BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

1 Pursuant to WAC 480-07-640(2)(a)(ii), Qwest Corporation ("Qwest") hereby petitions the Washington Utilities and Transportation Commission ("Commission") to review and reverse certain portions of Order 10, Arbitrator's Report and Decision ("Arbitrator's Report") dated March 12, 2007. The specific findings and rulings as to which Qwest seeks review and reversal are set forth in detail hereafter

I. INTRODUCTION

2 The overriding issues in this arbitration are responsibility for intercarrier compensation and responsibility for costs of interconnection for interexchange traffic. Today, virtually all of the traffic exchanged between Qwest and Level 3 is Internet Service Provider ("ISP") traffic. (Tr. 433, 544-45). Level 3's ISP customers have made the business decision to centralize their operations nationally to minimize costs. (Tr. 462-63; Ex. 47). As a result, the calls placed by dial-up customers are often delivered to ISPs located outside of Washington.

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3 The service that Level 3 offers to its ISP customers, commonly known as VNXX, is the functional equivalent of a 1-800 toll free service. (Tr. 545-46, 549-50). Level 3 provides "local" telephone numbers to its ISP customers who, in turn, provide those numbers to their dial-up customers. Where the ISP customer is not physically located in the same local calling area ("LCA") as the calling party, Level 3 uses improper number assignment to disguise interexchange calls to the ISP as local calls. Level 3 creates this toll free arrangement because Level 3 asserts it is necessary if its ISP customers are to have a viable product. (*Id.*).

4 To provide its toll-free interexchange service, Level 3 undertakes to gather traffic from dial-up callers and to deliver that traffic to the ISPs it serves. (Ex. 111T at 10-13; Exs. 32-33). Since the dial-up customers are located on Qwest's network, Level 3 causes Qwest to incur costs to originate and transport these calls to Level 3. Under the established intercarrier compensation regime for interexchange traffic, Level 3 should compensate Qwest for the origination and transport that Qwest provides. Indeed, Level 3 witness Wilson conceded at hearing that for a 1-800 service, the terminating carrier (Level 3) is responsible for paying intercarrier compensation. (Tr. 561).

5 By engaging in VNXX, Level 3 unlawfully deprives Qwest of compensation to cover its cost of originating and transporting calls to ISPs.[1] At the same time, Level 3 asks the Commission to require Qwest to pay intercarrier compensation to Level 3 on these VNXX calls. It is fundamentally unjust and unreasonable to allow Level 3 to deprive Qwest of compensation for originating long distance calls to ISPs and at the same time to require Qwest to pay Level 3 terminating compensation on these same calls.

6 In this Petition for Review, Qwest requests that the Commission review and reverse those parts

[1] Qwest recovers its costs of originating interexchange calls through originating access charges. Qwest's costs for originating interexchange calls are not covered by the flat monthly rate for local service and never have been. (Ex. 113-T at 2).

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of the Arbitrator's Report that deprive Qwest of compensation for the costs it incurs to carry interexchange (VNXX) traffic and that reverse the compensation flow for this traffic such that Qwest pays rather than receives intercarrier compensation on this traffic.

II. ARGUMENT

A. The Commission should Adopt Qwest's Proposed Sections 7.3.4.2, 7.3.6.1, and 7.3.6.3 and thus Preclude Level 3 from Recovering Terminating Compensation on VNXX Traffic.

7 The Arbitrator's Report adopts Qwest's proposed definition of VNXX. (Arbitrator's Report ¶¶ 39, 41). The primary dispute between the parties concerning VNXX traffic is whether Qwest is required by the *ISP Remand Order*[2] to pay intercarrier compensation to Level 3 on calls delivered to ISPs located outside the LCA of the calling party. Instead of issuing another decision concerning the scope of the *ISP Remand Order*, the Arbitrator noted that the Commission, in its order in the Level 3 complaint docket (Docket UT-053039), had ruled that "the *ISP-Remand Order* established a compensation scheme for all ISP-bound traffic, no matter whether it is local, toll or long distance." (Arbitrator's Report ¶ 32).[3] The Arbitrator determined that the issues in that docket were on appeal in federal court, and that there was no reason to re-litigate the issue while the appeal was pending. (*Id.* ¶ 47).

8 Thus, on this point, the Arbitrator decided that it was appropriate to wait until the United States District Court for the Western District of Washington decides the pending appeal concerning the Commission's interpretation of the *ISP Remand Order*. That appeal is close to resolution. The appeal has been fully briefed and oral argument took place on March 15, 2007. Qwest anticipates that a decision will be issued before the oral argument in this matter

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[2] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (April 17, 2001) ("*ISP Remand Order*").

