[Service date: January 22, 2007]

BEFORE THE
WASHINGTON 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 No. UT-063006 **LEVEL 3 COMMUNICATIONS, LLC'S REPLY BRIEF**

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"It's not what you don't know that makes you look like a fool. It's what you ***do*** know that ain't so."--Appalachian Mountain proverb.

LEVEL 3'S REPLY BRIEF

I. INTRODUCTION AND SUMMARY.

The single strangest thing about Qwest's brief is how it handles *Verizon California, Inc. v. Peevey,* 462 F.3d 1142 (9th Cir. 2006). *Peevey* destroys Qwest's opposition to compensation for VNXX calls; it destroys Qwest's key objection to combining traffic on LIS trunks; and it destroys Qwest's claim that geography controls intercarrier compensation. Qwest should be discreetly ignoring *Peevey,* or struggling to distinguish it. Instead – perhaps on the theory that, when handed lemons, one should try to make lemonade – Qwest brandishes *Peevey* like a sword, suggesting that it undercuts this Commission's decisions affirming that the *ISP Remand Order* covers VNXX traffic.[1] *See* Qwest Corporation's Opening Brief ("*Qwest Brief*") at 7-8, 14-16. Qwest is wrong.

In *Peevey*, the California Public Utilities Commission ("CPUC") ordered Verizon to pay for VNXX calls to ISPs. The 9th Circuit affirmed, relying on the CPUC's finding that "whether a call is local" is "based on the NPA-NXXs of the calling and called parties, not the routing of the call." 462 F.3d at 1155-56. This approach is "consistent with ... industry-wide practice" and recognizes "essential differences between the ...network architectures" of ILECs and CLECs. *Id.* As to combining traffic, the court

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[1] *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*"); *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 6, Order Denying Petition for Reconsideration (June 9, 2006) ("*Core Reconsideration Order*"). The Commission found that the compensation regime in *Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (subsequent history omitted) ("*ISP Remand Order*") is best read to include VNXX calls.

affirmed the CPUC's ruling that "traffic studies are common in the industry" to sort out traffic subject to different rates. 462 F. 3d at 1159.

So, after *Peevey,* we know that the 9th Circuit will affirm a Commission ruling calling for compensation for VNXX ISP-bound traffic; we know that it will affirm a ruling that does not slavishly classify traffic on the basis of geography; and we know that it accepts traffic studies as "common," and so would affirm a ruling requiring Qwest and Level 3 to use them to sort out traffic on LIS trunks.

What's left of Qwest's case?

LIS Trunks. While not as strange as its treatment of *Peevey,* Qwest's handling of the use of LIS trunks for long distance traffic is still fairly odd. *See Qwest Brief* at 10-12. A key fact established at the hearing was that under Qwest's proposed language, Level 3 is ***already allowed*** to combine most long distance traffic with other traffic on LIS trunks. This is because Level 3 would be providing the tandem switching portion of jointly provided switched access. Qwest's brief totally ignores this fact. And, as noted above, Qwest also ignores *Peevey*'s confirmation that "traffic studies are common in the industry," undercutting Qwest's objection to using them if need be.

VNXX. On the VNXX front – aside from its inside-out interpretation of *Peevey* – Qwest argues that Washington law uses location to classify traffic types. This is true, but the traffic at issue – ISP and VoIP traffic – is interstate in nature and not subject to state-law limitations. Qwest also argues that number assignment guidelines forbid VNXX in the first place. This isn't true; but in any case, the fact that the CPUC approved the use of VNXX (*see Peevey*) shows that any purported restrictions in the guidelines do not bind state regulators, so this Commission is free to approve VNXX. Finally, Qwest claims

that "sound economics" and "cost causation" counsel against compensation for VNXX calls, but its argument boils down to the claim that VNXX calls are "really" long distance and so should be rated like long distance. This is sophistry, not economics.

VoIP Traffic. On the issue of VoIP, Qwest views the "ESP Exemption" through the warped lens of its own obsession with geography. The result is a claim that the ESP Exemption requires assigning a VoIP provider a location and treating that location as the end point of a VoIP call for compensation purposes. In fact, the FCC has ruled that the ESP Exemption does not affect intercarrier compensation.

Mirroring Rule. The FCC's mirroring rule is simple. It identifies two classes of traffic – "ISP-bound traffic" and "all section 251(b)(5) traffic" – and requires an ILEC to offer to exchange both at the FCC's $0.0007 rate. If the ILEC does not make that offer, the TELRIC rate applies to both. Qwest's brief makes clear that it has ***not*** made the offer required by the mirroring rule, so the only result consistent with federal law is that Qwest must pay the TELRIC rate for all ISP-bound traffic it sends to Level 3.

Other Issues. The remainder of this brief is organized to generally parallel the presentation of issues in Qwest's opening brief. This does not result in the most logical flow of the discussion, but hopefully it will make it easier for the Commission to see Level 3's specific responses to Qwest's specific arguments. The exception is that we have placed most disputes over definitions into an Appendix.[2]

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[2] Also, with respect to several issues, Level 3, after reviewing Qwest's presentation, rests on its own opening brief. (A) With respect to Issue 1D (§ 7.2.2.1.2.2), Level 3's proposed language properly reflects its right to purchase transport for interconnection at TELRIC rates. Qwest objects to Level 3's language on the grounds that Qwest is not always required to provide ***UNE*** transport at those rates. *Qwest Brief* at 6. Level 3 explained that the same FCC order that relieved Qwest of some of its UNE transport obligations made clear that ***interconnection*** transport obligations remained in place. *Level 3 Brief* at 27. (B) At pages 49-50 of its brief, (note continued)...

II. RESPONSES TO QWEST'S ARGUMENTS.

A. The Commission Should Reject Qwest's Language On The Scope of Interconnection and Responsibility for Interconnection Costs (Issue No. 1).

1. Qwest's Language Would Unreasonably Restrict Interconnection (Issue Nos. 1A and 1B).

Qwest has two main objections to Level 3's proposals for Sections 7.1.1, 7.1.1.1, 7.1.1.3, and 7.1.2. First, Level 3 would allow interconnection for types of traffic that Qwest wants to exclude. Second, Qwest says Level 3 could demand a single point of interconnection ("POI") at a technically infeasible location. *Qwest Brief* at 4-5. These claims are groundless.

Qwest says that the under the *Local Competition Order*[3] interconnection is "intended ***solely*** to allow a CLEC to provide 'telephone exchange service' or 'exchange access.'" *Qwest Brief* at 4 (emphasis added). But Section 251(c)(2) interconnection is not limited to those two traffic types. To the contrary, as long as the interconnection carries either of those traffic types, it can and should be used for ***all*** types of traffic. *See Level 3 Brief* at 10-12, 14-15 & n.28, *citing Local Competition Order* at ¶¶ 184, 191, 995.

...(note continued)
Qwest addresses Level 3's proposal regarding Quad Links used for interconnection of signaling networks. (Issue No. 30; §§ 7.2.2.6.1.1, 7.2.2.6.1.2 & 7.2.6.1.3). Qwest does not understand that Level 3's proposal regarding Quad links relates to interconnecting signaling networks, not SS7 signaling as a UNE. *See Qwest Brief* at 49-50. Level 3 rests on its opening brief with respect to this issue. *Level 3 Brief* at 28. (C) The Commission should accept Level 3's proposed language allowing it to ordering UNEs and have them installed promptly, with any disputes about possible "non-impairment" sorted out after the fact. (Issue Nos. 31 & 32; §§ 9.1.1.4 & 9.1.1.4.1). *Level 3 Brief* at 30-32. (D) Finally, Qwest objects to Level 3's efforts to include language defining both "Meet Point Interconnection Arrangement" and "Mid-Span Meet"). *Qwest Brief* at 45-46. As Level 3 explained, Qwest's language is ambiguous and could lead to claims that Level 3 is financially responsible for facilities on Qwest's side of a meet point. *See Level 3 Brief* at 25 n.42.

