with Qwest is ISP-bound traffic. This Commission determines such traffic to be ISP-bound traffic, not separately categorized as VNXX traffic. Qwest's proposed language in Section 7.3 refusing to exchange VNXX traffic is rejected. The parties should revisit this issue in an amendment following the Commission's final order in Docket UT-063038.

48 Second, the Arbitrator refrains from addressing the issue of compensation for ISP-bound VNXX traffic in this arbitration. The Commission decided the issue in Docket UT-053039 concerning Level 3's petition for enforcement of its interconnection agreement with Qwest. The matter is now under review in federal district court. There is no reason to relitigate the issue in this arbitration while the matter is pending on appeal.

49 Third, the parties' dispute about compensation for ISP-bound traffic guides their positions on how to approach the mirroring rule. The Arbitrator does not find Qwest's offer noncompliant with the FCC's mirroring rule given their position in their proceeding. Qwest's position, however, is not consistent with this Commission's interpretation of the *ISP-Remand Order*. Qwest's language in Section 7.3.6.1 governing compensation for ISP-bound traffic is appropriate, and should be accepted, provided Qwest also includes the $.00007 rate for exchanging local traffic in its proposed language in Section 7.3.4.1 of the agreement.

50 As a result, the parties' proposed language in Sections 7.3.4.2 and 7.3.6.3 is rejected, consistent with the decisions above. For the reasons discussed above, Qwest's proposed language in Section 7.3.6.1 is accepted, except that Qwest must remove the

[46] *Id*., ¶¶ 39-48.
[47] *Id*., ¶¶ 66-68; Qwest Reply Brief, ¶¶ 52-56.

parenthetical phrase "(where the end users are physically located within the same Local Calling Area)." Qwest's proposed language in Section 7.3.6.2 is also accepted. Level 3's proposed language in Sections 7.3.4.1, 7.3.6.1 and 7.3.6.2 is rejected.

51 ***Relative Use Factors for ISP-Bound Traffic***. Under the FCC's rules, in particular 47 C.F.R. § 54.709(b), an ILEC may charge a CLEC for the use of transmission facilities, and will reduce or credit the amount the CLEC must pay by the CLEC's relative use of the facilities. Under this rule, a relative use factor is applied to the traffic in order to determine the CLEC's use of the facility. In arbitrating the existing interconnection agreement between Qwest and Level 3, the Commission required that ISP-bound traffic be attributed to the originating carrier (Qwest) when determining the relative use factor.[48] Level 3 and Qwest raise the issue of responsibility for ISP-bound traffic again in disputing the relative use factor.[49]

52 This issue hinges on an interpretation of the FCC's Rule 709(b). That rule provides:

> [T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[50]

The interpretation of the rule depends in part on whether the rule applies to all traffic or telecommunications traffic. The FCC defines telecommunications traffic as "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider," but excludes from the definition interstate or intrastate exchange access, information access, or exchange services for such access.[51]

53 In the Commission's prior arbitration decision, the Commission noted that, similar to this proceeding, Level 3 will originate no traffic on its side of the network for

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[48] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation, Pursuant to 47 U.S.C. Section 252*, Fourth Supplemental Order, Commission's Final Order, Docket UT-023042 (Feb. 5, 2003) [Hereinafter *Prior Level 3 Arbitration Order*].
[49] The disputed language appears in Exh. 4, §§ 7.3.1.1.3, 7.3.1.1.3.7.1, 7.3.2.2, and 7.3.2.2.1.
[50] 47 C.F.R. § 54.709(b).
[51] 47 C.F.R. § 54.701(b)(1).

termination on Qwest's network, and will only terminate traffic on its own network that originates from Qwest's customers calling dial-up ISPs.[52] The Commission also explained that the effect of excluding ISP-bound traffic from the relative use factor would result in Level 3 paying all of the costs associated with Qwest's customers calling dial-up ISPs.[53] The Commission determined that even if Rule 709(b) applied only to telecommunications traffic, the rule would not exclude ISP-bound traffic from the relative use calculation.[54] Further, the Commission determined that the rule applies to traffic originated by the interconnecting carrier, not traffic terminated by the carrier.[55] The Commission rejected Qwest's proposal noting that the proposal would apply the relative use rule in reverse and make the rule inapplicable to transmission facilities dedicated to ISP-bound traffic.[56]

54 Level 3 asserts that Qwest's proposal concerning the relative use factor calculation would unfairly transfer a large portion of the cost of receiving ISP-bound traffic from Qwest to Level 3, undermining Level 3's effort to efficiently provide dial-up access to the Internet.[57] Level 3 asserts that the FCC's orders and rules require that the originating carrier, in this case Qwest, must pay to transport traffic to a point of interconnection, or POI, between the carriers' networks.[58] Level 3 requests the Commission not change its prior decision on this issue in this proceeding.