[3] The Commission reached the same conclusion in the Pac-West complaint docket (Docket UT-053036).

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that is presently scheduled for May 24, 2007.

9 There is no need to belabor Qwest's position on this issue. Qwest contends that the *ISP Remand Order* only prescribed intercarrier compensation for calls delivered to an ISP located in the caller's LCA. (Qwest Opening Br. ¶¶ 39-65; Qwest Reply Br. ¶¶ 39-49). Indeed, the FCC defined the issue it was addressing in the *ISP Remand Order* to be "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC."[4]

10 Since the time of the Commission's original February 2006 ruling in Docket No. UT-053039, four federal circuit court decisions have addressed the scope of the *ISP Remand Order*. Three of those decisions were rendered after the Commission's denial of Qwest's rehearing petition in UT-053039. All four decisions interpret the *ISP Remand Order* to apply only to calls placed to an ISP located in the caller's LCA. *Global NAPs v. Verizon New England*, 444 F.3d 59, 62 (1st Cir. 2006) ("*Global NAPs I*") ("the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*.") (*emphasis added*); *Global NAPs v. Verizon New England*, 454 F.3d 91, 99 (2nd Cir. 2006) ("*Global NAPS II*") ("[t]he ultimate conclusion of the 2001 Remand Order was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation.") (*emphasis in original*); *In re Core Communications*, 455 F.3d 267 (D.C. Cir., 2006) (reaffirmed the original *WorldCom* decision that defined the *ISP Remand Order* as applying only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area*.") (*emphasis added*); *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1159 (9th Cir. 2006)("*Peevey*") (*ISP Remand Order's* "rate caps are intended to substitute for the reciprocal compensation that would otherwise be due to CLEC's for terminating *local ISP-bound traffic*. They do not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic.") (*emphasis*

[4] *ISP Remand Order* ¶ 13.

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added). These four cases unanimously describe current federal law on this issue. There is no contrary authority at or above the circuit court level.

11 Level 3 claims erroneously that the Ninth Circuit decision in *Peevey* supports its position because it affirmed the California PUC's decision requiring the payment of reciprocal compensation on VNXX traffic. An accurate reading of *Peevey* discloses that it does not support Level 3's position, and indeed that it is consistent only with Qwest's position.

12 First, in California, unlike Washington, the California PUC determined that calls would be classified as local solely based on the telephone numbers of the calling and called parties and it did so based on unique, pre-existing California state law. 462 F.3d at 1148. The California rule on classification of calls as local or interexchange is not the rule in Washington. Washington state law and Washington Commission decisions are clear that local and interexchange calls in Washington are defined based on the geographical location of the parties to the call and not on the basis of their telephone numbers.

13 For example, the Commission's rules define a local calling area as "one or more rate centers *within which* a customer can place calls without incurring long distance (toll) charges." (*emphasis added*). The same rule defines "interexchange" as "calls, traffic, facilities or other items that *originate in one exchange and terminate in another*." WAC 480-120-021 (*emphasis added*). Likewise, the Commission's rule on expansion of EAS areas (WAC 480-120-265) requires the Commission to focus on issues such as access to medical facilities, schools, and government. The rule specifically requires the Commission to "consider the overall community-of-interest of the entire exchange"—an "exchange" is a "geographic area" that is established for "telecommunications *within* the area." WAC 480-120-021 (*emphasis added*).

14 Consistent with the geographic test inherent in these rules, in the 2004 AT&T Arbitration

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Order[5], the Commission explicitly rejected AT&T's proposal to classify traffic as local or long distance based on telephone numbers. Thus, under clear Washington law, calls are classified based on customer location. It follows, therefore, that under *Peevey* the compensation regime of the *ISP Remand Order* applies only to ISP calls where the calling party and the ISP are located in the same LCA.

15 Second, the context of *Peevey* demonstrates that it does not support reciprocal compensation for VNXX traffic under the current state of the law. In parts III and V of *Peevey*, upon which Level 3 relies, the Ninth Circuit addressed the California PUC's decision interpreting a pre-*ISP Remand Order* ICA under state law to require the payment of reciprocal compensation on VNXX calls. Prior to the *ISP Remand Order*, state commissions were permitted to apply state law to determine whether an interconnection agreement required the payment of reciprocal compensation on ISP traffic.[6] That is no longer the case. In the *ISP Remand Order*, the FCC determined that reciprocal compensation does not apply to ISP-bound traffic.[7]

