BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of: LEVEL 3 COMMUNICATIONS, LLC, 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 UT-063006

LEVEL 3'S OPENING BRIEF

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION AND SUMMARY	1
II.	INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC.	3
	A. Per-Minute Compensation for ISP-Bound Calls (Issue No. 3A, Section 7.3.6.3; Issue No. 3B, Section 4; Issue No. 3C, Section 7.3.6.1; Issue No. 4, Section 7.3.4).	3
	B. Responsibility For Inter-Network Facilities Costs/RUF (Sections 7.1.1.4, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2 and 7.3.2.2.1) (Issues 1G, 1H, 1I and 1J).	7
	C. Interconnection Under 47 U.S.C. § 251(c) Is Not Limited To "Telephone Exchange Service" or "Exchange Access" (Issue 1A) (Sections 7.1.1, 7.1.1.3, and 7.1.1.4)	10
III.	LEVEL 3 SHOULD BE PERMITTED TO SEND INBOUND LONG DISTANCE TRAFFIC OVER LIS TRUNKS (ISSUES 2A & 2B) (SECTIONS 7.2.2.9.3.1, 7.2.2.9.3.2, & 7.2.2.9.3.2.1).	12
	A. Language Not In Dispute Establishes That Level 3 May Route Inbound Long Distance Traffic Over LIS Trunks.	12
	B. Permitting Level 3 To Route Inbound Long Distance Traffic From Third Party IXCs Over LIS Trunks Is The Correct Answer.	14
IV.	INTERCARRIER COMPENSATION FOR VOIP TRAFFIC SHOULD PARALLEL COMPENSATION FOR ISP-BOUND TRAFFIC.	21
V.	ISSUE-BY-ISSUE REVIEW.	24
	A. The Commission Should Accept Level 3's Proposed Language Relating To Establishing Mid-Span Meet POIs (Issue No. 28, Sections 7.1.2.3 & 7.1.2.3.1; Issue No. 23, Section 4).	25
	B. OC Level Interconnection Should Be Subject To Automatic Negotiation (Issue 1B) (Section 7.1.2)	26
	C. Level 3's Proposed Modifications to Section 7.2.2.1.2.2 Properly Reflect Level 3's Right To Purchase Transport for Interconnection at TELRIC Rates (Issue 1D).	27
	D. The Commission Should Accept Level 3's Proposed Language Relating To Quad Links (Issue No. 30; Sections 7.2.2.6.1.1, 7.2.2.6.1.2 And 7.2.6.1.3).	28
	E. The Commission Should Accept Level 3's Proposed	28

TABLE OF CONTENTS

		Page
	Definition Of "UNE" (Issue No. 27; Section 4)	
F.	The Commission Should Accept Level 3's Proposed Language Relating To Ordering UNEs (Issue Nos. 31 & 32; Sections 9.1.1.4 & 9.1.1.4.1).	30
G.	Use of Statutory Definitions.	32
H.	Scrivener's Errors Regarding Qwest's SGAT.	34
VI.	CONCLUSION.	35

TABLE OF AUTHORITIES

	Page(s)
Cases	
Pacific Bell v. Pac-West Telecomm, 325 F.3d 1113 (9th Cir. 2003)	11
SBC v. Missouri PSC, 2006 US Dist. LEXIS 65536 (E.D. Mo. 2006)	23, 27
WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002),	11, 12
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").	7, passim
Administrative Materials	
FCC, *Local Telephone Competition, Status as of December 31, 2005*	17
Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001)	1, passim
Iowa Network Services v. Qwest, 385 F. Supp. 2d 850 (S.D. Ia. 2005)	18, 19
Level 3 v. Qwest, Docket No. UT-053039, Order No. 5, Order Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006)	1, 4, 5, 9
Level 3 v. Qwest, Docket No. UT-053039, Order No. 6, Order Denying Petition for Reconsideration (June 9, 2006)	1, 4, 5, 9
MTS and WATS Market Structure, Third Report and Order, 93 F.C.C.2d 241 (1983)	24
Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corporation Pursuant to 47 U.S.C. Section 252, Docket No. UT-023042 Fourth Supplemental Order & Commission's Final Order (February 5, 2003)	8
Qwest Corporation v. Washington Utilities & Transportation Commission, Complaint, No. CV 06-0956RSL (2006)	5
Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, etc., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003)	27
Transport Rate Structure and Pricing, Third Memorandum Opinion And Order On Reconsideration And Supplemental Notice Of Proposed Rulemaking, 10 FCC Rcd 3030 (1995)	16
Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 6429 (2004)	22

TABLE OF AUTHORITIES

	Page(s)
Statutes	
47 U.S.C. § 153(16)	10, 24
47 U.S.C. § 153(47)	11,
47 U.S.C. § 153(48)	24
47 U.S.C. § 251(a)	10, 27
47 U.S.C. § 251(b)(5)	3, passim
47 U.S.C. § 251(c)(2)	10, passim
47 U.S.C. § 251(c)(3)	17, 29
47 U.S.C. § 251(d)(3)	29, 30
47 U.S.C. § 215(g)	11
47 U.S.C. § 261(c)	29, 30
Other Materials	
http://en.wikipedia.org/wiki/Moral_hazard	31

When you come to a fork in the road, take it.
– Yogi Berra

I. INTRODUCTION AND SUMMARY

Level 3 Communications, LLC ("Level 3") and Qwest Corporation ("Qwest") disagree about many facets of their new interconnection agreement, but there are two overarching disputes. First, Qwest wants to treat "local" Internet traffic (where the ISP has a "local" presence) differently from "VNXX" ISP-bound traffic (where it does not). Second, Qwest wants to forbid Level 3 from efficiently competing for the business of providing tandem switching to interexchange carriers ("IXCs"), by denying Level 3 the right to send jointly-provided access traffic over so-called "local interconnection service" ("LIS") trunks.

As to the first point, the Washington Commission ruled earlier this year that the Federal Communications Commission's ("FCC's") *ISP Remand Order*[1] applies to ***all*** ISP-bound traffic, whether it is handed off "locally" or via VNXX.[2] It is true that some VNXX-related issues are before the Commission in another proceeding; so, it is possible that the Commission could change its mind at some point in the future. But for purposes

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1 *Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted).

2 *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 5, Order Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006) ("*Core Interlocutory Review Order*") at 24 ("The FCC's *ISP Remand Order* applies to all ISP-bound traffic, ***regardless of the point of origination and termination of the traffic.*** In the *ISP Remand Order*, the FCC creates a separate compensation category for all ISP-bound traffic, regardless of the nature of the traffic. *ISP Remand Order*, ¶ 77") (emphasis added); *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 6, Order Denying Petition for Reconsideration (June 9, 2006) ("*Core Reconsideration Order*") at 7 ("The FCC's policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*, is to establish a ***uniform*** compensation regime for all ISP-bound traffic. Our decision in Order 05 reflects the FCC's intent") (emphasis in original); *id.* at 8 ("We affirm our interpretation of the *ISP Remand Order*, finding that the FCC created a separate compensation category for ***all*** ISP-bound traffic, regardless of origination and termination of the traffic, to advance its goal of a uniform intercarrier compensation scheme") (emphasis added).

of ***this*** proceeding at ***this*** time, the Commission's currently effective ruling on the scope of the *ISP Remand Order* governs, so Level 3 must prevail on this issue.

As to the second point, there does not appear to be a real dispute. Qwest's proposed language establishes that Level 3 may use LIS trunks for jointly-provided access. Level 3's language is broader, and also plainly permits this use of LIS trunks.[3] So this issue, too, should be resolved in Level 3's favor.

With these two issues out of the way, the key remaining dispute is how to handle intercarrier compensation for Voice-over-Internet-Protocol ("VoIP") traffic. Unlike ISP-bound traffic, this is not a question on which the FCC has spoken clearly. Nonetheless, the analogies between ISP-bound traffic and VoIP traffic are sufficiently close that the two types of traffic should be subject to the same compensation regime.

The remainder of this brief is organized as follows. Section II discusses the question of compensation for ISP-bound calling, including VNXX-routed traffic. Because the Commission has so recently ruled on this issue, in Level 3's favor, we do not dwell on this topic, although we do address two subsidiary issues – the impact of the uniform treatment of ISP-bound calling on inter-network facilities costs, and the definition of the scope of traffic that may be exchanged over interconnection facilities. Section III discusses the use of LIS trunks for inbound long distance traffic from IXCs, explaining why (a) the issue is already resolved under language not in dispute and (b) if there is any question about this issue, it makes sense as an economic, policy and legal matter to accept Level 3's position. Section IV discusses why intercarrier compensation

[3] Section 4 of the agreement defines "meet point billing" and "jointly provided switched access" as "an arrangement whereby two (2) LECs (including a LEC and CLEC) jointly provide Switched Access Service to" an IXC. Although Level 3 and Qwest have proposed different language for Section 7.2.2.9.3.1, relating to the use of LIS trunks, both parties' language plainly permits this traffic to be sent over such trunks.

for VoIP traffic should parallel that for ISP-bound traffic. Finally, Section V reviews the remaining issues in dispute, as set forth in the final version of "Exhibit 4" in this matter, with a brief explanation of why Level 3's proposed contract language should prevail.[4]

II. INTERCARRIER COMPENSATION ISP-BOUND TRAFFIC.

This section of the brief address intercarrier compensation for ISP-bound traffic, including per-minute compensation and costs of inter-network facilities. It also addresses a related issue regarding the definition of the scope of traffic that can be exchanged over interconnection arrangements established under the agreement.