55 Qwest proposes to apply a relative use factor to entrance facilities used for interconnection and direct trunk transport used to carry traffic between the POI and Qwest end offices.[59] Qwest proposes that the terminating carrier (in this case Level 3) be responsible for ISP-bound and VNXX traffic. Qwest asserts that VNXX and ISP-bound traffic are interexchange traffic to which Rule 709(b) does not apply.[60] Qwest asserts that it is economically sound to require a terminating carrier to bear the costs

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[52] *Prior Level 3 Arbitration Order*, ¶ 18.
[53] *Id*.
[54] *Id*., ¶ 38.
[55] *Id*.
[56] *Id*., ¶¶ 38, 40.
[57] Level 3 Opening Brief at 7.
[58] *Id*.
[59] Qwest Opening Brief, ¶ 18.
[60] *Id*., ¶ 20.

of ISP-bound traffic.[61] Qwest relies on a Colorado federal district court decision to support its analysis.[62]

56 The court upheld the Colorado commission's decision to exclude ISP-bound traffic when allocating costs between Level 3 and Qwest.[63] First, the court found that the FCC had determined ISP-bound traffic to be interstate in nature, not local. The court determined that the word "traffic" in Rule 709(b) referred to telecommunications traffic, not all traffic, given both the context of the rule and that Rule 709(a) refers to "telecommunications traffic."[64] The court found that ISP-bound traffic is not telecommunications traffic, and thus, cannot be included in the relative use calculation.[65]

57 Qwest provides no new facts or points of law to persuade the Arbitrator to change the Commission's prior decision on this issue. Having considered the parties' arguments on this issue, the Arbitrator is persuaded that ISP-bound traffic should not be considered in determining the relative use factor, consistent with the Commission's decision on this issue in Docket UT-023042. The Arbitrator is also persuaded that there should be a calculation of relative use, contrary to Level 3's proposal. Thus, this Order rejects both parties' proposed language. The parties should incorporate in the agreement the language on this issue from the current agreement.

2. Definition, Terms and Conditions and Compensation for VoIP Traffic (Issue Nos. 1A, 4, 16, 29)

58 VoIP is a relatively new technological development enabling persons with specialized customer premises equipment to originate and receive voice communications over the Internet.[66] The FCC has addressed various regulatory and technical issues concerning VoIP services in several orders.[67] While the FCC has not yet adopted a formal

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[61] *Id*., ¶ 22.
[62] *Level 3 Communications, LLC v. Public Utilities Commission of Colorado*, 300 F.Supp.2d 1069 (2003).
[63] *Id*.
[64] 300 F.Supp. 2d. at 1177-78.
[65] *Id*. at 1178-79.
[66] *See In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211, 19 FCC Rcd. 22404, ¶ 4 (Nov. 12, 2004) [Hereinafter *Vonage Order*].
[67] *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither*

definition of VoIP,[68] it has found that: "'interconnected VoIP services' [are] those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN."[69] The FCC has not yet classified the service as a telecommunications or information service,[70] or determined the appropriate intercarrier compensation due when carriers exchange VoIP traffic.[71] Most importantly, the FCC has determined that the FCC is responsible for determining the appropriate regulatory treatment of VoIP and other IP-enable services, preempting states from imposing "traditional common carrier economic regulations" on VoIP services.[72]

59 Qwest and Level 3 ask that this Commission resolve disputes in this proceeding concerning the definition, classification and intercarrier compensation for VoIP services. Given the FCC's orders concerning VoIP services, it is not appropriate for this Commission to do more than apply the FCC's decisions.

60 ***Definition.*** The parties agree that certain traffic that travels over an IP network is not properly VoIP traffic. For example, voice traffic that originates and terminates on the PSTN, but is routed during the call over an IP network, is not VoIP traffic. The parties refer to this type of call as PSTN-IP-PSTN, or IP in the middle. The parties also agree that traffic solely between two IP networks (IP to IP traffic), and traffic that originates on an IP network (IP to PSTN) is properly VoIP traffic.[73] The parties

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Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd. 3307 (2004); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd. 7457 (2004); *IP Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) [Hereinafter *IP Enabled Services Proceeding*]; *See also Vonage Order; In the Matter of E911 Requirements for IP-Enabled Service Providers, et seq.*, WC Docket No. 05-196, First Report and Order and Notice of Rulemaking, FCC 05-116 (2005) [Hereinafter *VoIP E911 Order*]; and *In the Matter of Universal Service Contributions Methodology, et seq.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (2006) [Hereinafter *Universal Service Order*].

[68] *VoIP E911 Order*, ¶ 24; *Universal Service Order*, ¶ 36.

[69] *Universal Service Order*, ¶ 36; *VoIP E911 Order*, ¶ 24.

[70] *Universal Service Order*, ¶¶ 35, 41-42.

[71] *Vonage Order*, n.46.

[72] *Id*, ¶¶ 1, 33-35; *Universal Service Order*, ¶ 14.

[73] Qwest Initial Brief, ¶ 72;

dispute, however, whether traffic that originates on the PSTN and terminates on an IP network (PSTN-IP) is VoIP traffic.

61 Notwithstanding the FCC's description of VoIP in its *Vonage Order*, Qwest asserts that "PSTN and VOIP calls should be treated neutrally," such that the nature of the traffic should be determined by how they are originated.[74] Level asserts that any call that contains a net Protocol conversion – from IP to PSTN or PSTN to IP – should be considered a VoIP call.[75]

62 Qwest proposes a definition in Section 4 of the agreement that limits VoIP traffic to traffic originating in Internet Protocol, and requires the party initiating the call to have certain IP customer premises equipment "at the premises."[76] Level 3 proposes that the definition include traffic terminating in Internet Protocol and a specific description about how voice communication travels over IP and PSTN networks.[77] Level 3's proposed definition also includes rates for intercarrier compensation for VoIP traffic.