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

Moreover, Qwest isn't obliged to provide interconnection only under Section 251(c)(2); it is also obliged to provide interconnection under Section 251(a)(1) – which extends to all "telecommunications."[4] So, both the *Local Competition Order* and the statute show that interconnection cannot be limited to a few traffic types.

Qwest also says that Level 3's proposals would permit Level 3 to demand a single point of interconnection ("SPOI") at a location where interconnection is not technically feasible. *Qwest Brief* at 4. However, the contract language makes clear that, to the extent that Level 3 requires a SPOI, it must be at a technically feasible location. Exhibit 4 at 62 ("The SPOI may be established at any mutually agreeable location within the LATA or, at Level 3's sole option, at any ***technically feasible point*** on Qwest's network") (Level 3's proposed Section 7.1.1.1, emphasis added). *See also id.* at 27 (defining "technically feasible"). Qwest's concern is therefore groundless.

Finally, Qwest objects to Level 3's language that would affirm that Qwest, not Level 3, is responsible for the costs of establishing facilities on Qwest's side of the POI. *Qwest Brief* at 5. That, however, is exactly what is required at a meet point POI. *See Local Competition Order* at ¶553 ("In a meet point arrangement, each party pays its portion of the costs to build out the facilities to the meet point"); 47 C.F.R. § 51.5 (defining "interconnection" and "meet point").[5]

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[4] Section 251(a) provides that "each telecommunications carrier has the duty – (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Unlike Section 251(c)(2) there is no limitation on the types of telecommunications traffic to which this duty extends.

[5] In order to avoid any confusion, it bears emphasis that a "meet point interconnection arrangement" – defined in the FCC's interconnection rules cited above – refers to something totally different from a "meet point billing" arrangement. "Meet point billing" refers to an FCC-mandated system for billing a toll carrier when two LECs jointly provide the exchange access that the toll carrier needs to reach an end user. *See, e.g., Waiver of Access Billing Requirements and*

(note continued)...

2. The Commission Should Accept Level 3's Language Relating To Mid-Span Meet POIs (Issue Nos. 1B & 28).

Qwest claims that Level 3 cannot pursue its dispute regarding Section 7.1.2.3 – regarding the terms and conditions applicable to mid-span meets – because the dispute was not listed in the arbitration petition. *Qwest Brief* at 5-6. However, this dispute ***was*** included in the definitive "Exhibit 4" laying out the parties' opposing positions and distributed by Judge Rendahl following the close of the hearing. *See* Exhibit 4 at 63-64. Qwest cannot now object to considering the issue.[6]

On the merits, Qwest's only objection seems to be that Level 3 deleted language that affirmatively banned using a mid-span meet to get access to unbundled elements. *Qwest Brief* at 6. The deleted language is redundant. Both Qwest and Level 3 state that "a Mid-Span Meet POI is a negotiated Point of Interface, ***limited to*** the Interconnection of facilities between one (1) Party's ***Switch*** and the other Party's ***Switch***" (emphasis added). Facilities connecting two switches will necessarily be used to exchange traffic, not to access UNEs such as loops.

...(note continued)
Investigation of Permanent Modifications, Memorandum Opinion and Order, 2 FCC Rcd 4518 (1987) at ¶ 2. Meet point billing – also known as "jointly provided switched access" – arises, for example, when a CLEC's end user receives a toll call that is handled by a toll carrier without a direct connection to the CLEC. In that case the toll carrier hands the call off to the ILEC's tandem, which routes the call to the CLEC. In ***this*** arbitration, the record shows that Level 3, not Qwest, will provide tandem functionality to toll carriers. *See Level 3 Brief* at 13-14 & n.23; *see also* Exhibit 33. But, whichever LEC provides which functions, in a meet point billing situation, each LEC will bill the toll carrier for the portion of the exchange access service it provides. They each will also bill the toll carrier something based on the cost of "transporting" the call between the tandem and the end office. How much transport each one bills to the toll carrier will depend on where the LECs' networks "meet" – hence the name, "meet point billing," for this access arrangement

[6] At the start of the hearing there was debate about what issues were, and were not, included in the arbitration. *See* Tr. 299-303. The point of developing a definitive "Exhibit 4" was precisely to establish which issues were "in play" and which were not.

In fact, Qwest's brief doesn't even address the real crux of Level 3's proposals, which clarify that (a) the key criterion for a mid-span meet point is technical feasibility and (b) the use of new methods of interconnection whose feasibility has not yet been determined will be governed by 47 C.F.R. § 51.305, the applicable FCC rule. 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. *See also Level 3 Brief* at 25-26, 10-12, 14-15.

3. Qwest May Not Avoid Responsibility For Inter-Network Facilities Costs (Issue Nos. 1G, 1H, 1I & 1J).

ISP-bound traffic should be included in any "relative use factor" ("RUF") for facilities linking Qwest and Level 3. The FCC's rules require this. Specifically, the *Intercarrier Compensation Further Notice,* released in 2005, says that even when CLECs have targeted ISPs as customers, "***the originating carrier bears the cost of interconnection to the single POI selected by the competitive LEC.***"[7] In other words, even for ISP-bound traffic, the originating carrier is responsible for transport to the POI. Including ISP-bound traffic in the RUF is also most consistent with the Commission's decision that the *ISP Remand Order* intended to create a uniform compensation scheme. *Core Interlocutory Review Order supra; Core Forbearance Reconsideration Order, supra.* It would defeat uniformity to exclude ISP-bound traffic from the RUF. *Level 3 Brief* at 7-9.

Qwest raises two new arguments on this issue. First, Qwest observes that *Peevey* affirmed a CPUC decision to allow the ILEC to impose modest call origination costs for

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[7] *Developing A Unified Intercarrier Compensation Regime,* Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005) ("*Intercarrier Compensation Further Notice*") at ¶ 91 & n.299.

VNXX-ISP-bound traffic. *Qwest Brief* at 7-8. This is correct, but it does not help Qwest. The CPUC approved call origination charges only for ***VNXX-ISP-bound traffic,*** but Qwest's proposed language would, via the RUF, impose call-origination costs for ***all*** ISP-bound traffic. Moreover, in *Peevey* the 9th Circuit did not hold that federal law required payment of call origination costs for VNXX traffic; it merely concluded that state regulators have some discretion to do so.[8] The Commission's analysis in the *Core* orders noted above, promoting harmonious treatment of ISP-bound and other traffic, and the overwhelming public interest in such treatment, shows that this Commission should exercise its discretion to reject Qwest's arguments.