A. Per-Minute Compensation for ISP-Bound Calls (Issue No. 3A, Section 7.3.6.3; Issue No. 3B, Section 4; Issue No. 3C, Section 7.3.6.1; Issue No. 4, Section 7.3.4).

A key dispute between Qwest and Level 3 is whether the FCC's compensation regime for ISP-bound traffic (requiring compensation for such traffic, along with "normal" Section 251(b)(5) traffic, at $0.0007/minute) covers so-called "VNXX" traffic.[5] Qwest argues that the FCC's regime does not apply to VNXX traffic, but earlier this year – in a dispute between Level 3 and Qwest on this precise topic – the Commission ruled that it did. So, Level 3 should prevail as a matter of law.

By way of background, the earlier dispute arose under the existing Qwest-Level 3 interconnection contract, which incorporates the compensation regime from the *ISP*

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[4] In an email to the parties dated December 8, 2006, Judge Rendahl distributed a copy of "Exhibit 4" for use as the template agreement. All references in this brief to agreement sections or pages in "Exhibit 4" relate to the document that Judge Rendahl distributed at that time.

[5] VNXX refers to a routing arrangement in which the calling party dials a number with an NXX code that is "local" to that customer, but the call is physically delivered to the called party in a distant location. In Washington, some of the physical facilities that Level 3's ISP customers use to provide Internet access are located in Seattle. So, ISP-bound traffic that originates in the large Seattle local calling area is compensable, even under Qwest's theory of how the FCC's compensation regime works. The dispute involves what compensation regime applies to ISP-bound traffic arising outside of Seattle. It directly relates to Issue No. 4, at pages 82-83 of Exhibit 4, as well as Issue Nos. 3A, 3B and 3C, at pages 30 and 84-85 of Exhibit 4.

Remand Order. The parties disagreed about how the *ISP Remand Order* applies to VNXX traffic, so the question there was exactly the same as here – does the *ISP Remand Order* apply to VNXX traffic, or not?

The Commission ruled clearly, unequivocally – and correctly – that it does. Specifically, after considering both parties' arguments, it ruled that:

> The FCC's *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic. In the *ISP Remand Order*, the FCC creates a separate compensation category for all ISP-bound traffic, regardless of the nature of the traffic. *ISP Remand Order*, ¶ 77.

Core Interlocutory Review Order, supra at 24. Unhappy with this decision, Qwest sought reconsideration, using an unrelated ruling from the 1st Circuit as a "hook." The Commission, however, was not misled. On reconsideration, it ruled:

> The FCC's policy and intent, both in the *ISP Remand Order* and in the *Core Forbearance Order*, is to establish a ***uniform*** compensation regime for all ISP-bound traffic. Our decision in Order 05 reflects the FCC's intent.
>
> ...
>
> We affirm our interpretation of the *ISP Remand Order*, finding that the FCC created a separate compensation category for all ISP-bound traffic, regardless of origination and termination of the traffic, to advance its goal of a uniform intercarrier compensation scheme.

Core Reconsideration Order, supra at 7, 8 (emphasis in original). Nothing has changed since the issuance of this decision that would warrant an about-face by the Commission. As a result, the new interconnection agreement should embody this same conclusion.[6]

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[6] Level 3 submits that the Commission should not permit Qwest to relitigate this issue here. The rulings noted above are not technically "final" because Qwest has challenged them in federal court, so the doctrine of collateral estoppel does not literally apply. Even so, at least as far as the Commission is concerned, it would make no sense to waste Commission resources reconsidering them in this proceeding. The Commission should simply rule for Level 3 on this issue, citing its earlier decisions.

Qwest's own actions at the hearing remove any doubt about the applicability of the $0.0007 rate to all ISP-bound calls. At the hearing, Level 3 expressed concern that Qwest was trying to avoid its full responsibilities under the *ISP Remand Order,* as interpreted by the Commission, by hedging and qualifying its offer to exchange all traffic, including ISP-bound traffic, under the terms of that order.[7] Fully aware of the Commission's decisions cited above – which, again, hold that that the *ISP Remand Order* applies to ***all*** ISP-bound traffic – Qwest's counsel stated on the record that it was offering to exchange ***all*** traffic subject to the FCC's "mirroring rule" at the FCC rate:

> MR. DETHLEFS: Your Honor, just for the record, Level 3 apparently is taking the position that Qwest has not previously made a correct offer under the mirroring rule. I want to go on record that ***the traffic that is contemplated by the mirroring rule*** Qwest is today offering, if it hasn't in the past, to exchange traffic at the rate contemplated in the mirroring rule, so –
>
> JUDGE RENDAHL: I think that's -- you've said it, so that's enough. All right.

Tr. 335, lines 16-25 (emphasis added).[8] In light of the Commission's rulings cited above, Qwest must be charged with knowledge that "the traffic that is contemplated by the mirroring rule" encompasses "all ISP-bound traffic, regardless of origination and termination of the traffic," because only that understanding would "advance [the FCC's] goal of a uniform intercarrier compensation scheme." *Core Reconsideration Order* at 7.

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[7] Specifically, Level 3 sought to cross-examine Qwest's witnesses on this topic. The issue arose in the context of discussing which portions of Qwest's testimony would be stricken as going too far into legal, rather than evidentiary, matters. Level 3's counsel made entirely clear on the record that Level 3 was concerned that Qwest's "offer" was not adequate under the mirroring rule. *See* Tr. 333:18-334:12.

[8] Qwest is obviously aware that the Commission has ruled that the *ISP Remand Order* embraces all VNXX-routed ISP-bound traffic, because Qwest has sued the Commission in federal court, complaining about those rulings. *See Qwest Corporation v. Washington Utilities & Transportation Commission,* Complaint, No. CV 06-0956RSL, at ¶ 33.

In this regard, it is clear from the record that Qwest's counsel was trying to protect Qwest from cross-examination on the issue of the scope and effectiveness of Qwest's offer.[9] Level 3 relied on Qwest's statement (and the Judge's ruling that the statement was "enough") as indicating that no further cross-examination on that point would be permitted or appropriate. Again, since the offer was made in the Commission's own offices with full knowledge on Qwest's part that the Commission had ruled that the compensation regime of the *ISP Remand Order* applies to all ISP-bound traffic, it would be completely inappropriate now for Qwest to argue that it didn't really mean to offer to exchange "the traffic that is contemplated by the mirroring rule" – as the Washington Commission has interpreted that rule – at all. In short, Qwest chose to avoid controversy at the hearing by making the legally required offer on the record at the start of the hearing. The only fair interpretation of that offer is that rather than risk a ruling that its basic ***offer*** was inadequate, Qwest threw in the towel on this point.[10]

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[9] As noted above, the colloquy quoted in the text arose only after Level 3's counsel had expressed serious concern about the adequacy of Qwest's offer under the mirroring rule. Following that expression of concern, Judge Rendahl ruled that all of the affected testimony would remain in the record ***and therefore be fully subject to cross-examination.*** Tr. 335:1-15. ***Immediately*** following that ruling, Qwest's Mr. Dethlefs made the on-the-record statement quoted above. The only reasonable interpretation of that statement was that there was no need to cross-examine on this topic because the required offer had just been made, live, on the record.

[10] Under the *ISP Remand Order,* the consequences to Qwest of making an ***inadequate*** offer can be financially severe. Specifically, the FCC has made quite clear that it wants all ISP-bound traffic and all "normal" Section 251(b)(5) traffic exchanged at the same rate. *ISP Remand Order* at ¶ 89 ("It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed") (footnote omitted). If Qwest does not properly offer to exchange all such traffic at the FCC's low rate, the result is that all such traffic is, instead, to be exchanged at the higher TELRIC rate for Section 251(b)(5) traffic. It would be totally unfair to Level 3 to permit Qwest to avoid controversy about this issue at the hearing by letting it purport to make the required offer on the record, only to allow it ***after*** the hearing to hem and haw about how it ***really*** only meant its offer to extend to some, but not all, of the traffic "contemplated by the mirroring rule." In this regard, *see* Level 3's proposed language for Section 7.3.6.2 (Issue No. 19, Exhibit 4 at pages 84-85),

B. Responsibility For Inter-Network Facilities Costs/RUF (Sections 7.1.1.4, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2 and 7.3.2.2.1) (Issues 1G, 1H, 1I and 1J).[11]

As part of its effort to undermine Level 3's ability to support its ISP customers in providing efficient dial-up Internet access, Qwest's language would impose a "relative use factor" ("RUF") calculation that would unfairly transfer to Level 3 large portions of the cost of receiving ISP-bound traffic from Qwest to Level 3. This is inappropriate. The *ISP Remand Order,* FCC Rule 51.703(b), FCC Rule 51.709(b), and the *Local Competition Order*[12] – and this Commission's own decisions on precisely this topic – all compel the conclusion that the originating carrier must pay to transport traffic, including Internet traffic, to a point of interconnection ("POI") between the two carriers' networks.[13]

The *ISP Remand Order*, at ¶ 78 n.149, makes clear that the FCC ruling modifying the normal rules for intercarrier compensation for traffic "did not alter other obligations ... such as obligations to transport traffic to points of interconnection." The only reasonable conclusion from this language is that even though the *ISP Remand Order* was

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where Level 3 proposes language that ensures that the TELRIC rate for local traffic will apply if Qwest has not properly invoked the mirroring rule. (It actually doesn't matter if Level 3's specific contract language is not clear on this point, because Qwest's obligation to pay the higher TELRIC rate if it fails to make a proper "mirroring" offer arises as a matter of law. So, to the extent that Qwest, in its brief, attempts to qualify its plain on-the-record offer to pay $0.0007 for all traffic, either (a) that qualification is ineffective, and the $0.0007 rate applies even to VNXX traffic, or (b) the qualification is effective, in which case Qwest's offer is ***de***fective, and the TELRIC rate applies to all ISP-bound traffic.)