63 Qwest's proposal to exclude PSTN-IP traffic from the definition of VoIP traffic in the agreement is rejected. While the FCC has not adopted a formal definition of VoIP, its description of "interconnected VoIP services" includes traffic that both originates and terminates on the PSTN. Further, Qwest's proposal to require traffic to originate at the caller's "premises" creates ambiguity in the agreement that can only invite later disputes over its interpretation. The mobility of VoIP equipment makes the reference to a caller's premises unnecessary.

64 Concerning Level 3's definition, it is not always that case that more is better. Level 3's definition includes unnecessary descriptions of how VoIP traffic is handled on the PSTN and IP networks. In addition, it is not appropriate to include terms and conditions of service or rates for compensation in a definition. Level 3's proposed definition is rejected.

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[74] *Id.*, ¶ 73.
[75] Level 3 Reply Brief at 21-22.
[76] Exh. 4, § 4; Exh. 3 at 43-45.
[77] Exh. 4, § 4.

65 Based on the above analysis, and consistent with the FCC's orders on the issue, the parties should include the following definition of VoIP in their proposed agreement:

> "VoIP" (Voice over Internet Protocol) traffic is traffic that originates or terminates in Internet Protocol by a party using IP-Telephone handsets, end user premises Internet Protocol (IP) adapters, CPE-based Internet Protocol Telephone (IPT) management "plug and play" hardware, IPT application management and monitoring hardware or such similar equipment.

66 ***Classification of and Compensation for VoIP.*** Despite the FCC's statements that it has not yet determined how to classify the service, Qwest seeks to classify VoIP as an information service.[78] In addition, Qwest seeks to impose intercarrier compensation rules for reciprocal compensation and access charges depending on the location of a VoIP Provider Point of Presence (POP) and how Level 3 actually exchanges VoIP traffic.[79] Level 3, however, seeks to apply to VoIP the intercarrier compensation rate the FCC applies to ISP-bound traffic.[80]

67 Neither party's proposal is appropriate given the FCC's decisions on VoIP services. VoIP traffic has not been classified as a telecommunications service that would subject it to either reciprocal compensation or access charges. Nor has the FCC found that VoIP traffic is sufficiently analogous to ISP-bound traffic to apply to VoIP traffic the compensation requirements for ISP-bound traffic from its *ISP Remand Order*. The FCC intends to address the classification of and appropriate intercarrier compensation for VoIP services in its *IP-Enabled Services Proceeding*. Until the FCC resolves these issues, it would be inappropriate for a state commission to impose "traditional common carrier economic regulations" on VoIP services.[81]

68 In order to provide some certainty in the agreement in the meantime, the agreement should simply include a category of traffic referred to as "VoIP traffic," without trying to fit it into some other classification of service. For example, in Qwest's proposed Section 7.1.1, the agreement should refer to exchanging "VoIP traffic" in

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[78] *Id.*, § 7.2.2.12.
[79] *Id.*, §§ 7.2.2.12, 7.2.2.12.1, 7.3.4.1, 7.3.4.2.
[80] *Id.*, §§ 7.2.2.12, 7.2.2.12.1, 7.3.4.1, 7.3.4.2, 7.3.4.3; *see also* Level 3 Initial Brief at 21.
[81] *Vonage Order*, ¶ 35.

addition to the other types of services listed in the section. Further the agreement should provide that the parties will exchange VoIP traffic on a "bill and keep" basis until the FCC decides the issue of compensation.[82] In this way, the parties' agreement will allow the exchange of VoIP traffic, without requiring either party to pay the other for such traffic.

69 ***Qwest's Audit Proposal.*** Qwest proposes two provisions that would allow Qwest to conduct "operational verification audits" of Level 3's exchange of VoIP traffic.[83] These audit provisions are intended to address whether the traffic is originating on IP or VoIP equipment rather than on the PSTN, and to verify whether traffic is local or switched access for purposes of determining the appropriate intercarrier compensation. Given the decisions above requiring Qwest to modify its proposed definition and rejecting the parties' proposals for intercarrier compensation for VoIP, Qwest's audit language is unnecessary. Qwest's proposed sections 7.1.1.1 and 7.1.1.2 are rejected.

3. Combining Traffic on Two-Way Trunks (Issues No. 2A, 2B, 18)

70 Level 3 proposes language in this arbitration allowing Level 3 to combine interexchange traffic with local traffic on local interconnection service (LIS) trunks under the agreement.[84] While neither party disputes that competing carriers are entitled to combine local and access, or toll, traffic on the same two-way trunks, Level 3 and Qwest dispute whether Level 3 should combine traffic on Qwest's LIS trunks, or Feature Group D (FGD) trunks designed to service access traffic.