Second, Qwest claims that if its customers call Level 3's ISP customers, such as AOL and Earthlink, ***Level 3*** "causes Qwest to incur costs to originate and transport these calls to Level 3." *Qwest Brief* at 8-9; *see also id.* at 3. Qwest has this backwards. The "cost causers" with respect to calls to any business are the end users making the calls, not the business that receives them. This applies as fully to ISPs as it does to lawyers or other

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[8] Note that, in the underlying CPUC decision in *Peevey,* the CPUC did not impose access charges on VNXX traffic. Rather, it followed a decision in an earlier arbitration that required that the CLEC pay cost-based transport charges for the portion of the transport outside the originating local calling area. *See In the Matter of Verizon California Inc. (U-10021-C) Petition for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996,* DECISION APPROVING ARBITRATED AGREEMENT PURSUANT TO SECTION 252, SUBSECTION (e), OF THE TELECOMMUNICATIONS ACT OF 1996 (ACT) (CPUC May 22, 2003) at 4-5, *citing Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Decision D-02-06-076 (June 27, 2002) at 28. In this regard, the unrebutted evidenced demonstrated that in Washington, Level 3's network extends into almost every local calling area in the state. Thus, Qwest's costs of transporting ISP-bound traffic to Level 3's switching facilities in Seattle are nearly zero. *See* Exhibit 31-T, Direct Testimony of Mack Greene filed May 30, 2006, page 21 (costs of transporting ISP-bound traffic to Level 3 are $0.000008/MOU); *see also* Exhibit 32 (showing Level 3's extensive deployment of transport (and sometimes collocation) facilities throughout the state); note as well that Level 3 serves the entire state via switching facilities located in Seattle. Qwest's proposals, by contrast, distort the market by harming a primary competitor for wholesale VoIP and ISP dialup services. *See* Exhibit 41-C.

businesses that make money by receiving telephone calls. *See* Tr. 636-44 (Easton).

4. Level 3's Disclaimers of Cost Responsibility Are Appropriate (Issue Nos. 1A, 1I, 1J, 2A & 21).

Qwest objects to Level 3's language clarifying that each party is responsible for costs on its side of a POI. *Qwest Brief* at 9-10. As discussed above, each party ***is*** responsible for costs on its side of the POI. Moreover, these provisions do not undercut payment of per-minute intercarrier compensation rates. Instead, they ensure that Level 3 is not saddled with paying for interconnection ***facilities*** on Qwest's side of a POI, above and beyond the ***traffic termination charges*** that Level 3 understands and agrees are appropriate. The Commission should rule that neither party is responsible for facilities charges on the other party's side of a POI.

B. Level 3 May Use LIS Trunks For Long Distance Traffic (Issue Nos. 2A & 2B).

Qwest has presented a somewhat vacuous defense of its claim that Level 3 should not be permitted to combine toll and non-toll traffic – including terminating switched access traffic – on LIS trunks. *See Qwest Brief* at 10-12. Notably, even though the issue was addressed very directly at the hearing (*see* Tr. 607-10 (Easton), Qwest ignores the fact that its own language ***already permits Level 3 to use LIS trunks for terminating long distance traffic from 3rd party IXCs.*** *See Level 3 Brief* at 12-14. So, the disagreement on this matter relates to the small amount of incoming long distance traffic where Level 3 is the originating long distance carrier. In fact, it would be unfair and discriminatory to forbid Level 3 from using the same efficient LIS routing for long distance traffic from itself or an affiliate, while permitting it for the vast majority of incoming long distance traffic, from third parties. The only fair resolution of this dispute is to allow Level 3 to send all inbound long distance traffic to Qwest over LIS trunks.

In any event, Qwest's substantive objections to combined traffic are without merit. Essentially, Qwest says that the recording capabilities associated with Feature Group D trunks are not available on LIS trunks, so Level 3 should incur the costs of converting its existing LIS network to an FGD network. *Qwest Brief* at 10-12. Level 3 has already shown, however, that (a) Qwest's need for recording capabilities is not as great as it claims; (b) Qwest could implement recording capabilities on LIS trunks for a lot less than it would cost Level 3 to convert to FGD trunks;[9] and (c) Level 3's proposal to do periodic traffic studies and bill based on factors is eminently workable and acceptable to the major carriers in the industry. *Level 3 Brief* at 14-21.

Moreover, *Peevey* directly undercuts Qwest. In *Peevey,* the CPUC imposed certain traffic origination charges on VNXX-ISP-bound traffic. One of Pac-West's objections to that ruling was that it could not distinguish inbound VNXX traffic from other traffic for purposes of determining when the charges apply. The court rejected this challenge:

> The record indicates that ***traffic studies are common in the industry*** and that Pac-West could conduct such studies to separate the calls that are not subject to reciprocal compensation but are subject to access charges. Other state commissions have reached similar conclusions, so we cannot say that the CPUC's determination is without support.

Peevey, supra, 462 F.3d at 1159 (emphasis added, footnote omitted).[10] So, *Peevey*

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[9] *See* Level 3 Confidential Response to Bench Request No. 5.

[10] The omitted footnote cites a number of state rulings affirming that traffic studies are a common and reasonable way to determine which traffic is subject to which charges: *See, e.g., AT&T Communications of Ill., Inc. et al. Verified Petition for Arbitration,* 2003 Ill. PUC LEXIS 715, *288-89, *303-04 (Aug. 26, 2003); *Arbitration of the Interconnection Agreement Between Global NAPs and Verizon-Rhode Island,* 2002 R.I. PUC LEXIS 20, *49 (Oct. 16, 2002); *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecomms. Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New Engl., Inc.*, 2002 Mass. PUC LEXIS 65, *49-54 (Dec. 12, 2002).

eliminates Qwest's objection to using traffic studies and factors to bill for different types of traffic. "Traffic studies are common in the industry." Nothing more should be necessary to reject Qwest's attempt to impose upon Level 3 an expensive and inefficient requirement to convert its LIS interconnection network to FGD trunks.[11]

C. Issue 3: Compensation For ISP VNXX Traffic.

A key dispute is whether the new agreement should require compensation for VNXX ISP-bound traffic. *Peevey* describes VNXX as a "wrinkle" in the general regime of intercarrier compensation:

> The second wrinkle in the reciprocal compensation regime concerns VNXX traffic. Telephone numbers generally consist of ten digits in the form of NPA-NXX-XXXX. The first three digits indicate the Numbering Plan Area (or NPA), commonly known as the area code, and the next three digits refer to the exchange code. Under standard industry practice, area codes and exchange codes generally correspond to a particular geographic area served by an LEC. These codes serve two functions: the routing of calls to their intended destinations, and the rating of calls for purposes of charging consumers. Each NPA-NXX code is assigned to a rate center, and calls are rated as local or toll based on the rate center locations of the calling and called parties. When the NPA-NXX codes of each party are assigned to the same local calling area, the call is rated to the calling party as local; otherwise it is a toll call, for which the calling party must normally pay a premium.
>
> VNXX, or "Virtual Local" codes are NPA-NXX codes that correspond to a particular rate center, but which are actually assigned to a customer located in a different rate center. Thus a call to a VNXX number that appears to the calling party to be a local call is in fact routed to a different calling area. The CPUC has determined that VNXX traffic should be rated to consumers as a local call, meaning that the originating LEC cannot charge the calling customer a toll despite the long-distance nature of the call's physical routing. *In re Competition for Local Exchange Service*, CPUC Decision No. 99-09-029, 1999 WL 1127635, *11 (Sept. 2, 1999) (the *VNXX Decision*).

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[11] *See* Exhibit 31-T, Direct Testimony of Mack Greene filed May 30, 2006, pages 22-36. Level 3's trunking proposals are technically feasible, and today, approved in the state of Washington as Level 3 has employed a single trunking architecture using Local Interconnection Trunks for all forms of traffic with Verizon for over two years.