[11] The contract language regarding Issue No. 1G appears at pages 79-80 of Exhibit 4; the language regarding Issue No. 1H appears at pages 81-82. For Issue Nos. 1I and 1J, see note 16, *infra.*

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

[13] In other states Level 3 has proposed alternative possible solutions to the apparent impasse between the parties on this issue. Qwest has routinely rejected them. Qwest is of course free to contact Level 3 should it wish to seriously discuss those alternative solutions here in Washington.

setting up a separate, special per-minute rate for ISP-bound traffic, it wanted the normal rules regarding the costs of originating traffic to remain in place.

As for the FCC's rules, Rule 51.703(b) bans LEC-to-LEC traffic origination charges, and Rule 51.709(b) requires that the cost of dedicated inter-network transmission facilities – such as LIS trunks – be borne in proportion to the amount of traffic each carrier ***originates***.[14] That the FCC did not intend to alter these rules when it modified its rules defining the scope of intercarrier compensation (that is, Rule 53.701) is shown by footnote 149 of the *ISP Remand Order*.

The Commission itself reached exactly this same conclusion when it considered this very issue in a dispute between Level 3 and Qwest, leading to the adoption of the parties' current interconnection agreement.[15] There the Commission specifically relied upon footnote 149 of the *ISP Remand Order,* noted above, along with sound economic and policy considerations, to rule that the most consistent way to handle ISP-bound traffic is to treat it like any other originated traffic for purposes of the RUF.

Subsequent FCC rulings have only confirmed this Commission's view. Specifically, in the FCC's 2005 *Intercarrier Compensation Further Notice,* the FCC notes that CLECs "have targeted customers that primarily or solely receive traffic, ***such as ISPs***, in order to become net recipients of traffic." *Id.* at ¶ 91 (emphasis added). The footnote to that statement (*id.,* note 299 emphasis added) then says that "[i]n such situations, ***the originating carrier bears the cost of interconnection to the single POI selected by the competitive LEC,*** in addition to paying reciprocal compensation for the

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14 *See also Local Competition Order* at ¶ 1062 (to the same effect as Rule 51.709(b)).

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

termination of traffic." The only conceivable way to read these statements is that the FCC understands – and agrees with the Washington Commission – that even for ISP-bound traffic, the originating carrier is responsible for transport to the POI.

Moreover, this result is the only conclusion consistent with the Commission's rulings earlier this year, that the intent of the *ISP Remand Order* was to create a uniform compensation scheme for all ISP-bound traffic that parallels the compensation applicable to non-ISP-bound traffic. *Core Forbearance Order supra; Core Forbearance Reconsideration Order, supra.* It would defeat uniformity to authorize substantial swings in carrier responsibility for the costs of originating traffic based on whether the traffic is ISP-bound or not.

For all these reasons, it is neither lawful nor fair to exclude Internet traffic from the RUF calculations. The Commission should adopt Level 3's proposals on this issue.[16]

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[16] A closely related point is raised by Issue No. 21, relating to Section 7.4.1.1 of the agreement. *See* Exhibit 4, page 88. Level 3 is concerned that some Qwest language in Section 7.4 could be construed to permit Qwest to charge Level 3 for "ordering" the LIS trunks that Qwest will establish to deliver its originating traffic to Level 3. Level 3 understands that to the extent that it uses the LIS trunks to send traffic to Qwest – specifically to the extent it uses those trunks to send terminating access traffic – the RUF will operate to impose some of the costs of those trunks on Level 3. But the agreement should make clear that no other trunking costs may properly be imposed on Level 3. This is what its proposed language in Section 7.4.1.1 would accomplish. Furthermore, since the FCC's $0.0007 rate is intended to cover both "transport" and "termination" of traffic, it would be inappropriate double-charging to impose additional costs beyond that amount – whether nominally for "facilities" or for the exchange of traffic – even for Level-3-originated traffic, as long as the traffic is covered by the $0.0007 rate. In this regard, precisely because the $0.0007 rate is inclusive of both transport and termination, by electing to take advantage of it, Qwest has waived any right it might otherwise have had to receive separate payment for tandem switching and transmission. Level 3 has proposed language in Section 7.2.2.1.4 of the agreement (*see* Exhibit 4, page 67 – Issue No. 1E) that makes this clear. Finally in this regard, with respect to Issues 1I and 1J (Section 7.3.3.2, Exhibit 4 at page 82), the agreement should make clear that Qwest, not Level 3, is responsible for the nonrecurring costs of establishing and, as need be, rearranging the LIS trunks needed to carry Qwest-originated traffic to Level 3. These costs are simply the non-recurring aspect of Qwest's traffic origination costs – which, as a general matter, Level 3 cannot be forced to pay.

C. Interconnection Under 47 U.S.C. § 251(c) Is Not Limited To "Telephone Exchange Service" or "Exchange Access" (Issue 1A) (Sections 7.1.1, 7.1.1.3, and 7.1.1.4).

Level 3's proposed language in these contract sections assures that Qwest cannot block Internet traffic, VoIP traffic, or terminating access traffic on interconnection facilities. Qwest's language would allow it to ban or block this traffic by technical or economic means. To avoid this result, the Commission should affirm Level 3's language.[17]

In other states, Qwest has claimed that CLECs are not entitled to interconnection under Section 251(c) for the purpose of originating or terminating interexchange traffic. Any such claim is wrong. Section 251(c)(2) requires interconnection for "telephone exchange service" and "exchange access" traffic. These are statutorily defined terms. "Exchange access" is the use of local exchange facilities or services for the origination or termination of telephone toll service. 47 U.S.C. § 153(16). So, allowing Level 3 to terminate long distance traffic over its interconnection facilities is not only a ***permitted*** use of interconnection under Section 251(c)(2); to the extent it constitutes providing exchange access, Qwest has an affirmative duty to interconnect for this purpose.

The FCC's antipathy towards ghettoizing particular types of traffic is confirmed by its explicit ruling that traffic ***not*** covered by Section 251(c)(2) – including traffic that is not even a "telecommunications service" – may be exchanged over a Section 251(c)(2)

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[17] In Issue No. 10, at page 17 of Exhibit 4, Level 3 and Qwest have a slight dispute about the definition of the term "Interconnection." For reasons which are not clear to Level 3, Qwest seeks to exclude from the scope of interconnection IntraLATA toll traffic that might, at some point in the call path, be carried by an IXC rather than by a LEC. Thus, Qwest's definition states that interconnection for the exchange of IntraLATA toll traffic is available only where such traffic is "solely" carried by LECs. As far as Level 3 can tell, there is no justification in any state or federal law or regulation that would support Qwest's proposed limitation, and the Commission should reject it. To the extent that Qwest supplies an explanation for this proposal in its own initial brief, we will respond to that explanation on reply.

or Section 251(a)(1) interconnection.[18] Here, Level 3 provides telecommunications services to its customers, including terminating exchange access, originating and terminating information access, and telephone exchange services.[19] So, Level 3 is affirmatively ***entitled*** to include terminating long distance traffic, as well as VoIP and Internet traffic, on its interconnection links with Qwest.

Finally, in some other states Qwest has relied on Section 251(g) to limit Level 3's interconnection rights. Section 251(g), however, is merely a transitional provision to ensure that ILEC duties to provide access to long distance carriers and information service providers are not impaired by the 1996 Act. It cannot be used to hobble competitors by denying interconnection rights.[20] In fact, because LEC-to-LEC interconnection duties did not exist before the Act, Section 251(g) has no bearing on

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[18] *Local Competition Order.* at ¶ 995 ("telecommunications carriers that have interconnected ... under sections 251(a)(1) [or] 251(c)(2) may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well"). The FCC thus supports efficient arrangements where different "types" of traffic are commingled on the same facility.