16 In part VI of *Peevey* (the portion of the decision that specifically addressed the post-*ISP Remand Order* compensation regime), the Ninth Circuit held that under federal law VNXX calls are interexchange calls that *are not* subject to reciprocal compensation under current FCC rules. Since the ISP traffic at issue here is jurisdictionally interstate, federal law governs. Because this docket concerns a post-*ISP Remand Order* arbitration of a new ICA, Part VI of *Peevey* controls here, and holds (1) that the *ISP Remand Order* prescribes compensation only for "local ISP-bound calls" and does not affect origination charges on interexchange traffic, (2) that VNXX traffic is interexchange in nature, and (3) that in determining whether a call is VNXX or local as a matter of federal law, the relevant end point is where the call is handed off

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5 Order No. 05, *In the Matter of` the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to47 U.S.C. Section 252(b),* Docket UT-033035 ¶¶ 12-16 (Feb. 6, 2006).

6 *ISP Remand Order* ¶ 82.

7 *ISP Remand Order* ¶ 35.

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to the called party. 462 F.3d at 1159.

17 For these and all of the reasons given in Qwest's post-hearing briefs, Qwest requests that the Commission (1) adopt Qwest's proposed Section 7.3.4.2 that the Arbitrator rejected (Arbitrator's Report ¶ 50); (2) adopt Qwest's proposed Section 7.3.6.1 by restoring the language stricken by the Arbitrator (*Id.*); and (3) adopt Qwest's proposed Section 7.3.6.3 that the Arbitrator rejected. (*Id*.).

B. The Commission should Order the Adoption of Qwest's Proposed Language on the Relative Use Factor ("RUF") (Qwest-Proposed Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, and 7.3.2.2.1)

18 Issues 1G and 1H concern whether the Commission should apply a relative use factor ("RUF") to entrance facilities used for interconnection and direct trunk transport ("DTT") used to carry traffic between the POI and Qwest end offices. The Arbitrator's Report concludes that a RUF is appropriate and adopts the contract language on this issue from the last arbitration between Qwest and Level 3. (Arbitrator's Report ¶ 57). In the last arbitration, the Commission determined that FCC Rules 703(b) and 709(b)—47 C.F.R. §§ 51.703(b) and 51.709(b)—require that ISP-bound traffic be attributed to the originating carrier in the RUF.[8] But in that arbitration, the Commission did not address the appropriate treatment of VNXX ISP traffic.

19 The Arbitrator's Report is based on an erroneous interpretation of federal law to the extent that it requires Qwest to bear the cost of carrying VNXX ISP traffic. Under federal law, Rules 703(b) and 709(b) govern only the transport and termination of "telecommunications traffic." 47 C.F.R. § 51.701(a). The FCC's rules specifically define "telecommunications traffic" to exclude "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b). In *Peevey*, the Ninth Circuit determined as a matter of

[8] Fourth Supplemental Order, *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*, Docket UT-023042, ¶¶ 35-40 (February 5, 2003) ("*Level 3 Arbitration Decision*").

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federal law that VNXX traffic is interexchange traffic that falls within the categories of traffic excluded from the Rules 703(b) and 709(b). 462 F.3d at 1157-58.

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

21 In its post-hearing briefs, Level 3 attempted to argue that footnote 149 of the *ISP Remand Order* required Qwest to bear the cost of transporting ISP-bound traffic. (Level 3 Opening Br. at 7-9). Footnote 149 states:

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

In the prior arbitration with Level 3, the Commission interpreted footnote 149 to mean that the pre-*ISP Remand Order* obligations to transport traffic to the POI were not changed by the *ISP Remand Order*.[9]

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

[9] *Level 3 Arbitration Decision*, at 9-11.

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telecommunications traffic. Prior to the *ISP Remand Order*, Rule 51.701 of the FCC's reciprocal compensation rules provided that "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of *local* telecommunications traffic between LECs and other telecommunications providers."[10] As the FCC expressly recognized in the *Local Competition Order*, the Act preserved the right of local exchange carriers who originate interexchange traffic to charge access charges for the origination and transport of interexchange traffic to a point of interconnection ("POI") with an interexchange carrier ("IXC").[11]

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

24 Interpreting Rules 703 and 709 to require Level 3 to bear the full cost of transporting ISP-bound traffic, and in particular, VNXX ISP-bound traffic, is the only economically rational approach. If Level 3 bears the cost of origination and dedicated transport, then the ISP and ultimately the ISP's dial-up customers will be required to compensate Level 3 for the

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[10] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("*Local Competition Order*"), aff'd in part and rev'd in part, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999) Appendix B, § 701(a) (*emphasis added*) (found at 11 FCC Rcd at 16228).