Peevey, 462 F.3d at 1147-48. The "wrinkle" arises from the fact that VNXX calls are rated as local but are delivered outside the originating local calling area; the question is whether intercarrier compensation should follow the call's physical routing, or instead the call's dialing pattern and end user rating.

Peevey's straightforward explanation of VNXX traffic is quite different from Qwest's claims that VNXX is "arbitrage," designed to "disguise long distance calls as local calls."[12] In this regard, Verizon tried a similar rhetorical approach, arguing to the 9th Circuit that "Virtual NXX traffic is interexchange traffic that masquerades as local traffic solely by virtue of the telephone number Pac-West assigns to its customer."[13] The 9th Circuit was, evidently, unimpressed by this rhetoric, choosing to characterize VNXX arrangements using the neutral language above.

In fact, stripped of its anti-VNXX rhetoric, Qwest's brief reveals no sound reason for the Commission to reverse course. Instead, the Commission should continue to embrace ISP-bound VNXX traffic within the framework of the *ISP Remand Order.*

1. Level 3 Should Be Permitted to Charge Terminating Compensation on VNXX ISP Traffic (Issue No. 3C).

Qwest raises several arguments against applying the FCC's $0.0007 compensation regime to VNXX ISP traffic – none of them valid. *See Qwest Brief* at 15-28. We address them *seriatim* below.

First, Qwest says *Peevey* and other recent cases compel the Commission to rethink its conclusion that intercarrier compensation is due for VNXX ISP traffic. *Qwest*

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[12] See Qwest Brief at 13, citing Global NAPs v. Verizon New England, 454 F.3d 91 (2nd Cir. 2006).

[13] Verizon *Peevey* 9th Circuit Opening Brief at 25; *id.* at 26 (suggesting that VNXX only creates "an impression that calls are local when they actually travel to distant points").

Brief at 15-16. Pleasantries aside, this is absurd. *Peevey* affirmed the CPUC's decision to ***require*** such compensation. 462 F.3d at 1155-56. It therefore affirms the validity of the Commission's earlier decisions and supports Level 3's position. The CPUC had held that "whether a call is local" ***for purposes of compensation*** is determined "based on the NPA-NXXs of the calling and called parties, not the routing of the call;" it had found that this was "consistent with ... industry-wide practice;" and it had found that this approach recognized the "essential differences between the ...network architectures" of ILECs and CLECs. 462 F.3d at 1155-56. The 9th Circuit concluded that these were sound reasons supporting compensation for VNXX calls, and affirmed the CPUC.

In these few lines, *Peevey* puts the lie to large swaths of Qwest's claims that call rating and intercarrier compensation must be based on the locations of the calling and called parties. *See, e.g., Qwest Brief* at 22-24. Treating calls as "local" for compensation purposes based on NPA-NXXs – not geography – is consistent with "industry-wide practice," and reflects the "essential differences between [ILEC and CLEC] network architectures." These few lines, indeed, should be sufficient for the Commission to resolve this entire issue in Level 3's favor.[14]

Qwest, therefore, is simply wrong to say that *Peevey* "requires that the Commission rule in Qwest's favor with respect to VNXX traffic and reexamine its prior

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[14] *Peevey* also recognizes that, under the *ISP Remand Order,* the status of a call as "local" plays, at most, a muted and subsidiary role: "Even the FCC has abandoned the notion ... that ISP-bound calls are not local." 462 F.3d at 1153. This statement in *Peevey* closely echoes the 9th Circuit's decision in *Pacific Bell v. Pac-West*, 325 F.3d 1114, 1130-31 (9th Cir. 2003), where the court ruled that "the FCC itself [has] abandoned the distinction between local and interstate traffic as the basis for determining" whether reciprocal compensation applies. The FCC did so, of course, because it found that it had "erred" in placing its focus on the status of traffic as "local" in the first place, *ISP Remand Order* at ¶ 26, and that this "mistake" had created "ambiguities" in how compensation should be applied. *Id.* at ¶¶ 45-46. This is exactly the "mistake" that Qwest urges upon the Commission here.

ruling with respect to ISP-bound traffic." *Qwest Brief* at 7. *Peevey* does no such thing, and neither its specific holding nor its reasoning suggests that the Commission "should reverse its earlier conclusion that the *ISP Remand Order* applies to all ISP traffic." *Qwest Brief* at 16. To the contrary, *Peevey* affirms this Commission's authority to require compensation for VNXX traffic.[15]

Qwest also argues that cases from the First, Second and District of Columbia Circuits should lead this Commission to rethink its analysis in the *Core Interlocutory Review Order* and the *Core Reconsideration Order. See Qwest Brief* at 16. Those cases, however, do not support Qwest.

The issue in the First Circuit's decision – *Global NAPs v. Verizon New England,* 444 F.3d 59 (1st Cir. 2006) ("*Global NAPs I*") – was whether the *ISP Remand Order* preempted state authority to decide whether intercarrier compensation applied to VNXX ISP-bound calls. The court ruled that the FCC had not done so – leaving the question to the states. The most important aspect of *Global NAPs I* is the *amicus* brief that the FCC submitted to the court. In that brief, the FCC states that the *ISP Remand Order* "can be

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[15] In fact, *Peevey* is just the latest in a series of 9th Circuit cases that without exception ***approve*** mandatory intercarrier compensation for ISP-bound calling. In *U S West v. MFS Intelenet,* 193 F.3d 1112, 1122-23 (9th Cir. 1999), the court upheld this Commission's ruling requiring compensation for ISP-bound traffic against Qwest's claim that, because ISP-bound traffic was interstate, it could not be "local" for compensation purposes. In *Pacific Bell, supra,* the court upheld the CPUC's arbitration ruling requiring compensation for such traffic against Verizon's claim that "ISP-bound traffic is not local traffic under federal law." 325 F.3d at 1130. (The 9th Circuit applied this same logic to uphold decisions requiring compensation for ISP-bound calls from this Commission and the Oregon commission in two similar cases at that time: *Verizon Northwest v. Electric Lightwave,* 2003 U.S. App. LEXIS 6720 (9th Cir. 2003) (affirming Oregon PUC decision to require compensation); *Verizon Northwest v. WorldCom,* 2003 U.S. App. LEXIS 6724 (9th Cir. 2003) (affirming this Commission's decision to require compensation).) And now in *Peevey* the court addressed another "wrinkle" on this issue, upholding the CPUC's decision requiring compensation for VNXX ISP-bound traffic, specifically ruling that "industry-wide practices" and "essential differences between [ILEC and CLEC] network architectures" support the conclusion that VNXX ISP-bound traffic should be viewed as "local" for these purposes.

read to support the interpretation of either party," *i.e.*, can be read to extend the new compensation regime to ***all*** ISP-bound traffic, including VNXX traffic. This is just what this Commission did – after considering *Global NAPS I* – in the *Core Reconsideration Order*. It is also what the CPUC did – and the 9th Circuit affirmed – in *Peevey*.[16]

The Second Circuit's decision – *Global NAPs v. Verizon New England,* 454 F.3d 91 (2d Cir. 2006) ("*Global NAPs II*") – is essentially no different. There the court held that the FCC had not preempted the states regarding call origination charges for VNXX ISP-bound traffic. *Global NAPs II* does not hold that federal law or public policy forbids, or even frowns upon, treating such traffic as subject to the FCC's compensation regime, or that federal law or public policy requires or favors imposing call origination charges.