71 Level 3 explains that it seeks to combine interexchange traffic on LIS trunks as the company plans to provide tandem switching services through its softswitch in Seattle in competition with Qwest.[85] Level 3 asserts that the language in the agreement

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[82] "Bill and keep" is described in the Commission's rules governing telecommunications carriers as "a compensation mechanism where traffic is exchanged among companies on a reciprocal basis. Each company terminates the traffic originating from other companies in exchange for the right to terminate its traffic on that company's network." WAC 480-120-540(4)(c). In a bill and keep environment, no money changes hands, but the parties may continue to exchange traffic.
[83] Exh. 4, §§ 7.1.1.1, 7.1.1.2.
[84] *Id*., §§ 7.2.2.9.3.1, 7.2.2.9.3.2 and 7.2.2.9.3.2.1.
[85] Level 3 Opening Brief at 12-13.

currently allows the parties to combine Jointly Provided Switched Access (JPSA)[86] on LIS trunks, and that the issue is a red herring.[87] Level 3 asserts that its proposal is more efficient and less costly to Level 3 than requiring it to reconfigure its interconnection arrangements with Qwest over FGD trunks.[88]

72 Level 3 argues that that appropriate legal standard for considering the company's request is under Section 251(c)(2) of the Act, which requires interconnection to be "just and reasonable."[89] Level 3 asserts that the responses to the Commission's bench requests show that Qwest's position is more costly (to Level 3) than Level 3's, and thus does not meet the standard.[90] In response to Qwest's concern over the recording capabilities of LIS trunks for collecting billing information, Level 3 proposes that Qwest add recording capabilities to FGD trunks, or use Level 3's proposal for periodic traffic studies and allocation of costs based on factors.[91]

73 Qwest does not object to Level 3's proposal to combine traffic, but agrees to the proposal only if traffic is combined on FGD trunks. Qwest asserts that the software and systems associated with FGD trunks are designed to record and bill switched access charges for interexchange traffic, whereas LIS trunks are not.[92] Qwest opposes Level 3's proposal as Qwest would incur significant costs to either modify LIS trunks to allow for recording and billing functions or to implement Level 3's factors system, resulting in Qwest and other carriers no longer having mechanized systems available to record actual traffic data from FGD trunks.[93] Qwest also opposes as inadequate Level 3's proposal in Section 7.2.2.3.5 to send via LIS trunks only "IntraLATA Toll Traffic, InterLATA Traffic and VoIP traffic that would route to NPA-NXX codes

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[86] "Jointly Provided Switched Access" is defined in the proposed agreement as "an arrangement whereby two (2) LECs (Including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs." Exh. 4, § 4.
[87] Level 3 Opening Brief at 12-14.
[88] *Id*. at 14-21.
[89] *Id*. at 16.
[90] Level 3 Reply Brief at 9-10.
[91] *Id*. at 10-11.
[92] Qwest Opening Brief, ¶ 26; Easton, TR 248:13-249:20; Exh. 123.
[93] Qwest Opening Brief, ¶¶ 27-30.

homed to Qwest switches."[94] Qwest asserts that under Level 3's proposal, Qwest could not produce the necessary switched access records for other carriers for billing.

74 In response to Level 3's arguments about delivering JPSA traffic over LIS trunks, Qwest asserts that the agreement permits Level 3 to deliver such traffic, but only if Level 3 has met various industry standards for delivering such traffic.[95] Qwest asserts that the delivery of JPSA is not the issue in dispute. Qwest objects to Level 3's proposal as a means to avoid its responsibility to pay access charges.[96] Qwest also argues that the just and reasonable standard does not apply to interconnection used to carry interexchange traffic.[97] Qwest further argues that a cost benefit analysis would need to take into account the cost savings for Level 3 of combining all traffic types on FGD trunks.[98]

75 ***Discussion and Decision.*** The parties both agree that Level 3 may combine traffic types on two-way trunks. The only question is whether Qwest must allow Level 3 to combine traffic on LIS trunks, either by applying recording and billing capabilities to LIS trunks, or by using factors to allocate costs, or whether Level 3 must bear the costs to rearrange its interconnection with Qwest to combine traffic on FGD trunks.

76 As a matter of law, both Level 3's and Qwest's proposals are technically feasible ways for Level 3 to interconnect with Qwest. While it is inappropriate to consider costs in determining technical feasibility, a requesting carrier that requests technically feasible but expensive interconnection is required to bear the cost of the interconnection.[99] Given this analysis, Level 3's argument that Qwest should bear the costs of allowing interexchange traffic on LIS trunks or modifying LIS trunks to support interexchange traffic is not supportable.

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[94] *Id*., ¶ 31.
[95] Qwest Reply Brief, ¶¶ 16-19.
[96] *Id*., ¶ 20.
[97] *Id*., ¶ 26.
[98] *Id*.
[99] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, ¶ 199 (1996), *aff'd in part and rev'd in part, Iowa Utils. Bd. v. FCC,* 525 U.S. 1133 (1999) [Hereinafter *Local Competition Order*].

77 As a practical matter, Level 3's request is not reasonable. Qwest's proposal will cause Level 3 to incur significant costs in rearranging its interconnection.[100] Qwest, will also incur significant costs if it modifies its LIS trunks to provide for recording and billing capability, and would also lose the ability to capture the data necessary to meet Qwest's contractual agreements with other carriers.[101] Under Level 3's alternative proposal, if Qwest allows Level 3 to deliver interexchange traffic over LIS trunks using a factors methodology, Qwest will not be able to provide the actual traffic data Qwest has agreed to provide to these carriers under contract.[102] Implementing either of Level 3's proposals will affect Qwest's obligations to other carriers that are not a part of the dispute or interconnection agreement. In addition, there is an underlying issue of trust concerning the traffic Level 3 proposes to exchange with Qwest. It is important for the interconnection relationship between the two carriers that interexchange calls are recorded and billed correctly. Qwest's proposed language for Sections 7.2.2.9.3.1, 7.2.2.9.3.1.1, 7.2.2.9.3.2, 7.2.2.9.3.2.1, is accepted and Level 3's language is rejected. Accordingly, both parties' proposed language for Section 7.3.9 and subsections is rejected.