[19] "Telephone exchange service" is defined at 47 U.S.C. § 153(47). Section 153(47)(A) describes traditional "local" service, in which subscribers can call within a set of interconnected exchanges without incurring a toll charge. Section 153(47)(B) was added by the 1996 Act, and vastly expands the definition to include any service "comparable" to traditional service. The services Level 3 provides to ISPs and VoIP providers are a form of "information access." *See ISP Remand Order* at ¶ 42 & n.76. While those services do not literally fall under the traditional definition of "telephone exchange service" in Section 153(47)(A), they are clearly "comparable" to those traditional services. For example, calls to and from Level 3's information access services use normal "local" PSTN numbers. No provider imposes, or ever has imposed, toll charges for these calls. And, they are routed though Qwest's network to Level 3 exactly like a traditional local call would be. Moreover, they are comparable to calls to wireless customers, which the FCC also found to be "telephone exchange service." *Local Competition Order* at ¶¶ 1013-14. As a result, Level 3's services constitute "telephone exchange service," and they are entitled to interconnection under Section 251(c)(2).

[20] *WorldCom v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002), held that the sole purpose of Section 251(g) was to "preserve[e] various ILEC duties that antedated" the 1996 Act." The 9th Circuit has found that, by virtue of the D.C. Circuit's ruling that the FCC is "precluded" from relying on Section 251(g) to limit ILEC obligations under the Act, so too are ILECs "precluded" from relying on Section 251(g) to accomplish that same end. *Pacific Bell v. Pac-West Telecomm,* 325 F.3d 1113, 1131 (9th Cir. 2003).

duties that one LEC (Qwest) bears to another (Level 3).[21] For these reasons, the Commission should adopt Level 3's proposed contract language.

III. LEVEL 3 SHOULD BE PERMITTED TO SEND INBOUND LONG DISTANCE TRAFFIC OVER LIS TRUNKS (ISSUES 2A & 2B) (SECTIONS 7.2.2.9.3.1, 7.2.2.9.3.2, & 7.2.2.9.3.2.1).

As subsection A below explains, the language proposed by both parties clearly establishes that Level 3 may use LIS trunks to deliver traffic from IXCs to Qwest end offices. For this reason, there is no need to examine the arguments in favor of this result in any detail. Even so, as subsection B explains, this is, in fact, the ***right*** answer from a legal, policy, and economic perspective.[22]

A. Language Not In Dispute Establishes That Level 3 May Route Inbound Long Distance Traffic Over LIS Trunks.

Using LIS trunks for Feature Group D traffic (that is, incoming long distance traffic) is "the great issue that wasn't." Level 3 explained that it seeks to make efficient use of its connections with Qwest in Washington by adding outbound (from Level 3) terminating long distance traffic to the same LIS trunks that are now mostly devoted to handling inbound (to Level 3) ISP-bound traffic. *See* . Exhibit 31T, pages 22-36; Exhibit 33, Exhibit 11T, pages 15-26; Exhibit 13, 16T pages 2-10. Qwest, however, has argued that Level 3 may not use LIS trunks for this purpose. Qwest's position, however, is inconsistent with its own proposed contract language.

Today traffic bound for a Qwest customer from an IXC that is not directly routed from the IXC to the affected Qwest end office goes from the IXC, to Qwest's tandem, to the appropriate Qwest end office, to the called party. *See* Exhibit 33. In that scenario the

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[21] *WorldCom v. FCC, supra,* 288 F.3d at 433-34 (Section 251(g) "speaks only of services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP").

[22] The language relating to Issue Nos. 2A and 2B appears on pages 75-77 of Exhibit 4.

IXC pays Qwest for tandem switching, transport, and end office switching. Level 3 would like to use the capabilities of its multi-function softswitching devices in Seattle and elsewhere to perform the tandem switching function for IXCs – that is, to "look at" long distance traffic coming in from around the country, identify the Qwest end office to which it is bound, and switch it onto trunks directly connected to that end office. In so doing, Level 3 would be competing with Qwest for the tandem switching business that Qwest currently effectively monopolizes in Washington. Obviously, IXCs will only be motivated to use Level 3 for this function to the extent that its services are competitively priced and equal or superior to Qwest's in quality.

When incoming long distance traffic follows this path – IXC, to Level 3's switch, to Qwest's end office switch – that is simply an example of what the industry (and the parties' contract) defines as "jointly provided switched access." That term is defined in Section 4 of the template agreement and is not in dispute:

> "Meet-Point Billing" or "MPB" or "Jointly Provided Switched Access" refers to 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.

Exhibit 4 (Template Contract) at 20. This definition contains no requirement that Qwest, and not Level 3, be the LEC providing tandem functionality. So, the arrangement Level 3 seeks to establish – using its own network to provide tandem switching functionality to IXCs – fits precisely within this definition.[23]

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[23] Qwest's witness conceded this on the stand. *See* Tr. 610:20-611:16 (Easton) (emphasis added) ("Q: But, in fact, if a CLEC had a switch that had multiple capabilities, and wanted to compete with the ILEC in the provision of tandem functionality, nothing that you are aware of would prevent the CLEC from soliciting business from IXCs, saying, connect to me, and I will get your traffic out to the end offices cheaper and more efficiently than the ILEC can. That's perfectly legal? ***A: Nothing I am aware of would prohibit that.*** Q: And if that were to occur,

Qwest agrees in its own proposed language that this type of traffic may be transmitted over LIS trunks. Qwest's proposed version of Section 7.2.2.9.3.1 states:

> Exchange Service (EAS/Local), ISP-Bound Traffic, IntraLATA LEC Toll, VoIP traffic and ***Jointly Provided Switched Access*** (InterLATA and IntraLATA Toll involving a third party IXC) ***may be combined in a single LIS trunk group*** or transmitted on separate LIS trunk groups.

Exhibit 4 at 75 (Qwest's proposed language, emphasis added). Level 3's proposed language is more expansive, and also permits this type of traffic to flow over LIS trunks. *Id.* (Level 3's proposed language). So, there is no real dispute about this issue: under both parties' proposals, traffic from an IXC, to Level 3's multifunction device (operating as a tandem) to a Qwest end office, is "jointly provided switched access," which may be carried on LIS trunks. The Commission, therefore, should resolve this issue by stating clearing in its arbitration ruling that Level 3 may use LIS trunks to deliver to Qwest Feature Group D switched access traffic.[24]

B. Permitting Level 3 To Route Inbound Long Distance Traffic From Third Party IXCs Over LIS Trunks Is The Correct Answer.

Although Qwest's proposed language largely disposes of this issue, the Commission should clearly and unequivocally rule that Level 3 may use LIS trunks to

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that would be a form of jointly provided switched access? A: Let's go through the example again. So it would be an ILEC going through a CLEC's tandem? Q: And it would be incoming, an IXC with a call coming in from Los Angeles, goes to the CLEC switch which is functioning as a tandem, recognizes that call as bound for a particular Qwest customer. The CLEC would then route that to the appropriate Qwest end office? ***A: That would be an example of jointly provided switched access.***")

[24] Although Level 3 itself does not operate substantially as a "1+" long distance carrier, Level 3 notes that it would make no sense at all to ***permit*** Level 3 to send Feature Group D traffic from a third party IXC on its LIS trunks to Qwest end offices – which the agreement plainly provides – but to ***forbid*** Level 3 to send the same type of traffic on those same trunks just because in some distant location Level 3, and not a third party, was the IXC picking up the call from the originating end user. The Commission, therefore, should make clear in its ruling that, to the extent that Qwest's proposed language would impose such a discriminatory, anticompetitive restriction, that language is rejected. Level 3's proposed language regarding this issue is broad enough to eliminate this problem, and the Commission should adopt it.

terminate long distance traffic bound for Qwest's end users. There is no valid reason to require Level 3 to bear the large nonrecurring and recurring costs of establishing a "Feature Group D" network for this purpose when the LIS trunks that already exist are perfectly adequate.

In this regard, there is no serious dispute that sending all traffic on a single, integrated network of trunks is more efficient.[25] Qwest, however, wants to force Level 3 to turn off its existing, extensive network of LIS trunks[26] and replace them with FGD trunks, which come pre-configured to record information often used to bill for switched access. LIS trunks are not now configured to record that information, but can readily be configured to do so (*see, e.g.,* Tr. 515:11-19 (Wilson) – if, indeed, such detailed recording is actually required.[27]

For many different reasons, Level 3 should not be required to reconfigure its interconnection with Qwest in this way.

First, there is no basis for any ***legal*** objection – under Section 251(c)(2) or otherwise – to combining different types of traffic on a single network of interconnection trunks. To the contrary, the FCC affirmatively approves of using interconnection trunks for multiple types of traffic.[28] The only question is whether the technical or operational

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[25] *See* Tr. 562:9-16 (Wilson).

[26] Level 3 has approximately 35,000 active LIS trunks in Washington. *See* Transcript of Technical Conference at 106:15-16; Tr. 654:22-655:3.

[27] Note that it is not the "trunks" *per se* – that is, the transport capability – that needs to be modified. Recording capabilities are implemented in the switch ports at the ***ends*** of the trunks. So, in fact an FGD trunk is identical to a LIS trunk; what is different is that Qwest configures the software in its switches differently for these different "types" of trunks. Tr. 553:11-19 (Wilson).