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[16] In the years since the *ISP Remand Order* was issued, a number of other regulators have ruled that VNXX ISP-bound traffic is subject to compensation. These include **Kentucky**, *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order, p. 7 (Ky. PSC Mar. 14, 2001); **Michigan**, *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001), 2001 WL 1335639; **New Hampshire**, *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); **Alabama**, *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906, Declaratory Order (Ala. PSC Apr. 29, 2004) **Ohio**, *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9. *See also, Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002) (same result); **Maryland**, *Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) Concerning Interconnection Rates, Terms And Conditions*, Order No. 79250, Case No. 8882 (P.S.C. Md. 2004); and **Wisconsin**, *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Docket 05-MA-130, Arbitration Award (WI PSC Dec. 2, 2002) at 20-21. In fact, **the FCC itself, acting for the Virginia commission**, also approved payment of compensation for VNXX ISP-bound traffic. *See Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n*, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 (2002).

The D.C. Circuit case – *In Re Core Communications,* 455 F.3rd 267 (D.C. Cir. 2006) – affirmed the *Core Forbearance Order,* which ***expanded the scope of ILECs' compensation obligations for ISP-bound calling, in the name of establishing a uniform compensation regime.***[17] The question of compensation (or call origination charges) for VNXX traffic was not before the court. Its short-hand description of the issue (which refers to local calling areas) neither expands or contracts the scope of the FCC's compensation regime – which, as noted above, the FCC itself says is broad enough to cover VNXX traffic.

Second, Qwest says "sound economics" indicates that it should not pay compensation for VNXX ISP-bound calls. *Qwest Brief* at 17-19. Qwest's reasoning, however, is not "economics" at all; it is sophistry. Qwest assumes that because VNXX calls are geographically interexchange, they should be deemed interexchange for compensation purposes, and on the basis of that raw assumption – not any "economics" – it concludes that access charges "should apply to this traffic." *Id.* at 17. *See also id.* at 22-23 But, as *Peevey* shows, "it is not unusual" to "separate[e]" how calls are treated for rating purposes from their geographical end points. *Peevey,* 462 F.3d at 1157. So, Qwest isn't offering an economic argument. It is pointing to the geographic nature of VNXX traffic and then just asserting that geography is all that matters.[18]

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[17] *See Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order,* 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*").

[18] Qwest's bare assertion that when Level 3 offers VNXX service, it "functions as a long distance carrier," *Qwest Brief* at 17, is equally unsupported. Level 3 does not seek out end user customers for this supposed "long distance" service; it is not anyone's presubscribed carrier with respect to it; end users do not get to Level 3's network by using a "1+" dialing pattern; and, of course, neither Level 3 nor Qwest bills end users a toll charge for the calls. All Qwest means by the claim that Level 3 "functions as a long distance carrier" is that VNXX calls traverse local

(note continued)...

Third, Qwest says that the *ISP Remand Order* does not cover VNXX calls. *Qwest Brief* at 18. But the FCC's *amicus* brief in *Global NAPs I* shows this issue to be open for decision by the states – and it is precisely the question this Commission answered adversely to Qwest in the *Core Reconsideration Order.* Qwest's bare assertion that the *ISP Remand Order* is limited to geographically local connections between end users and ISPs cannot be squared with either the FCC's admission that the *ISP Remand Order* can be read to the contrary, or with this Commission's ruling that it should be.

Fourth, Qwest says that "the flat monthly rate paid by a customer to place an unlimited number of local calls does not include calls placed outside of the customer's LCA." *Qwest Brief* at 18. The most obvious flaw with this claim is that it does not reflect how the $0.0007 rate translates to particular dollar amounts based on usage. If a customer is online for an hour a day, 30 days per month, that's 1800 minutes of ISP-bound calling. At $0.0007 per minute, that would generate a compensation liability of $1.26. It is not credible to assert that Qwest's local calling rates do not have at least $1.26 in usage costs built into them – especially as wireless services and email continue to decrease the actual usage customers impose on a typical wireline loop. Qwest, of course, provides no back-up for its claim.

Also, the availability of broadband Internet access makes heavy dial-up usage self-limiting. Heavy users want faster access speeds, so they obtain broadband access, whether from Qwest (DSL), their local cable operator (cable modem service) or a wireless provider (such as Clearwire). Precisely these considerations led the FCC, in the

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...(note continued)
calling area boundaries. But as *Peevey* shows, that simply does not control how calls should be rated to end users or treated for purposes of intercarrier compensation.

Core Forbearance Order, to eliminate the growth caps and new market caps that it had originally imposed on its compensation regime for ISP-bound calling:

> Recent industry statistics indicate [that there is] declining usage of dial-up ISP services. For example, one recent report suggests that the number of end users using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows. ... we now conclude that the policies favoring a unified compensation regime outweigh any remaining concerns about the growth of dial-up Internet traffic.

Core Forbearance Order at ¶ 20 (footnotes omitted).

Fifth, Qwest claims that requiring it to pay when its customers call ISPs "violates the economic principle of cost causation." *Qwest Brief* at 18-19. But testimony at the hearing shows Qwest has this backwards. The "cost causers" with respect to calls to a business are the end users making the calls, not the business that receives them. *See* Tr. 636-43 (Easton). This applies as fully to ISPs as it does to lawyers or other businesses that make money, in part, by receiving telephone calls. When pressed, Mr. Easton was forced to admit that his theory that ISPs "cause" the costs that arise when customers call them is not economically based at all; it is based, simply, on the notion that ISPs should be treated as carriers rather than businesses. *Id.* The FCC, however, has rejected the conclusion that ISPs are or should be viewed as carriers. *See ISP Remand Order* at ¶ 60 (noting that, while connections to ISPs are "analogous" to long distance calling, it is "not identical"). ISPs "technically modify and translate communication, so that their customers will be able to interact with computers across the global Internet." *Id.* at ¶ 63. These "information service" functions mean that ISPs ***cannot*** be viewed as providing

telecommunications "carriage," because the categories of "information service provider" and "telecommunications carrier" are mutually exclusive.[19]

Sixth, Qwest claims that classifying VNXX ISP-bound calls as non-local is more consistent with Washington state law. *Qwest Brief* at 19-21.[20] The question at hand, however, is not how traditional intrastate POTS calls are handled. The question is whether it makes sense to exclude one class of nontraditional interstate traffic – VNXX ISP-bound traffic – from the FCC's nontraditional interstate compensation regime for this traffic. Given the FCC's statements emphasizing the importance of "a unified compensation regime" in the *Core Forbearance Order,* the answer is clearly "no." Indeed, the Commission found these considerations to be persuasive in the *Core Reconsideration Order.* Nothing since last spring suggests a different result.[21]

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[19] *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended,* Order on Remand, 16 FCC Rcd 9751 (2001) at ¶ 36. *See also Federal-State Joint Board on Universal Service,* Report to Congress, 13 F.C.C. Rcd 11501 at ¶ 36 (1998); *Vonage Holdings Corp. v. Minnesota PUC,* 290 F. Supp. 2d 993, 998 (D. Minn. 2003).

[20] This discussion responds to Section II.C.3 of Qwest's brief.