4. Interconnection Terms, Conditions and Charges (Issues No. 1A, 1B, 1D, 1E, 1I, 1J, 21)

78 Level 3 and Qwest dispute in Issue 1 a number of items relating to terms and conditions, and charges for interconnection. This Order addresses each of the issues in numerical order.

79 ***Single Point of Interconnection (Issues No. 1A and 1B).*** Level 3 proposes language to allow Level 3 to establish a single point of interconnection in each LATA for exchanging "telecommunications," proposes that each party bear the costs of interconnection on their side of the POI, and proposes terms for transmission rates and reciprocal compensation.[103] Qwest also proposes language generally describing the interconnection of Qwest's and Level 3's networks and the means of interconnection.[104]

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[100] *See* Exh. 126.
[101] *See* Exh. 123 at 2; 125.
[102] Qwest Reply Brief, ¶ 32.
[103] The disputed language appears in Exh. 4, §§ 7.1.1, 7.1.2 and subsections.
[104] *Id*.

80 Level 3's proposal is intended to ensure that Qwest will not block Internet, VoIP, or terminating access traffic on interconnection facilities.[105] Level 3 also seeks to ensure in the agreement that it may negotiate interconnection at OC-3 or higher speeds, and objects to Qwest's proposal to negotiate such interconnection through a Bona Fide Request, or BFR, process.[106] Level 3 objects to Qwest's language, asserting that Qwest interprets the interconnection requirements of the Act and the *Local Competition Order* too narrowly.[107]

81 Qwest asserts that Level 3's proposed language includes legally incorrect and ambiguous language. Specifically, Qwest asserts there is no right to a single POI at any technically feasible point that applies to all telecommunications, as interconnection under Section 251(c)(2) and all associated rights are intended to allow a CLEC to provide "telephone exchange access" or "exchange access."[108] Qwest argues that Level 3's proposal asserts Level 3's interconnection rights too broadly, and requests the Commission reject the proposals.

82 The Arbitrator concurs with Qwest that Level 3's language states its rights to interconnection to all telecommunications too broadly. Level 3's language creates ambiguities that will only produce disputes between the parties. Qwest's language clearly defines that Level 3 is allowed interconnection at a single point in a LATA and provides sufficient flexibility in offering types of interconnection, including the opportunity to negotiate other forms of interconnection through the BFR process. Qwest's proposed language in Sections 7.1.1 and 7.1.2 is accepted. Level 3's language is rejected.

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[105] Level 3 Opening Brief at 10.
[106] *Id*. at 26.
[107] Level 3 Reply Brief at 4-5.
[108] *Id*., ¶ 11, citing *Local Competition Order*, ¶¶ 186-91; Qwest Reply Brief, ¶ 6-8.

83 ***Responsibility for Costs of Dedicated Transport (Issues No. 1D and IE).*** Level 3 proposes the following language, in bold and underlined, in Section 7.2.2.1.2.2:[109]

> **For purposes of network management and routing of traffic to/from the POI** CLEC may **order** ***purchase*** transport services from Qwest or from a third party, including a third party that has leased the private line transport service facility from Qwest. Such transport provides a transmission path for the LIS trunk to deliver the originating Party's Exchange Service EAS/Local traffic to the terminating Party's End Office Switch or Tandem Switch for call termination. **To the extent CLEC requires dedicated transport for purposes other than the exchange of Traffic, transport*Transport*** may be purchased from Qwest as Tandem Switch routed (i.e., tandem switching, tandem transmission and direct trunked transport) or direct routed (i.e., direct trunked transport). This Section is not intended to alter either Party's obligation under Section 251(a) of the Act **or under Section 51.703 or 51.709 of the FCC's Rules.**

Level 3 also proposed the following changes to Section 7.2.2.1.4:

> LIS ordered to a Tandem Switch will be provided as direct trunked transport between the Serving Wire Center of CLEC's POI and the Tandem Switch**. To the extent CLEC requires dedicated transport for purposes other than the exchange of Traffic, tandem*Tandem*** transmission rates, as specified in Exhibit A of this Agreement, will apply to the transport provided from the Tandem Switch to Qwest's End Office Switch.

84 Level 3 asserts that its proposed language ensures Level 3's rights to transport functionality needed for LIS trunks, not for access to UNEs.[110] Qwest objects to Level 3's language in these two sections asserting that the language allowing for "routing of traffic to/from the POI" can be interpreted to allow access to unbundled transport.[111] Qwest argues this is contrary to the FCC's definition of interconnection, which excludes transport and termination.[112]

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[109] Qwest's proposed language is noted in italics.
[110] Level 3 Opening Brief at 27.
[111] Qwest Opening Brief, ¶ 17.
[112] Qwest Reply Brief, ¶ 10.

85 Level 3's language is not sufficiently precise, which may lead to disputes in the future on this issue. Level 3's proposed language in Sections 7.2.2.1.2.2 and 7.2.2.1.4 is rejected. Qwest's language more appropriately describes the parties'obligations for interconnection under the Act and FCC rules.