[11] *Local Competition Order* ¶¶ 176, 1033-34. Level 3's reliance on footnote 149 only underscores why the *ISP Remand Order* should be interpreted only to prescribe intercarrier compensation for calls placed to an ISP in the same LCA as the calling party. Only then does the preservation of the rules applicable to local traffic (Rules 51.703 and 51.709) make sense.

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origination and transport costs incurred to provide dial-up service. If those costs are shifted to Qwest, as Level 3 seeks to do in this proceeding, then Qwest either unfairly bears the cost without compensation or has to recover those costs from ratepayers generally, including those who do not use dial-up service. As the FCC stated in the *ISP Remand Order*, "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet Access." *ISP Remand Order* ¶ 87.

25 For these reasons, Qwest respectfully requests that the Commission adopt Qwest's proposed contract language for the RUF (Sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, and 7.3.2.2.1) instead of the contract language adopted in the Arbitrator's Report.

C. The Commission Should Adopt Qwest's Proposed Language on VOIP Issues

1. The Commission should reject the Arbitrator's bill and keep approach to all VoIP Traffic. In the alternative, any bill and keep approach should apply only to local traffic.

26 The Arbitrator, in an effort to deal with compensation on VoIP traffic pending FCC decisions on intercarrier compensation for IP-enabled traffic, made a well-intentioned but unlawful decision to adopt a bill and keep approach for VoIP traffic. (Arbitrator's Report ¶¶ 66-68). The Arbitrator's Report on this point should be rejected for three reasons.

27 First, the bill and keep recommendation does not comply with federal law under either of the compensation regimes that could potentially apply to VoIP traffic. Both parties agree that VoIP is an enhanced service. Based on that, the rules related to enhanced services providers ("ESPs") should apply to compensation related to VoIP traffic. Under federal law, an ESP is treated as an end user for purposes of applying access charges.[12] The ESP Exemption is a federally-mandated compensation rule that a state commission cannot simply ignore, as the

[12] *ISP Remand Order*, ¶11; Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 ¶ 2, n. 8 (1988) ("Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. . . .") (*emphasis added*).

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Arbitrator's Report does. Thus, one problem with the bill and keep approach recommended by the Arbitrator is that it applies to all VoIP calls (including interexchange VoIP calls) and thus effectively exempts interexchange VoIP traffic from the access charges that would otherwise apply, a result that directly violates the FCC's rules for the treatment of ESPs. It also violates the FCC's stated policy in its *IP-Enabled Service NPRM*: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the costs of the PSTN should be borne equitably among those that use it in similar ways."[13]

28 Alternatively, if VoIP is treated as a "telecommunications" service, then the proper end user locations would be the actual physical location of the called and calling parties, and access charges would apply any time they are not physically located in the same LCA. By adopting a bill and keep approach to interexchange traffic that, under the telecommunication service rules, would be subject to access charges, the Arbitrator's Report is unlawful for the same reasons it is unlawful under the ESP rules.

29 Second, the Arbitrator's recommended approach simultaneously brushes too broadly and too narrowly. It is too broad in that it applies a bill and keep approach to *all* VoIP traffic and, in effect, authorizes VNXX for interexchange VoIP traffic. It is too narrow in that only VoIP is subject to bill and keep. If the Commission were to adopt a bill and keep approach for *all local traffic*, its approach would be consistent and appropriate. Qwest does not oppose bill and keep for truly local traffic, whether it is traditional voice traffic, local VoIP traffic, or local ISP traffic. If the Commission were to adopt a bill and keep approach for *all* local traffic (including local VoIP traffic)—VoIP traffic that is local based on the proper application of the

[13] Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 ¶ 61 (March 10, 2004).

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ESP Exemption—Qwest would not object. Indeed, Qwest has agreed with numerous carriers in several states to exchange *all local traffic* on a bill and keep basis.

30 Third, the solution recommended by the Arbitrator was not one proposed by either party. As a consequence, even though the Arbitrator's approach is well-intentioned, the parties were not able to explore either the legal or factual implications of a bill and keep approach that applies to all VoIP calls. Thus, there is no factual record upon which the Arbitrator could base her recommendation. Such a lack of a factual record is obviously inconsistent with the Act. Had this issue been addressed at the hearing, Qwest would have been able to provide testimony on the proper application of bill and keep that would potentially have caused the Arbitrator to fashion a bill and keep approach that was properly focused on local traffic. Unfortunately, without the benefit of a record on that issue, the result is extremely unfair to Qwest. Under the Arbitrator's approach, Qwest would continue to pay terminating compensation to Level 3 on all ISP traffic, but would be denied terminating compensation on VoIP traffic that Qwest terminates for Level 3. The lack of balance and unfairness of this approach is obvious.