[21] Of course, even in the traditional POTS world, customers can break the geographic tethers of NXX codes by purchasing FX service, *see* Tr. 628-29 (Easton) – which, the record shows, is precisely what Qwest does to offer its ***own*** version of VNXX service to centrally-located ISP customers. *See* Exh. 72-TC (Easton pre-filed Reply) at 20-21. *See also* Qwest response to Level 3 Interrogatory #15 (Qwest does not require its ISP customers to have facilities in the originating local calling area to receive locally-dialed calls). This undermines Qwest's invocation of state law as a stalwart defender of geographic purity. The difference – at least the difference that matters to Qwest – is that under Qwest's state-law theory, Level 3 would have to pay Qwest millions of dollars per year for "private line" circuits rather than using efficient network-to-network interconnection arrangements under Section 251 to accomplish the same result. *See* Tr. 632:5-24 (Easton) (resisting "secondary POI" approach, which would recognize Level 3 presence in calling areas based on direct-trunked transport, but approving use of much more expensive FX lines to establish such presence); Tr. 592-601 (discussing cost of using PRI trunks and private line/FX lines in place of LIS trunking and DEOTs). So there's no question that Qwest will enthusiastically permit customers – including its own ISP customers – to obtain and use out-of-area telephone numbers; the only question as the price Qwest will demand for sacrificing its supposed devotion to geographic purity.

Seventh, and finally, Qwest argues that VNXX arrangements contradict industry number assignment guidelines. *Qwest Brief* at 24. This is false. No one disputes that traditional landline telephone numbers have typically been assigned on a geographic basis, but there have always been exceptions – for example, traditional FX service – that allow a customer in one area to have a number or numbers associated with another area. *See* Exhibit 66 (number assignment guidelines) at § 2.14. Indeed, in § 4.2.2, the guidelines outline what is necessary to receive numbers in a rate center. *Id.* They do not state or imply that the carrier's end user customer need be present in the rate center. Instead, they look to evidence that the carrier intends to do business there – a very different thing. Moreover, the FCC's actual number assignment rules – as opposed to industry guidelines – make clear that numbers ***must*** be made available to any telecommunications service, without discrimination based on the carrier providing the service or the technology used to do so.[22]

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[22] *See* 47 C.F.R. § 52.9. Also, 47 C.F.R. § 52.13 states that numbering resources shall be assigned and administered "in an efficient, effective, ***fair, unbiased, and nondiscriminatory*** manner consistent with industry-developed guidelines ***and Commission regulations.***" 47 C.F.R. § 52.13(b) (emphasis added). *See also* 47 C.F.R. § 52.13(d) (to the same effect). FCC Rule 52.9(b) gives specific content to what it means to be "fair" and "nondiscriminatory:" facilitating market entry; not favoring any existing industry segment (like traditional LECs over CLECs); and not favoring any particular technology (like circuit-switching over packet switching). Moreover, Rule 52.13 expressly recognizes that nontraditional uses of numbering resources will arise, stating that numbering authorities should explore how to make the resources available – including, specifically, central office codes (NXXs). Similarly, FCC Rule 52.15(g)(4) clearly permits states to authorize the use of numbering resources even in situations where numbering authorities might deny the use of such resources under traditional criteria. It also bears mention that yet again, *Peevey* contradicts Qwest's argument. As the 9th Circuit observed, in an earlier ruling the CPUC "addressed two issues: the appropriate ***rating to customers*** of VNXX calls and the appropriate ***intercarrier compensation*** for such calls." 462 F. 3d at 1155 (emphasis in original). If using numbers to provide VNXX services violated industry guidelines and requirements, the California PUC would never have approved of VNXX in the first place, much less establish rating and compensation rules for it.

2. The Commission Should Not Ban VNXX.

Qwest suggests that the Commission should use this arbitration to "ban the use of VNXX in Washington." *Qwest Brief* at 25-26. This is absurd. Qwest has initiated a complaint proceeding arguing that VNXX should not be permitted. That claim has no merit whatsoever; but irrespective of the merits, it would be completely inappropriate to rule on those issues in this proceeding.[23]

D. VoIP Issues (Definition of VoIP; Issue No. 16).

The parties disagree about how to define VoIP traffic and how it should be handled for purposes of intercarrier compensation. *Compare Level 3 Brief* at 21 n.37, 22 *with Qwest Brief* at 29-40. This section of this brief responds to Qwest's definitional concerns. The next section responds to Qwest's arguments regarding compensation.

1. TDM-IP Traffic Should Be Classified As VoIP.

Qwest objects to Level 3's proposal to classify all traffic that either begins or ends in IP format as VoIP. Qwest claims – with no legal or policy justification – that "VoIP" should only be traffic that originates in IP and terminates in TDM, arguing that the classification of calls as VoIP "should be defined by how they are originated." *Qwest Brief* at 30-31. Its sole basis for this claim is the fact that there is no governing federal definition of VoIP.

VoIP is a new, flexible and emerging technology that the Commission should foster and encourage. *See, e.g.,* Tr. 402-10 (Greene; discussion of Exhibit 33 involving routing/handling of VoIP calls). This is one reason why Level 3 proposes that all VoIP traffic should be exchanged at reciprocal compensation rates. It is also why Level 3

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[23] Level 3 addresses Qwest's claims regarding its purported compliance with the FCC's "mirroring rule" (*Qwest Brief* at 28-29, Section II.C.4) in Section II.G of this brief, *infra.*

proposes that any traffic that contains a complete net protocol conversion – from IP to TDM, or from TDM to IP – be deemed a VoIP call.

Qwest claims that Level 3's approach lacks logical and legal support, but in fact it draws on sound analogies between VoIP and other types of traffic in which the two "ends" of the call are in different modalities. First, calls involving a wireless carrier are subject to separate compensation and interconnection rules. *See Local Competition Order* at ¶ 1036; 47 C.F.R. § 51.701(b)(1) & (2) (setting up special rules for any traffic "between" a LEC and a CMRS provider). Qwest's approach – treating terminating VoIP differently from originating VoIP – is akin to treating calls ***to*** wireless carriers differently from calls ***from*** wireless carriers. Second, the special rules for dial-up calls to ISPs show that even if traffic that "looks" like TDM/PSTN traffic on the "front end," it may have distinctive treatment based on what happens on the "back end." There are clear similarities between ISP-bound traffic and IP-bound traffic – both begin as TDM telecommunications services but morph into a form of information services following a TDM-IP conversion. This, too, supports placing TDM-IP traffic into the "VoIP" category along with IP-TDM.

Qwest notes that Level 3 objects to Qwest's use of "premises" in its definition of VoIP. *See Qwest Brief* at 32. This is because it will be hard to know if such a "premises" even exists.[24] Suppose a customer sets up a VoIP call with a WiFi connection at

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[24] *See* Exhibit 4 at 79, Issue No. 16. As noted in Level 3's opening brief, *Level 3 Brief* at 21 n.37, 22, while Qwest declares this location to be "an end user premises for purposes of determining end points for a specific call," Qwest never explains 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").

Starbucks. Is Starbucks the customer's "premises"? Or suppose the customer sets up a VoIP call using a 3G wireless connection from a taxicab in London. Is the taxicab the customer's "premises"? Qwest's proposal to tie a protean service like VoIP to a "premises" is not based on legal, economic or technical considerations, but rather reflects a robotic insistence on tying call classification to geography, even when it is evident – with wireless traffic, with ISP-bound traffic, and now with VoIP traffic – that geography plays an ever-diminishing role. Qwest's failure to provide any meaningful definition of what might constitute a "VoIP POP" illustrates this problem, while at the same time making Qwest's proposal totally unworkable as a practical matter.[25]

2. Qwest Misconstrues the ESP Exemption (Qwest Issue No. 16).

Qwest argues at length that its approach to VoIP is based on the so-called "ESP Exemption." Its key claim is that for essentially all purposes, an enhanced service provider (ESP) is treated as an end user connecting to the PSTN. Building from this premise – which has already been specifically rejected by the FCC – Qwest lurches back to its obsession with geography, arguing that if an ESP is treated like an end user, it should be both possible and appropriate to identify a particular "premises" associated with that "end user," and then to tie interconnection and intercarrier compensation obligations to that location. *Qwest Brief* at 33-37.