86 ***Nonrecurring Charges for Interconnection (Issues No. 1I and 1J).*** Level 3 disputes whether Qwest may charge nonrecurring charges for installing or rearranging local interconnection service, or LIS, trunks for Level 3.[113] This Order accepts Qwest's proposed language and rejects Level 3's proposal, as ILECs may recover from requesting CLECs the costs the ILEC incurs to provide interconnection or access.[114]

5. Miscellaneous Definitions (Issues No. 7, 10, 14, 15, 23, 25, 26, 27, 28)

87 The parties dispute a number of other definitions in Section 4 of the Proposed Agreement. This Order will address each definition by issue, in numerical order.

88 ***Exchange Service (Issues No. 7 and 14).*** Level 3 proposes to include in the agreement the term "Telephone Exchange Service," defining the term "as defined in the Act."[115] Level 3 asserts that Qwest's definitions of "Basic Telephone Exchange Service" and "Exchange Service" do not describe Level 3's interconnection rights under federal law precisely.[116] Level 3 asserts that simply because Qwest's terms are used in agreements with other carriers does not mean they cannot be used in Level 3's agreement with Qwest.[117] Level 3 also asserts that Qwest's definitions work to exclude IP-enabled traffic and other traffic Level 3 seeks to exchange under the agreement.[118]

89 Qwest proposes to include definitions for the terms "Basic Telephone Exchange Service," and "Exchange Service" asserting that these terms and definitions are used throughout the agreement in sections Level 3 does not contest.[119] The terms are also

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[113] The disputed language appears in Exh. 4, §§ 7.3.3.1 and 7.3.3.2.
[114] *Local Competition Order*, ¶ 200.
[115] Exh. 4, §4.
[116] Level 3 Opening Brief at 33; Level 3 Reply Brief, App. at 2.
[117] Level 3 Reply Brief, App. at 2.
[118] Exh. 3 at 40.
[119] Qwest Opening Brief, ¶¶ 93, 96; Qwest Reply Brief, ¶ 72.

included in Qwest's Statement of Generally Available Terms (SGAT) throughout its 14 state region. Qwest asserts the definition of "Exchange Service" is consistent with Washington law.[120] Qwest argues that Level 3 provides no good reason to remove Qwest's proposed definitions from the agreement.

90 While Level 3's proposed terms are identified in the Act, Qwest's proposed definitions have been approved in SGATs in 14 states in Qwest's region. These definitions are reasonable and removing them from sections of the agreement to which there is no dispute may create more complications and disputes than retaining the current terms and definitions. Qwest's proposed definitions are accepted and Level 3's proposed language is rejected.

91 ***Interconnection (Issue 10).*** Qwest and Level 3 disagree over the definition of the term "Interconnection" in the proposed agreement, as follows, with Level 3's proposal in bold and underline and Qwest's in italics:

> Interconnection" is as described in the Act and refers to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried ***solely*** by local exchange carriers, ISP-Bound traffic, **VoIP traffic,** and Jointly Provided Switched Access traffic.

92 Level 3 argues that Qwest's definition does not refer to VoIP traffic, and raises a concern that Qwest may rely on the absence of the term to prohibit Level 3 from exchanging such traffic.[121] Qwest objects to Level 3's proposal for categorizing VoIP traffic as its own category, rather than classifying it as local or toll, depending on the nature of the call.[122] We accept Qwest's proposed language as consistent with the Act and requirements for interconnection. We reject Level 3 proposal, finding that other decisions in this order require Qwest to allow Level 3 to exchange VoIP traffic under the agreement.

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[120] Qwest Opening Brief, ¶ 96.
[121] Level 3 Reply Brief, App. at 2.
[122] Qwest Opening Brief, ¶ 94.

93 ***Telephone Toll Service (Issue 15).*** Level 3 proposes to include in the agreement the definition of "Telephone Toll Service" used in the Act:

> Telephone toll service - the term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Qwest opposes the use of the term and definition in the agreement, asserting that the definition is not necessary.[123] Qwest also asserts that Level 3 has tried to use this definition in its argument that VNXX cannot be a toll call subject to access charges.[124] Level 3 responds that VNXX cannot be a toll call under the Act, as no carrier assesses a toll on such calls.[125]

94 Consistent with the discussion above, this decision does not reach the issue of whether VNXX traffic is appropriate, or whether it should be classified as local or interexchange traffic. These issues are more appropriately addressed in the pending complaint proceeding in Docket UT-063038. Accordingly, Level 3's definition is not necessary to the proposed agreement and is rejected.

95 ***Mid-Span Meets – Definition and Terms and Conditions (Issues No. 23 and 28).*** Level 3 and Qwest dispute the language in Sections 7.12.3 and 7.1.2.3.1 concerning the terms and conditions for a mid-span meet point of interconnection. Level 3 asserts that Qwest's proposal would increase the likelihood of disputes over establishing mid-span meets and the traffic to be exchanged over the meet points.[126] Qwest argues that the Commission need not decide the issues, as they were not identified in Level 3's petition or Qwest's response.[127] Qwest also asserts that Level 3's proposed language substitutes language concerning negotiation with the term technical feasibility.

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[123] *Id.*, ¶ 97.
[124] *Id.*
[125] Level 3 Reply Brief, App. at 4.
[126] Level 3 Opening Brief at 25-26.
[127] Qwest Opening Brief, ¶¶ 104-5.