[28] The FCC's seminal *Local Competition Order* indicates that, while traditional IXCs may not obtain interconnection under Section 251(c)(2) "solely" to terminate traditional long distance traffic, they may obtain interconnection as long as their traffic ***includes*** traffic subject to Section 251(c)(2) interconnection. *Local Competition Order* at ¶¶ 184, 191. The FCC concluded that long distance carriers ***could*** interconnect under § 251(c)(2) – even to terminate plain old long

concerns that Qwest has raised warrant refusing to do something that is plainly permissible as a legal and regulatory matter.[29]

The legal standard governing consideration of these operational concerns is Section 251(c)(2), which requires interconnection to be just and reasonable. Under Section 251(c)(2), Qwest can only refuse to combine traffic on LIS trunks if its refusal meets that standard. Sorting this out requires a consideration of the costs and benefits of Qwest's position, versus Level 3's. If Qwest's position is more costly overall, it must be rejected. Any other conclusion is irrational – it cannot make sense to impose the ***more expensive*** solution on the parties.[30]

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distance calls – as long as that was not the ***only*** type of traffic they terminated. *Local Competition Order* at ¶ 191. Interconnection under Section 251(c)(2) is mandatory as long as ***some*** of the traffic exchanged falls into one of the categories noted in the statute. The FCC explained that this approach would make it easy and efficient for long distance carriers to obtain Section 251(c)(2) interconnection, so they could compete against ILECs. *Id.* at ¶ 184. The only rational conclusion is that access traffic and "Section 251(c)(2)" traffic may be combined on the same trunks. *See also US West v. MFS,* 193 F.3d 1112, 1124-25 (9th Cir. 1999) (affirming requirement, imposed by Washington state regulators, to "combine local and toll traffic on two-way trunks").

[29] In this regard, at the hearing Qwest claimed that mixing different traffic types and establishing a charge by weighting the different applicable rates is a practice called "ratcheting." Tr. 6541-11 (Easton). Mr. Easton may not approve of "ratcheting," but the FCC does: "In [an earlier order], we concluded that ***interconnector ratcheting was beneficial to access customers*** and that ***retaining the prohibition on ratcheting*** ... is inefficient, ***artificially increasing the cost of interconnected services without any accompanying benefits.*** We continue to believe that ***ratcheting by interconnectors benefits access customers and competition,*** and therefore, decline to modify our rules with respect to ratcheting." *Transport Rate Structure and Pricing,* Third Memorandum Opinion And Order On Reconsideration And Supplemental Notice Of Proposed Rulemaking, 10 FCC Rcd 3030 (1995) at ¶ 125 (footnote omitted, emphasis added). Then, the context was putting switched access traffic on a special access link. Now, the context is combining switched access and other traffic on an interconnection trunk. But the logic is exactly the same. ***Permitting*** "ratcheting" – here, permitting the combination of multiple traffic types on interconnection trunks – benefits CLECs and competition; banning it "artificially increase[s] the cost of interconnect[ion] without any accompanying benefits."

[30] At the hearing, Mr. Easton refused to agree that this kind of cost-benefit analysis was relevant, implying that it would not be right to allow Level 3 to send Feature Group D traffic on LIS trunks no matter how much it would cost Level 3 to make alternative arrangements, and no matter how cheaply Qwest could configure its LIS trunks to record the billing data Qwest claims it needs. Tr. 646:10-648:15 (Easton). It is impossible to square this absolutist position with the "just and reasonable" standard in the law that actually governs this issue.

In fact, Qwest's position is unjust and unreasonable. Any claim that Qwest needs FGD trunks to record and bill switched access and other traffic is simply wrong. The recording capabilities now present on FGD trunks could be activated for LIS trunks; Tr. 553:11-19 (Wilson); the question is simply how much that might cost. On that point, Qwest suggests that modifying Qwest's systems to be able to record the relevant information would entail a one-time, region-wide cost of $1 million to $2 million.[31] This translates to Washington-specific costs of perhaps $227,000 to $454,000, one-time.[32] But Level 3 showed that transferring its interconnections from LIS to FGD trunks would cost Level 3 much more than 10 times that amount. *See* Level 3 Confidential Response to Bench Request No. 5. So even if Qwest's cost estimate is correct, it cannot be "just" or "reasonable" to require Level 3 to spend millions of dollars so that Qwest can avoid a one-time cost of less than half a million dollars – perhaps much less.

While Qwest does not want to change its existing arrangements to accommodate Level 3, an ILEC must provide an interconnection arrangement:

> even if [it] ... requires a novel use of, ***or some modification to,*** incumbent LEC equipment. ... If [ILECs] were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated.

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31 *See, e.g.*, Tr. 658:4-8 (Easton) (region-wide figure of $1 million to $2 million).

32 Considering that Level 3 and Qwest interconnect in (among other states) Arizona, Colorado, Minnesota, New Mexico, Utah, and Oregon, in addition to Washington, clearly only a small fraction of the unsubstantiated $1 million to $2 million region-wide figure could properly be attributed to Washington. As a rough estimate, note that in the states just listed, there are about 13.48 million ILEC access lines, of which Washington accounts for only 3.06 million – roughly 22.7%. (Figures calculated from FCC, *Local Telephone Competition, Status as of December 31, 2005* at Table 7.) While these figures include independent telephone companies, there is no reason to think that the ***proportion*** of Qwest lines in Washington differs materially from the ***proportion*** of total ILEC lines here. So, even assuming that Qwest's cost figure is not inflated, this suggests that the Washington-specific costs of activating the relevant software capabilities for LIS trunks would be a one-time expense of perhaps $227,000 to $454,000 – again, assuming that Qwest's $1 million to $2 million figure is correct.

Local Competition Order at ¶ 202 (emphasis added). So, the fact that Level 3's proposal might require Qwest to modify its systems is irrelevant to whether it is just and reasonable. Again, what matters is the relative costs of Level 3's proposal as compared to Qwest's.

Note also that, if Qwest has not configured its interconnection trunks to accommodate billing for access traffic, that failure is a self-inflicted wound. Section 251(c)(2) contemplates that interconnection trunks will be used to exchange "exchange access" traffic. Moreover, the *Local Competition Order* holds that, while traditional IXCs may not obtain interconnection under Section 251(c)(2) "solely" to terminate traditional long distance traffic, they may obtain interconnection as long as their traffic ***includes*** traffic subject to Section 251(c)(2) interconnection.[33] The only rational conclusion is that access traffic and "Section 251(c)(2)" traffic may be combined on the same trunks.

For these reasons, Qwest's arguments in favor of requiring FGD trunks for combined traffic are wrong. Qwest's position is that its proposal would allow Qwest to continue to use its mechanized systems for recording and billing. But that capability would remain if Qwest were to activate the relevant software in its switches to record detailed data on LIS trunks. This also answers any claim that using LIS trunks would interfere with Qwest's ability to prepare records for wholesale customers, such as its QPP customers. All Qwest needs to do to solve this supposed problem is enable recording capabilities on LIS trunks – the software equivalent of flipping a switch.[34]

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[33] *Local Competition Order* at ¶ 191.

[34] When the shoe is on the other foot, Qwest vigorously defends its right to ***send*** commingled local and long distance traffic on a single trunk group, even when that does not permit the terminating carrier to identify different traffic types. As described in *Iowa Network*

The discussion above shows that Qwest cannot require Level 3 to use FGD trunks for combined traffic ***even if there were no alternatives*** to activating the recording capability of LIS trunks. In fact, Level 3 has proposed alternatives to further alleviate Qwest's perceived problems. First, Level 3 will not send transit traffic on LIS trunks.[35] This eliminates any concerns about providing accurate billing data to third parties. Second, if Qwest (a) refuses to activate recording capabilities on LIS trunks, but (b) still wants call detail records, Level 3 will provide such records in industry-standard format. Qwest could use those records to bill third party carriers as well as its "QPP" customers. Even if Qwest has to take some steps to ensure that its billing systems can use these Level 3-supplied records, that is no reason to reject this solution.