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[25] Qwest also raises some minor drafting problems with Level 3's definition. *See Qwest Brief* at 32-33. Level 3 submits that these objections are not material. The definition is quite clear in its first sentence: "VoIP (Voice over Internet Protocol) traffic is traffic that originates or terminates in Internet Protocol." *See* Exhibit 4, page 30. The rest of the definition just illustrates and clarifies the definition's scope, to avoid disputes later on. The basic definition – the sentence just quoted – should be adopted, as should Level 3's proposals regarding compensation, discussed below. If the Commission adopts those key points, any remaining Qwest concerns about drafting issues can be fully resolved in developing final contract language for filing.

But the ESP Exemption is not a blanket rule that for all purposes ESPs are business customers with specific premises where calls originate or terminate. To the contrary, the exemption just means that ESPs may, if they so choose, purchase PSTN connections out of intrastate business tariffs, even though they are using an interstate information access service. *See, e.g., ISP Remand Order* at ¶¶ 11, 55. It does not control, or even address, what intercarrier compensation arises from how an ESP chooses to connect to the PSTN. As the FCC noted in connection with ISP-bound calling, it "has never applied the ESP exemption ... to the situation where two carriers collaborate to deliver traffic to an ISP."[26] Neither has it ever done so in the context of VoIP traffic. *Level 3 Brief* at 22-24.

The FCC's two main orders regarding compensation for ISP-bound calls both prove that Qwest's argument is totally wrong. During the proceedings leading up to the FCC's original ruling on this issue in 1999, some CLECs urged the FCC to adopt precisely Qwest's position. Those CLECs argued that under the ESP exemption, if an ISP had equipment in a local calling area, that equipment should be counted as a the end point of the call for purposes of intercarrier compensation. But the FCC was ***not*** "persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence." *ISP Declaratory Ruling* at ¶ 16 (footnote omitted); *id.* at ¶ 26. Had that argument prevailed, calls to ISPs would be subject to exactly the same reciprocal compensation rules as calls to pizza parlors or taxicab dispatch services. But the FCC

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[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*") at ¶ 26.

rejected that argument and ruled that even though the ESP Exemption allows ISPs to purchase PSTN connections on the same terms as any other business customer, ***it did not extend to intercarrier compensation and did not control what intercarrier compensation applied to such traffic.*** *Id. See also ISP Remand Order* at ¶ 26 (FCC describing its own handling of traffic as "local" under the ESP Exemption as "confusing"); *id.* at ¶ 35 (ISP-bound traffic subject to special intercarrier compensation rules "regardless of" the ESP Exemption). The FCC found that the location of ISP is irrelevant, and that the focus for purposes of compensation needs to be on the end-to-end nature of the traffic. *See ISP Remand Order* at ¶ 59. These rulings totally destroy Qwest's "ESP Exemption" argument.[27]

E. The Commission Should Adopt Level 3's Proposals for Compensation for VoIP Traffic (Issue No. 4) and Reject Qwest's Proposals Regarding VoIP Audit and Certification Requirements (Qwest Issue No. 1A)

1. Level 3's VoIP "Call Rating Theories" Are Consistent (Issue No. 4; VoIP Aspects of Issue Nos. 3A, 3B & 3C).

The analogies between VoIP and ISP-bound traffic are sufficiently strong that they should be treated the same for purposes of intercarrier compensation. *Level 3 Brief* at 21-24. The point is to ensure that VoIP traffic in either direction (TDM-IP or IP-TDM) will be subject to the reciprocal compensation rate established under the *ISP Remand Order*.[28] This is appropriate because VoIP traffic should never be subject to

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[27] As noted in Level 3's opening brief, *Level 3 Brief* at 23 n.40, if Qwest wants to be faithful to the true policies underlying the ESP Exemption, the appropriate analysis is exemplified by the federal district court's ruling in *SBC v. Missouri Public Service Commission,* 2006 U.S. Dist. LEXIS 65536 at [*49] – [*81]. Consistent with Level 3's proposals here, that court ruled that all VoIP traffic, irrespective of origination points and irrespective of where it is handed off to the ILEC, is subject to reciprocal compensation rather than access charges.

[28] If Qwest had complied with the "mirroring rule" established in the *ISP Remand Order,* (note continued)...

access charges as a legal, economic, and policy matter. *Id.*

A carrier's ability and obligation to pay access charges is linked to the collection of toll charges from end users. 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 from end users on "through routes" – calls in which more than one carrier was involved in completing an end-to-end call – among the carriers involved. *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). Again, the point was to establish a system for sharing toll revenue. Historically, the purpose of the access charge regime was to replace the prior system in which the Bell System shared toll revenues with the local companies that originated and terminated toll traffic. *Id.* Where there was (or is) no toll revenue to share, there is no reason to think access charges should apply. So, if no toll charges arise in connection with a particular type of traffic, it makes neither legal, nor economic, nor historical sense to impose access charges on it.

Qwest claims that Level 3 cannot "settle on a consistent theory" as to why the rate from the FCC's *ISP Remand Order* (as opposed to access charges) should apply. *Qwest Brief* at 38. This is not true. Qwest's problem is not that Level 3 has no single consistent theory but, rather, that there are several different mutually consistent "theories" that all

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...(note continued)
the rate would be $0.0007. In fact, as discussed below, Qwest has failed to comply with that rule. *See* Section II.G, *infra.* As a result, the TELRIC compensation rate established by this Commission is the rate that would properly apply.

support Level 3's proposal:

- ***First,*** as discussed above, the purpose and policy of the ESP Exemption – providing economically beneficial interconnection options to innovative service providers – supports establishing a regime that minimizes the access charge "tax" on VoIP traffic. Level 3's proposals accomplish that purpose.

- ***Second,*** as just noted, there is a legal and economic link between the obligation to pay access charges and the collection of toll charges from end users. Since VoIP providers do not collect toll charges from end users, there is no legal or economic reason to impose access charges on VoIP traffic. This, too, supports Level 3's proposal.

- ***Third,*** except for VoIP calls that a PSTN end user originates by dialing "1+" and that are handled by a traditional IXC, VoIP calls are dialed and billed to end users like traditional local calls, so it makes sense to treat such traffic as "local" for intercarrier compensation purposes.

- ***Fourth,*** just as it is impossible to know for sure where a wireless caller is located – giving rise to FCC endorsement of using a POI between the wireless and landline carrier as a surrogate for wireless caller location (*see Local Competition Order* at ¶ 1044), so too is it impossible to know for sure where a VoIP user might be. So, it makes sense to consider using the POIs between Level 3 and Qwest as proxies for VoIP customer location, which results in applying reciprocal compensation, not access charges, to such traffic.