96 The dispute over the terms and conditions of mid-span meets turns on whether such meet points should be negotiated or whether they are subject to the standard of technical feasibility. Qwest's language is appropriate to include in the agreement. Level 3 is not precluded by federal law from obtaining a mid-span meet point of interconnection at any technically feasible point. There is no need to include this language in the agreement. Further, Level 3's language seeks to avoid payment for the costs of interconnection, as discussed above concerning Issues No. 1I and 1J.

97 Level 3 also proposes the following definition of "Meet Point Interconnection Arrangement":

> "Meet Point Interconnection Arrangement" is an arrangement between state certificated LECs whereby each telecommunications carrier constructs, leases or pays for network facilities to a meet point.

98 Qwest asserts that if a definition of Meet Point Interconnection Arrangement is necessary, the FCC's definition in 47 CFR 51.5 should be used: "A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point."[128]

99 Similar to our discussion of Issues No. 1I and 1J, Level 3's proposed definition seeks to avoid paying the costs of interconnection with Qwest. Level 3's definition is rejected and Qwest's proposal to include the FCC's definition in the agreement is accepted.

100 ***PSTN – IP – PSTN Traffic (Issue 25).*** Level 3 proposes to include a definition of "PSTN – IP – PSTN Traffic" in the agreement to recognize that IP-in-the-middle traffic is considered plain old telecommunications service, not VoIP traffic.[129] Qwest objects to the proposed definition, asserting the term is not used in the agreement and is unnecessary.[130] In disputing the various issues surrounding VoIP traffic, the parties agree that PSTN – IP – PSTN traffic is not properly classified as VoIP. However, if

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[128] Exh. 3 at 55-56.
[129] Level 3 Opening Brief, n.38.
[130] Qwest Opening Brief, n.38.

the term is not used in the agreement, there is no need for a definition. Level 3's proposed definition is rejected.

101 ***Traffic (Issue 26).*** Level 3 asserts that the term "traffic" is used throughout the agreement, the Act, FCC rules and orders, and yet there is no formal definition of the term. Level 3 proposes to include in the agreement the following definition:

> "Traffic" is not a term defined in the 1996 Act or in FCC rules. For purposes of this Agreement "Traffic" includes "Telecommunications" and "Information Services" traffic as such are defined in the 1996 Act at 47 U.S.C. § 153. ISP-bound Traffic and VoIP calls are Information Services Traffic.

102 Level 3 asserts that this definition will eliminate disputes over what "types" of traffic are exchanged.[131] Qwest asserts that it is not necessary to define the term in the proposed agreement, as it is used as a modifier to numerous terms in the agreement, including local, toll, VNXX, and VoIP.[132] Qwest also asserts that Level 3's definition would result in eliminating intercarrier compensation.[133]

103 It is not necessary to define the term "Traffic" in the agreement. Further, Level 3's proposal classifies VoIP traffic similar to ISP-bound traffic, a decision the FCC has not yet made. Level 3's proposed definition is rejected.

104 ***Unbundled Network Element (Issue 27).*** Level 3 proposes to modify the definition of unbundled network element, or UNE to include the words "or the Commission."

> "Unbundled Network Element" ("UNE") is a Network Element that has been defined by the FCC **or the Commission** as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.

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[131] Level 3 Reply Brief, App. at 5.
[132] Qwest Opening Brief, ¶ 107.
[133] *Id*.

105 Level 3 asserts that this Commission may identify UNEs that must be unbundled beyond the FCC's minimum list of UNEs.[134] Qwest argues that Level 3 seeks to give the Commission authority to define UNEs when the authority under Section 251(c)(3) rests with the FCC.[135] Qwest recognizes that state commissions retain authority under state law to identify UNEs, where not inconsistent with federal law.[136]

106 Level 3's proposed change to the definition of UNE is rejected. While Level 3 is correct that state commissions retain authority under state law to establish UNEs where not inconsistent with federal law, Level 3's language incorrectly proposes that the Commission may define a network element under Section 2512(c)(3).

6. Out of Band SS7 Signaling and Quad Links (Issue No. 30)

107 This issue concerns the signaling system used in telecommunications systems to assist with call identification and routing. Each carrier provides two signaling transfer points, or STPs, from which the carrier will communicate information about each call using a signaling system, referred to as Signaling System 7, or SS7.[137] Signaling through SS7 is provided through two sets of redundant data links between each carrier's pair of STPs, referred to as quad links.[138] These links interconnect the signaling systems of the carriers' networks. Level 3 proposes language in Sections 7.2.2.6.1, 7.2.2.6.1.1, 7.2.2.6.1.2, 7.2.2.6.1.3 that would ensure Level 3's ability to use a single set of quad links when interconnecting with Qwest. i.e., a point of interconnection for quad links.[139]

108 Qwest argues that Level 3's language is unnecessary and duplicative of sections to which the parties have agreed.[140] Qwest asserts that Level 3 has not provided a basis in law or policy for including its proposal in the agreement.[141]

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[134] Level 3 Opening Brief at 28-30; Level 3 Reply Brief, App. at 5.
[135] Qwest Opening Brief, ¶¶ 110-112.
[136] *Id*., ¶ 112.
[137] Greene, TR 132:13-15; *see also* Newton's Telecom Dictionary, 19th Ed., at 722-23.
[138] Wilson, TR 180:1-10.
[139] Level 3 Opening Brief at 28.
[140] Qwest Opening Brief, ¶ 113.
[141] *Id*.