If Qwest (a) doesn't want to activate its own recording capabilities for LIS trunks and (b) doesn't want to make use of ***Level 3's*** recording capabilities, then Qwest's problems can still be solved using Level 3's proposal to identify billing factors, which would break the traffic down into that subject to interstate access rates, to intrastate

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Services v. Qwest, 385 F. Supp. 2d 850, 857 (S.D. Ia. 2005), "Qwest's network collects both wireline traffic and wireless traffic and directs this traffic to [terminating carriers]. The wireline and wireless traffic coming from Qwest include both interstate and intrastate telephone calls. Qwest 'commingles,' or mixes together, this wireline and wireless traffic before transmitting it to [terminating carriers]. Because of the commingling of calls by Qwest, the identity of the wireless or other carrier originating each call cannot be readily determined by [the terminating carriers'] equipment[, which made] it infeasible for [the terminating carriers] to directly bill the wireless carriers ... ." Qwest defended its practice against claims that this was in any way improper: "[D]uring the proceeding before the Board, [Qwest] ***vigorously disputed – and refuted*** – [the] allegations that Qwest's use of ***the same trunk group to deliver intraMTA traffic and long distance traffic is improper.*** In particular, Qwest contends the record before the Board shows the following: (1) use of the same trunk group to carry and deliver local and long distance traffic, a practice sometimes referred to as 'commingling,' is very common in the telecommunications industry; (2) many wireline ILECs in Iowa themselves commingle local and long distance traffic; and (3) the purpose of commingling is not to disguise long distance traffic, but to take advantage of efficiencies through use of a single trunk group, particularly when traffic volumes are not sufficient to justify separate trunk groups." *Id.,* 385 F. Supp. 2d at 893 n.61

[35] Level 3 makes this clear in its proposed language for Section 7.2.2.3.5. This is cited as Issue No. 29 in the issues matrix; its proposed language appears on page 68 of Exhibit 4.

access rates, to the FCC's $0.0007/minute rate, etc.[36] Qwest claims that using factors would interfere with its ability to provide billing data to its QPP customers, *see* Tr. 661:23-664:17, but even if this is true, it is irrelevant.

First, Qwest itself has used factors to bill other carriers. *See, e.g.,* Tr. 570:9-15 (Wilson). Second, Qwest's QPP customers cannot fairly expect to receive data that Qwest itself does not have, so they, too could use the Level 3-provided factors to bill Level 3 or third parties. Or, if detailed call records are so important to QPP customers, they can easily afford to have Qwest generate them. Mr. Easton testified that Qwest has at least 500,000 QPP lines in service, region-wide. Tr. 665:10-15 (Easton). As noted above, even Qwest estimates the region-wide cost of configuring LIS trunks to record all necessary call details to be no more than a one-time cost of $2 million. So, for a one-time charge of $4.00 (or less) per QPP line, the QPP customers – who, it seems, are the ones really "causing" the need for recording on LIS trunks – could cover Qwest's cost of activating that capability.

So, it is clear that Qwest has a least three ways to deal with the fact that LIS trunks are not, today, configured to record call details. First, enabling that capability is not at all burdensome – particularly when compared to the cost to Level 3 of shifting an entire interconnection network over to FGD. Second, Level 3 can provide the industry-standard records to Qwest if it wants them, either for its own purposes or to aid in billing third parties (such as QPP customers). Third, Level 3 and Qwest can develop usage factors to allocate the total minutes sent to Qwest on the LIS trunks into different billing

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[36] Level 3's proposals regarding the establishment of billing factors are included in Section 7.3.9 and associated subsections of the agreement. *See* Exhibit 4 at 86-87; *see also id.* at Section 7.2.2.9.3.1 (Issue No. 2B, Exhibit 4 at pages 76-77).

categories. Given this array of choices, it is not surprising that ***every other major ILEC has agreed to permit Level 3 to combine all traffic on interconnection trunks.*** That fact should speak volumes to the Commission about the lack of substance behind Qwest's objections to the use of factors.

For all of these reasons, the Commission should reject Qwest's attempt to bar Level 3 from combining all traffic types on LIS trunks. This is the least-cost way to obtain the benefits of efficient, combined trunk groups while avoiding the enormous and unjustified costs Level 3 would incur if it were forced to establish a new FGD network to carry the combined traffic.

IV. INTERCARRIER COMPENSATION FOR VOIP TRAFFIC SHOULD PARALLEL COMPENSATION FOR ISP-BOUND TRAFFIC.

The parties disagree about how to define VoIP traffic and how it should be handled for purposes of intercarrier compensation. Qwest proposes to make two physical locations crucially relevant – the VoIP end user premises and something it calls the "VoIP Provider Point of Presence."[37] Level 3, by contrast, seeks to integrate the definition of, and intercarrier compensation for, VoIP traffic with intercarrier compensation for Internet traffic. Level 3 accomplishes this by proposing that, like ISP-bound VNXX traffic, the FCC's $0.0007 rate should apply as long as the traffic exchange occurs in the same LATA as the party on the PSTN is located. *See* Exhibit 4 at page 30 (Issue 3B). This will have the effect of causing VoIP traffic to be subject to the FCC's

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[37] *See* Exhibit 4 at 79, Issue No. 16. Although Qwest declares that this location "is an end user premises for purposes of determining end points for a specific call," at no point in the proposed agreement does Qwest actually explain what functions or equipment would, theoretically, need to exist at such a premises in order for it to actually be deemed a "VoIP Provider Point of Presence." This is a hopelessly vague concept, and if it is embodied in the parties' agreement, it will lead to countless disputes. *See also* Exhibit 4 at 30, Issue No. 16 (competing definitions of "VoIP").

$0.0007/minute rate in essentially all cases.[38]

The regulatory situation surrounding VoIP traffic is not identical to that surrounding Internet traffic, but they are in many respects parallel. First and foremost, just as the nature of communications with the Internet makes it impossible to assign an unambiguous "end point" to Internet traffic, so too is it generally very difficult, if not impossible, to know where any particular VoIP user might be.[39] There is no justification for Qwest's assumption that a VoIP provider will have a clear "POP," or for its proposal to give that "POP" significance in setting intercarrier compensation rates. *See* Exhibit 4 at 79, Sections 7.2.2.12, 7.2.2.12.1 (Issue No. 16).

Qwest misunderstands the so-called ESP Exemption, on which it relies for this argument. That exemption says that information service providers may, if they so choose, purchase connections to the PSTN out of intrastate end user business tariffs, even though they are using interstate information access service. *See, e.g., ISP Remand Order* at ¶¶ 11, 55. It does not say that all ESPs must connect to the PSTN by means of such a

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[38] In this regard, Level 3's proposed definition of "Interconnection" (Issue No. 10, Exhibit 4 at 17) would include "VoIP traffic" within the scope of traffic covered by interconnection arrangements established under the agreement. In addition, Level 3 proposes (in Issue No. 25, Exhibit 4 at pages 24-25)) to clearly define "PSTN-IP-PSTN" traffic – that is, so-called "IP in the middle" traffic – that the FCC has ruled is to be treated like plain old telecommunications traffic. We do not understand why Qwest would object to having this clear definition in the agreement.

[39] *See, e.g., Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 6429 (2004) at ¶ 9 ("in marked contrast to traditional circuit-switched telephony, a call to a [VoIP] number can reach that customer anywhere in the world and does not require the user to remain at a single location"); *id.* at ¶ 24 (VoIP "harnesses the power of the Internet to enable ... users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet's inherently global and open architecture obviates the need for any correlation between [VoIP service and [the] end users' geographic locations"); *id.* at ¶ 25 ("The geographic location of the 'termination' of the [VoIP] communication is ... difficult or impossible to pinpoint [because of] the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously").

tariff. Nor does it say that any particular intercarrier compensation obligations result from any particular ESP's decision whether or not to do so.

In this regard, if the ESP exemption meant what Qwest seems to think – that is, that when the question is intercarrier compensation, the answer is to pretend that the ESP is simply an end user with a physical location at its "POP" – there would never have been any controversy about ISP-bound calls. The FCC would have simply declared all such calls to be "local" or not based on the location of the ISP. If the FCC had believed that to be the right answer, there would have been no reason to establish a separate, special compensation regime for ISP-bound calls. Instead, the FCC created a new regime precisely because the location of the ISP is irrelevant. *See ISP Remand Order* at ¶ 59. This history of how the FCC actually applied the ESP Exemption to ISPs totally eviscerates Qwest's argument about how the ESP Exemption works, and in particular how it should be applied to VoIP providers.[40]

Moreover, as a practical matter, Qwest's proposals regarding VoIP traffic will be impossible to implement. VoIP providers use multiple Internet functionalities, distributed in multiple locations, to provide their services. The equipment providing those functionalities may or may not be anywhere near the point at which VoIP traffic is

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[40] If Qwest wants to be faithful to the ESP Exemption, the appropriate analysis is exemplified by the federal district court's recent ruling in *SBC v. Missouri Public Service Commission, infra,*, 2006 U.S. Dist. LEXIS 65536 at [*49] – [*81]. The court found that because VoIP was an information service (due to net protocol conversion), VoIP providers were deemed end users not subject to access charges. It then found that because (a) reciprocal compensation under Section 251(b)(5) applies to all "telecommunications" and (b) CLECs serving VoIP providers supply "telecommunications services" (to get VoIP traffic between the VoIP provider and the ILEC), reciprocal compensation obligations – not access charges – apply to VoIP. This analysis of the ESP Exemption implements its key purpose – protecting information service providers from directly or indirectly being subject to access charges – without engaging in any fetish about determining precisely where this or that communications function takes place. The Missouri court's analysis would, of course, support the result that Level 3 seeks here.

exchanged with the PSTN. In other words, to the extent that VoIP providers have identifiable "POPs" at all, those locations do not necessarily have any particular technical significance. Qwest's proposals, in short, are unworkable.