31 Qwest requests that the Commission either adopt Qwest's proposed VoIP language or, at the very least, limit the bill and keep approach on VoIP traffic to only local VoIP traffic—as defined by the proper application of the ESP Exemption.

2. The Commission Should Adopt Qwest's Proposed VoIP Audit and Certification Provisions (Sections 7.1.1.1 and 7.1.1.2).

32 The Arbitrator's Report rejected Qwest-proposed language that would require Level 3 to certify that VoIP traffic meets the approved definition and the language that would provide Qwest with a right to audit to assure that VoIP calls were properly identified. (Arbitrator's Report ¶ 69). The language is necessary so that Qwest can verify that the traffic that Level 3 identifies as VoIP traffic is valid VoIP traffic entitled to the ESP exemption and is properly classified for billing purposes. It was undisputed that Level 3 agreed to numerous other audit

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procedures in other portions of the agreement, and even proposed section 7.3.9, an auditing provision for company factors. As with auditing provisions, Level 3 agreed to numerous certification requirements in the agreement. As noted above, the Arbitrator's bill and keep approach to VoIP traffic is unlawful. Given that the Arbitrator rejected the auditing and certification provisions because of the adoption of the bill and keep approach, the Commission should and adopt Qwest's proposed Sections 7.1.1.1 and 7.1.1.2.[14]

D. Access to High Capacity UNEs (Issue No. 31—Section 9.1.1.4, 91.1.4.1 and 9.1.1.4.2)

33 The Arbitrator's Report adopts Level 3's proposed contract language for Sections 9.1.1.4 and 9.1.1.4.1 of the Agreement. (Arbitrator's Report ¶ 113). Level 3's proposed Section 9.1.1.4 is designed to give Level 3 access to high capacity UNEs, even when it is not entitled to them. Level 3's proposed Section 9.1.1.4 should be rejected. In Washington, there is a proceeding to identify non-impaired wire centers. That proceeding and any subsequent proceedings will determine whether Level 3 has a right to high capacity UNEs.

34 When viewed in that context, it is clear that the only purpose of Level 3's proposed language is to unlawfully expand Level 3's UNE rights. To make its unlawful access to UNEs permanent, Level 3 seeks to deprive the Commission of any role in enforcing the correct UNE requirements – whether they benefit Level 3 or Qwest. Thus, Level 3's proposed Section 9.1.1.4 deletes the last sentence of Qwest's proposed language that would permit Level 3 to go to the Commission to enforce its unbundling rights. Section 9.1.1.4.1 in turn mandates that Qwest be required to provide UNEs to Level 3 under any circumstances in which Level 3 requests them. Qwest's proposed language appropriately limits that right to circumstances in which "the UNE is in a location that does not meet the applicable non-impairment thresholds."

[14] *See* Qwest's Opening Brief ¶¶ 91-92 and Reply Brief ¶ 70 for a more detailed discussion of both issues. Even if the bill and keep approach for VoIP were to remain in effect, the audit and certification provisions are still necessary since it will still be necessary to know what traffic is VoIP (and thus subject to bill and keep) and what traffic is not (and thus subject to another compensation regime).

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The Commission will make the final decision. Finally, Level 3's proposed language deletes Section 9.1.1.4.2 which serves to allow Qwest to identify additional non-impaired wire centers. Under proposed Section 9.1.1.4.2, if the Commission finds that additional wire centers are not impaired, Qwest can provide notice to Level 3 that it is reclassifying such wire centers. Level 3's purpose in opposing this provision is clearly to prevent Qwest from asserting its lawful right not to provide UNEs in wire centers the Commission has determined are not impaired. It is not clear from the Arbitrator's Report what action the Arbitrator recommends for Section 9.1.1.4.2.

35 In short, Level 3's contract language for Section 9.1.1.4 is designed to unlawfully expand Level 3's unbundling rights by eliminating the "impairment" requirement altogether and then denying the Commission any role in limiting the expanded rights Level 3 seeks to create. The Commission should reject Level 3's proposed changes and adopt Qwest's proposed language for Sections 9.1.1.4, 9.1.1.4.1, and 9.1.1.4.2

III. CONCLUSION

36 For the reasons set forth herein, Qwest respectfully requests that the Commission review and reverse the portions of the Arbitrator's Report specifically addressed herein.

DATED this 4th day of April, 2007.

QWEST

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