109 ***Discussion and Decision.*** Similar to the treatment of Level 3's single point of interconnection language in other sections of the agreement, Level 3's proposed language concerning SS7 quad links is unnecessary and subject to different interpretations. Level 3's proposed language is rejected.

7. Access to High-Capacity UNEs (Issues No. 31-33)

110 Level 3 and Qwest dispute language in Sections 9.1.1.4, 9.1.1.4.1, and 9.1.1.5.1 of the agreement relating to their rights and obligations when Level 3 seeks access to high-capacity loops and transport UNEs from Qwest. In the Triennial Review Remand Order, or TRRO,[142] the FCC established criteria for determining whether requesting carriers had unbundled access to high-capacity loops and transport UNEs. These criteria are based on the number of fiber-based collocators at a wire center and the number of business lines serving the wire center. The FCC also established in the TRRO rights and obligations for obtaining and disputing access to high-capacity UNEs.

111 Level 3 recognizes that the differences between the parties are small. Level 3 asserts that Qwest must provide Level 3 access to the UNEs after Level 3 has made a diligent inquiry and provided a self-certification that the serving wire center is not unimpaired, or unavailable for CLEC access.[143] Level 3 objects to Qwest's proposed language as encouraging interference in Level 3's ability to compete.[144]

112 Qwest proposes language that would allow it to deny requests for high-capacity UNEs where the Commission has determined that UNEs are not available at a certain wire center.[145] Qwest notes that this Commission presently has a proceeding pending to determine which wire centers in Washington are impaired.[146] Qwest asserts that it

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[142] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005). [Hereinafter "*Triennial Review Remand Order" or "TRRO*"].
[143] Level 3 Opening Brief at 31.
[144] *Id*. at 32.
[145] Qwest Opening Brief, ¶ 114.
[146] *Id*.

does not make sense for a CLEC to ask for access to a wire center that the Commission has found to be non-impaired.[147]

113 ***Discussion and Decision.*** As to Section 9.1.1.4, Level 3's proposed language is appropriate and should be included in the agreement. Qwest's language includes unnecessary language restating the non-impairment criteria of the TRRO. In Section 9.1.1.4.1, Level 3's language also more appropriately follows the FCC's requirements in the TRRO. An ILEC is obligated to provide the requested UNEs and then may pursue the dispute resolution process.[148] While it may seem logical that a CLEC should not seek access to UNEs at a wire center that has been found to be non-impaired, the choice is the CLEC's to make and not the ILEC's. Finally, as to Section 9.1.1.5.1, Qwest's language is appropriate. In Docket UT-053025, the Commission determined that it is the ILEC that makes an initial designation of a wire center as non-impaired. A CLEC, or the Commission itself, may investigate an ILEC's claims of non-impairment.[149]

E. Implementation Schedule

114 Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In preparing an agreement for submission to the Commission for approval, the parties may include an implementation schedule as specific provisions to the agreement may contain implementation time-lines. The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Act, applicable FCC Rules, and this Commission's orders.

F. Conclusion

115 The Arbitrator's resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an

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[147] *Id*.
[148] *Triennial Review Remand Order*, ¶ 234.
[149] *In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Order on the Competitive Telecommunications Environment in Washington State*, Docket UT-053025, Order 06, ¶ 31 (Dec. 15, 2006).

interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

116 Any party may petition for Commission review of this Arbitrator's Report and Decision by **April 4, 2007**. Any petition for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrator's Report and Decision should be modified. Replies to any petition for Commission review must be filed by **April 20, 2007**.

117 The parties must also file, by **April 20, 2007**, a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. This filing will include the parties' request for approval, subject to any pending petitions for review.[150] The agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text.

118 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, are consistent with the public convenience, and necessity, and satisfy applicable state law requirements, including relevant Commission orders.

119 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders. A party that petitions for review must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition.

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[150] If the parties agree that no petition for review will be filed, the parties may file their joint request for approval and complete interconnection agreement at any time after the date of this Report and Decision.

120 Any petition for review, any response, and any request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.

121 Any petition for review of this Arbitrator's Report and Decision and any response to a petition for review must be filed **(original and six (6) copies)** with the Commission's Secretary and served as provided in WAC 480-07-145. Post-arbitration hearing filings and any accompanying materials must be served on the opposing party by delivery on the day of filing, unless jointly filed.

122 An electronic copy of all post-arbitration hearing filings must be provided by delivery to the Commission Secretary either via the Commission's Web Portal (www.wutc.wa.gov/e-filing) or by sending an e-mail to records@wutc.wa.gov. Alternatively, Parties may furnish an electronic copy by delivering with each filing a CD or 3.5-inch, IBM-formatted, high-density diskette including the filed document(s), in MSWord file format (*i.e.,* <filename>.doc) and Adobe Acrobat file format (*i.e.,* <filename>.pdf), reflecting the pagination of the original. Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Approval Procedure

123 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.

124 The Commission will consider any request(s) for approval at an oral argument scheduled for **Thursday, May 24, 2007, beginning at 9:30 a.m.**, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. Any person may appear at the hearing to comment on the request(s).

125 The Commission will endeavor to enter an order approving or rejecting the Agreement by **June 15, 2007**.[151] The Commission's order will include its findings and conclusions.

Dated at Olympia, Washington, and effective March 12, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Arbitrator and Administrative Law Judge

[151] As noted above, the parties have agreed to waive the statutory deadlines in 47 U.S.C. § 252(e)(4), but have requested prompt resolution of the petition.