It is true that this will result in the overwhelming majority of VoIP traffic being subject to the FCC's $0.0007 rate rather than any form of originating or terminating access charges. This is completely appropriate, however, because there is no reason that this traffic should be subject to such charges. As a purely economic matter, calls to or from VoIP users will not entail the collection of toll charges. Thus, there will not be a source of revenues from which payment of access charges could reasonably be funded.[41]

For all these reasons, it makes sense to simply integrate intercarrier compensation for VoIP traffic into the same, uniform $0.0007/minute regime applicable to ISP-bound traffic. Perhaps some day the FCC will either affirm this approach or establish a new one; but until it does, this is a simple and fair way to handle this traffic.

V. ISSUE-BY-ISSUE REVIEW.

The discussion above explains why Level 3 should prevail on what appear to be the major disputed issues in this arbitration. The discussion in this section presents the

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[41] Both legally and economically, access charges are linked to toll charges. Legally, the definition of "exchange access" in 47 U.S.C. § 153(16) requires that it be provided in connection with "telephone toll service," which entails a separate toll charge, under 47 U.S.C. § 153(48). Moreover, when the FCC created access charges in 1983, it relied on its authority under 47 U.S.C. § 201 to divide charges on "through routes" in which more than one carrier was involved in completing an end-to-end call. *See MTS and WATS Market Structure, Third Report and Order,* 93 F.C.C.2d 241 (1983) at ¶¶ 1-8 (summary of access charge plan); ¶ 11 (describing AT&T's "Division of Revenues" process). Similarly, as an economic (and historical) matter, the purpose of access charges was to replace the prior, informal system in which the Bell System shared toll revenues with the local companies involved in originating and terminating toll traffic. *Id.* Where there was (or is) no toll revenue to share, there is no economic reason to think that access charges should apply. So, if there are no toll charges to share in connection with a particular type of traffic, it makes neither legal, nor economic, nor historical sense to impose access charges on that traffic.

specific rationales supporting the specific Level 3 language proposed for the remaining identified "issues" in this arbitration.

A. The Commission Should Accept Level 3's Proposed Language Relating To Establishing Mid-Span Meet POIs (Issue No. 28, Sections 7.1.2.3 & 7.1.2.3.1; Issue No. 23, Section 4).

The dispute on this issue relates to the degree to which the parties' contract should clearly specify the standard that governs when a mid-span meet point POI may be established. Both parties agree that the details of a mid-span meet must be negotiated. Level 3's proposed language, however, makes clear that (a) the key relevant criterion is technical feasibility (that is, the interconnection must comply with Section 251(c)(2)) and (b) that the use of new methods of interconnection whose feasibility has not previously been determined will be governed by 47 C.F.R. § 51.305, the FCC rule governing such situations. Finally, Level 3's language makes clear that all types of traffic for which interconnection is permitted or required under the Act and the FCC's rules may be transmitted over a meet point POI. *See* Exhibit 4 at 63-64.[42]

Qwest's proposed language is both vaguer and more restrictive than Level 3's. Specifically, Qwest would have the details of a mid-span meet simply "subject to negotiations," with no proposed standard to govern those negotiations. In addition, Qwest would limit the types of traffic that may be transmitted over a mid-span meet to a

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[42] The parties also have a subsidiary dispute about the ***definition*** of a "mid-span meet." *See* Exhibit 4 at page 20, Issue Nos. 23 & 24. Qwest's definition states that in a mid-span meet, each party provides "its own" equipment up to the meet point. At first blush, this is fair enough, but the problem is that Qwest could argue that this language requires Level 3 to actually construct its "own" facilities to the meet point, as compared to leasing the facilities from some third party or from Qwest. So, Level 3's definition simply states that each carrier "provides cable and equipment," dropping the words, "its own." Level 3 believes that its proposal properly reflects the meaning of a mid-span meet without giving Qwest the opportunity to impede interconnection by arguing against Level 3's right to "provide" its facilities by relying on third parties. In this regard, Level 3's proposed language in Issue No. 23 would clearly define "Meet Point Interconnection Arrangement" in a way that would eliminate any ambiguity regarding this issue.

narrower class of traffic than that to which the Sections 251(c)(2) and 251(a) interconnection obligations apply. This language, if adopted, will simultaneously tend to create disputes between the parties regarding the establishment of mid-span meets and regarding whether particular traffic may permissibly be transmitted over these facilities. For this reason, Qwest's proposed language creates opportunities for Qwest to degrade the efficiency of its interconnection with Level 3. There is no reason for the Commission to allow Qwest to create these types of difficulties, and Qwest's language on this point should be rejected.

B. OC Level Interconnection Should Be Subject To Automatic Negotiation (Issue 1B) (Section 7.1.2)

Section 7.1.2 requires negotiation of the details of interconnection. Level 3 wants it to specify that OC-3 or higher-speed circuits can be negotiated. Qwest's language would require optical interconnections to be established using a cumbersome "bona fide request" process. Qwest's language should be rejected.

Level 3 is entitled to interconnect using any technically feasible method. *See* 47 U.S.C. § 251(c)(2). Qwest operates a nationwide fiber optic network.[43] So, optical interconnection is clearly feasible. In this regard, under 47 C.F.R. § 51.321(d), the ILEC "***must prove to the state commission*** that the requested method of ... interconnection ... is not technically feasible." Qwest has made no such showing on this record. Also, Level 3's proposed language says it will ***negotiate*** OC-level interconnection. If Qwest has a technical issue in a particular location, that can be addressed in negotiations. For these reasons, the Commission should adopt Level 3's language on this point.

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[43] "Qwest's ***advanced broadband fiber optic network,*** diverse product suite, market-based rates, user-friendly online tools, and simplified back-office processes provide you with everything you need." (Emphasis added.) *Available on the Internet at* http://www.qwest.com/wholesale/industrysolution/nationalresellers.html.

C. Level 3's Proposed Modifications to Section 7.2.2.1.2.2 Properly Reflect Level 3's Right To Purchase Transport for Interconnection at TELRIC Rates (Issue 1D).

Section 7.2.2.1.2.2 deals with transport functionality for LIS trunks.[44] It says Level 3 may buy LIS trunk transport from Qwest at cost-based rates under the Section 252(d)(2) standard, *i.e.,* TELRIC.[45] In other states Qwest has objected to this language on the grounds that it would somehow permit Level 3 to purchase the transport unbundled network element ("UNE") at low rates in circumstances beyond those permitted by the FCC.

Any such claim is wrong. This contract provision relates to interconnection, not "unbundled transport" or any other UNE. Specifically, this section relates to the transport functionality needed for LIS trunks, which are used to exchange traffic under Sections 251(c)(2), 251(b)(5), and 251(a)(1). It has no application to UNEs.[46] As a result, Level 3's language for Section 7.2.2.1.2.2 complies with Section 251, while Qwest's does not.

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[44] The undisputed language states: "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. 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)."

[45] *Local Competition Order, supra* at ¶ 672 (applying TELRIC to interconnection).

[46] Indeed, the FCC took care to make clear that its ruling limiting the availability of UNE transport did not interfere with the availability of TELRIC-rated "transport" in the context of interconnection (Section 251(c)(2)) as opposed to UNEs. *Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, etc.,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 365-66, 548 (2003) ("[t]o the extent that [CLECs] need facilities ... to 'interconnect[] with the [ILEC's] network,' section 251(c)(2) ... expressly provides for this and we do not alter the Commission's interpretation of this obligation."). *See also SBC v. Missouri PSC,* 2006 US Dist. LEXIS 65536 (E.D. Mo. 2006) at [*42] – [*49] (discussing *TRRO* and affirming that CLECs may obtain ***interconnection*** (but not access to UNEs) at TELRIC rates).

D. The Commission Should Accept Level 3's Proposed Language Relating To Quad Links (Issue No. 30; Sections 7.2.2.6.1.1, 7.2.2.6.1.2 And 7.2.6.1.3).

In other states Qwest has failed to understand the purpose of Level 3's language regarding "quad links." Level 3's proposed language addresses the terms on which the parties will exchange signaling information with respect to traffic they exchange – an issue under Section 251(c)(2).[47] Previously, Qwest has objected to Level 3's language on the grounds that Qwest is not obliged to provide SS7 signaling as a UNE. But that is not the issue. If Level 3 provides its own SS7 signaling, the parties have to agree on how to connect their ***signaling*** networks, just as they need to agree on how to connect their TDM trunks to exchange calls between their customers. Level 3's language makes clear that they will agree on a "meet point" for their signaling networks to correspond with the POIs for TDM traffic. This is a reasonable concern, and Level 3's language is a reasonable way to address it.

E. The Commission Should Accept Level 3's Proposed Definition Of "UNE" (Issue No. 27; Section 4).

The disagreement on this issue is simple: Level 3's proposed language properly recognizes that the Washington Commission may lawfully identify network elements that must be unbundled, beyond the minimum list of elements that the FCC has identified. Qwest opposes this language because it maintains, wrongly, that the Washington Commission may not identify any UNEs on its own. *See* Exhibit 4 at page 29.

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[47] The agreed-to language refers to SS7 signaling in connection with LIS trunks – that is, trunks used for interconnection; the entire issue relates to what Level 3 and Qwest have to do to exchange signaling information associated with the traffic they exchange. To the extent that the language mentions purchasing SS7 signaling from Qwest, it recognizes that that would be a tariffed function, not a UNE.

The two statutes governing this issue are 47 U.S.C. § 251(d)(3) and 47 U.S.C. § 261(c). Section 251(d)(3) states that the FCC may not preclude states from "establish[ing] access and interconnection obligations of local exchange carriers [that are] consistent with the requirements of this section; and [that do] not substantially prevent implementation of the requirements of this section and the purposes of this part." In this regard, the reference to "access" refers back to Section 251(c)(3), which refers to the provision of "access" to UNEs, and to Section 251(d)(2), immediately preceding Section 251(d)(3), which refers repeatedly to "access" to UNEs. So, Section 251(d)(3) plainly contemplates that state commissions, such as this Commission, have the authority to impose additional requirements regarding UNEs – including the requirement to provide access to UNEs beyond those defined by the FCC – as long as the specific state requirement is consistent with the Act.

This conclusion is only confirmed by Section 261(c) of the Act. That provision states:

> (c) ADDITIONAL STATE REQUIREMENTS.--Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Again, as long as the particular obligation imposed by the state commission is not inconsistent with the Act and the FCC's regulations, a state commission, such as the Washington Commission, may impose it – including an obligation to provide access to a UNE access to which is not required (but not forbidden) by the FCC.

Obviously, if the FCC has stated that it is unlawful for a state commission to require that a particular network element be unbundled as a UNE (subject to TELRIC

pricing, etc.), then it would be inconsistent with federal law for the Washington Commission to do so. In that event, Sections 251(d)(3) and/or 261(c) would not save the "potential" UNE. But even though there might be some particular potential UNEs to which the Washington Commission may not require access, based on some particular FCC ruling, that does not mean that there are ***no*** UNEs (beyond those specified by the FCC) to which the Washington Commission may require access. To the contrary, both Sections 251(d)(3) and 261(c) expressly preserve the right of state commissions such as the Washington Commission to impose obligations on ILECs beyond those identified by the FCC – again, subject to the requirement that in any particular case, the state-specific requirement must not be inconsistent with federal law.

Qwest's opposition to this language is based on a misreading of federal law. Qwest seems to believe that because the FCC has ruled, in some specific cases, that states may not require access to certain potential UNEs, that somehow Sections 251(d)(3) and 261(c) have been written out of the Communications Act, and that, therefore, a state may not ***ever*** require access to UNEs beyond the specific requirements in federal law. Level 3 cannot see any sound legal basis for Qwest's view. We will address this question in our reply brief, based on what reasoning, if any, Qwest puts forward in favor of its own position on this issue.

F. The Commission Should Accept Level 3's Proposed Language Relating To Ordering UNEs (Issue Nos. 31 & 32; Sections 9.1.1.4 & 9.1.1.4.1).

The parties have a slight but significant difference in the language they propose to govern Level 3's ordering of UNEs.[48] Both parties recognize that the FCC has

[48] *See* Exhibit 4 at pages 153-54.

established standards for "non-impairment" that make certain UNEs – notably high-capacity loops and transport – available in some wire centers but not in others. They disagree, however, about what to do when the parties disagree about whether those non-impairment standards have been met. Level 3 proposes that if it orders a UNE in good faith based on its own review of the applicable non-impairment criteria, then Qwest must provide the UNE without delay – recognizing its right after the fact to challenge whether the non-impairment criteria are met. Qwest seeks the right to stand athwart Level 3's network expansion plans yelling "Stop!" any time it unilaterally chooses to assert that the non-impairment criteria are met.

The difficulties with Qwest's position are obvious – Qwest wants language that allows it to interfere with Level 3's ability to offer and expand service on a reasonable schedule. This will allow Qwest to hinder Level 3 in the marketplace – particularly in competition for the business of large business and government customers whom Level 3 might need to reach using the high-capacity transport and loop UNEs at issue here. Level 3's language, by contrast, would completely preserve Qwest's right to object to the provision of facilities at UNE rates where that is not required by applicable law, but does not permit Qwest to interfere with Level 3's ability to provide service while any disputes about that point are worked out.

Qwest's language creates a situation known as "moral hazard," in which Qwest will have strong competitive reasons to trump up objections to Level 3's UNE requests precisely in order to hinder and delay Level 3's ability to compete in the marketplace.[49] The far better solution is to clearly oblige Qwest to install the UNEs that Level 3 requests

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[49] *See* http://en.wikipedia.org/wiki/Moral_hazard for a discussion of the concept of "moral hazard."

(after fulfilling its own contractual obligation to certify in good faith that it is entitled to the UNEs in question).

Broadly speaking this is analogous to a situation involving a request for an injunction. If Qwest installs a UNE and it later turns out that it was not obliged to do so, the primary effect is that the price that Level 3 must pay for the UNE will change (normally, increase). On the other hand, if Qwest drags its feet in installing a UNE that, it later turns out, should have been installed, the marketplace opportunity that Level 3 was trying to meet – that is, Level 3's ability to win an account and serve a customer using the UNE – will in all likelihood have been lost. The fact that at some point in the future Qwest says, "sorry!" and agrees to install the UNE will be irrelevant to the needs of customers in the marketplace.

For these reasons, the Commission should adopt Level 3's position on these issues. Otherwise, Qwest's proposed language will generate an irresistible urge for Qwest to interfere with Level 3's ability to compete.

G. Use of Statutory Definitions.

In several instances, Level 3 seeks to incorporate into the parties' contract the definitions of certain terms as those definitions appear in the federal Communications Act.[50] From Level 3's perspective this makes complete sense. After all, the parties' basic rights and obligations at issue in this arbitration arise from the Communications Act, and, indeed, in several cases the specific provisions of the Communications Act

[50] The issues embraced by this discussion are Issue No. 7 (Exhibit 4, page 9) relating to the use of the term "Basic Exchange Telecommunications Service," which is not defined in the Act at all, versus the use of "Telephone Exchange Service," which is; Issue No. 14 (exhibit 4, page 16) relating to the use of the term "Exchange Service" and/or "Extended Area Service (EAS)/Local Traffic," which is not defined in the Act, versus, again, the use of "Telephone Exchange Service," which is; and Issue No. 15 (Exhibit 4, page 28), relating to the definition of "Telephone Toll Service."

underlying this arbitration – notably, Section 251(c)(2) – use terms, such as "telephone exchange service" and "exchange access" that are specifically defined elsewhere in the Act.

In these circumstances, incorporating the statutory definitions into the parties' contract would accomplish several purposes. First, it would eliminate disputes about whether, by using non-statutory terms and definitions, the parties somehow intended to expand or contract the scope of rights and obligations created by the statute. Second, because the terms in the contract would match those in the statute, in the event disputes do develop, there is a better chance that the FCC, another state, or a federal court will be interpreted or explained the meaning of the terms. This is much less likely if the contract contains idiosyncratic language. Third, Level 3 is concerned that, in fact, Qwest is seeking to limit its own obligations to Level 3 to less than those accorded by statute. Incorporating the specific statutory definitions into the contract may not bring total clarity at the outset to the precise metes and bounds of Level 3's statutory rights, but it will at least make clear that – whatever the precise scope of those rights – Level 3 has not sacrificed them.

Also, in this same connection, Level 3 proposes to include a specific definition of the near-ubiquitous term "traffic," which – despite its constant appearance in the proposed agreement and discussions of the issues, is not defined, as far as Level 3 can tell, either in the federal Communications Act, the FCC's rules, or any relevant FCC ruling. *See* Exhibit 4 at 28 (Issue No. 26). Level 3 proposes to tie this highly general term to the two most relevant definitions that do exist in the Communications Act, specifically, the terms "telecommunications" and "information services." This definition

would make clear that there are no artificial limitations on the "types" of "traffic" that may be exchanged between the parties. This is consistent with the FCC's rulings, discussed above, that make clear that an interconnection established under Section 251(c)(2) may be used to exchange essentially any kind of traffic whatsoever, as long as it is also used to exchange either telephone exchange service or exchange access traffic.[51]

For all these reasons, the Commission should adopt Level 3's proposed definitions, and reject Qwest's.

H. Scrivener's Errors Regarding Qwest's SGAT.

In a few places, Qwest's proposed contract makes reference to "this SGAT" instead of "this Agreement."[52] Level 3 believes that these are simply "scrivener's errors" arising from the fact that Qwest probably based its template agreement on its SGAT. Nonetheless, in order to avoid any confusion or ambiguity regarding whether the agreement, versus some SGAT language, might be applicable, the final agreement should remove references to "this SGAT" and replace them with "this Agreement."

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51 *See* discussion in Section III.B, *supra.*

52 *See* Exhibit 4, Section 1.7.1 (page 2); *id.,* Section 9.23.3.12 (page 218); *id.,* Section 17.15 (page 310).

VI. CONCLUSION.

For the reasons stated above, the Commission should rule for Level 3 on the disputed issues in this proceeding.

Respectfully submitted

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