- ***Fifth,*** given the "essential differences between the ... network architectures" of Level 3 and Qwest, *see Peevey, supra,* 462 F.3d at 1155, and given how Level 3's network architecture is used to provide nationwide VoIP connectivity, VoIP calls flow between Level 3 and Qwest in exactly the same way as traditional "local" PSTN calls. *See, e.g.,* Tr. 397:25-398:2 (Greene) ("The services that Level 3 provides are based primarily on IP technology"); Tr. 398:12-13; Tr. 402-04 (describing handling of VoIP traffic). As a result, there is no technical or "network"-based reason to treat VoIP calls in any different manner for compensation purposes.

These may be ***different*** "theories" showing that VoIP traffic should not be subject to access charges, but there is nothing "inconsistent" about them. To the contrary, they are mutually reinforcing. No matter how one looks at this issue, the right answer is to exchange VoIP traffic on the basis of reciprocal compensation rather than access charges. The ***only*** way to reach a contrary conclusion is to completely ignore the purpose and policy of the ESP Exemption; the economic and legal link between toll charges and

access charges; the dialing and routing of VoIP traffic; and the differences between Level 3's and Qwest's network architecture. Qwest manages to create such a theory by means of its dogged insistence – like a good real estate agent – on "location, location, location." But we operate in the communications industry, not the real estate industry, and here, location is becoming increasingly irrelevant.[29]

2. The Commission Should Reject Qwest's VoIP "Operational Audit" Requirements (Qwest Issue No. 1a).

Qwest's proposals regarding VoIP traffic are unworkable for several reasons, including – as discussed above – the inherently ambiguous nature of the "location" of the VoIP "end" of the call. Qwest unwittingly confirms this fundamental problem by recognizing that its proposal requires some artificial way to declare where VoIP calls begin and end. Qwest knows that this is essentially impossible, but cannot say so without cutting its own proposal off at the knees. So, it "exports" this problem to Level 3 by calling for "operational audits" of VoIP traffic and requiring Level 3 to "certify" that what Level 3 characterizes as VoIP traffic meets Qwest's unworkable definition. *See*

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[29] In support of its obsession with location, Qwest argues that Level 3's compensation proposals for VoIP traffic run afoul of Washington law that requires calls between separate LCAs to be treated as interexchange in nature. *Qwest Brief* at 36-37. There are three key difficulties with this argument. First, as noted above, the traffic is jurisdictionally interstate, not intrastate. This Commission has the authority to deal with interconnection matters regarding this traffic as a result of its delegated federal authority under Section 252 of the Communications Act, not as a result of any provisions of Washington law. Consequently, the Commission's understanding of federal law, not Washington state law, must provide the rule of decision. Second, Qwest's argument assumes what it is trying to prove, even on its own terms. That is, even if Washington law applies, Qwest simply assumes that this Commission would ignore the distinctive, pro-consumer, innovative nature of VoIP calling and unthinkingly apply rules and concepts relating to POTS traffic to this new, innovative service offering. Level 3 believes that this Commission, whether operating under Washington law or federal law, will appreciate the pro-competitive nature of Level 3's proposal for intercarrier compensation for VoIP traffic, and adopt it. Third, Washington law of course recognizes FX service, which severs any link between location, telephone numbers and call rating.

Qwest Brief at 39-40.

Qwest's proposal is founded on the misconception that it is feasible to know the location of the VoIP "end" of a VoIP call. That misconception is not magically resolved by making Level 3 "certify" anything. Qwest's proposal is not only likely to lead to disputes; Level 3 submits that it is ***intended*** to ***create*** disputes. If this language is included, then either (a) Level 3 will have to ignore the certification requirement, because it cannot in good faith ascertain where the VoIP "end" of particular calls might be – leading Qwest to claim breach of contract, bad faith, etc; or (b) Level 3 will have to provide Qwest with a "certification" based on whatever information and assumptions Level 3 can reasonably make – leading Qwest to claim breach of contract, bad faith, etc., when its "audit" reveals what should have been obvious from the start – that neither Level 3 nor Qwest nor anyone else can determine the location of the VoIP "end" of VoIP calls. *See also* Tr.820-21 (Brotherson)

For all these reasons, the Commission should adopt Level 3's proposals regarding the definition of, routing of, and compensation for VoIP traffic, and reject Qwest's proposals regarding these issues.

F. Technical Issues Regarding Billing Factors (Issue No. 18).

Qwest's discussion of this issue (*Qwest Brief* at 43-44) largely repeats its objections to combining traffic on LIS trunks, *see Qwest Brief* at 43, and objecting to Level 3's proposal to treat all VoIP traffic like ISP-bound traffic, *see id.* at 44. Those issues are discussed above. However, Qwest also claims that Level 3's specific proposed factors would create a manual process and do not correspond to the types of traffic the parties will exchange. *Id.* at 43-44.

Qwest's assertion about the supposed problems with a "manual" process must

also be taken with a grain of salt. First, precisely this "manual" process – that is, using traffic studies to determine billing – is what the court in *Peevey* affirmed was "common in the industry." 462 F.3d at 1159. Second, the record is clear that the other major ILECs around the country are agreeable to this approach. *See, e.g.,* Exh. 31-T (Greene Direct) at 23. So there is nothing magic about the process Level 3 proposes being called "manual" or "automatic." The 9th Circuit has affirmed that this process is "common" and the record makes clear that all other major ILECs have been willing to make it work.

Qwest also complains that auditing factors would be "complex and time-consuming," *Qwest Brief* at 43, but Qwest can avoid the whole problem for a relatively low, one-time cost if it activates recording capability on the LIS trunks. Finally, Qwest says that Level 3 did not include a factor for intrastate switched access. *Qwest Brief* at 44. This was an oversight in Level 3's language; if the parties use factors, there should be one to identify traffic subject to intrastate access charges. Obviously for factors to work there should be a factor for each type of traffic with a different per-minute rate.

G. Because Qwest Has Not Complied With The "Mirroring Rule," The Commission Must Order Qwest to Pay TELRIC Rates for ISP-Bound Traffic It Sends To Level 3 (Issue 19).

The FCC's "mirroring rule" serves a simple purpose: an ILEC ***cannot*** treat ISP-bound traffic differently from Section 251(b)(5) traffic for compensation purposes. *See ISP Remand Order* at ¶ 89; *Core Forbearance Order* at ¶ 8. In the words of the FCC, the rate caps for ISP-bound traffic:

> apply ***only*** if an incumbent LEC offered to exchange ***all traffic subject to section 251(b)(5)*** at the same rates. If a LEC ***did not offer*** to exchange section 251(b)(5) traffic at the rates set forth in the *ISP Remand Order*, it was ***required*** to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates.

Core Forbearance Order at ¶ 8 (emphasis added, footnote omitted). *See also id.* at ¶ 23 (emphasis added) ("the caps apply to ISP-bound traffic ***only*** if an incumbent LEC offers to exchange ***all*** section 251(b)(5) traffic at the same rate"). The purpose of this rule is to:

> preclude [ILECs] from paying reduced intercarrier compensation rates for ISP-bound traffic ... while collecting higher state reciprocal compensation rates for traffic that they receive.

Id. at ¶ 19.

This is not complicated. It is not subtle. The ILEC offer is dictated by the FCC and has two straightforward alternatives: (a) exchange ISP-bound traffic and ***all*** traffic subject to Section 251(b)(5) at the low, FCC-set rate; or (b) exchange ISP-bound traffic and ***all*** traffic subject to Section 251(b)(5) at TELRIC rates. If the ILEC does not present this offer, it ***cannot*** take advantage of the FCC's cap on per-minute charges for calls to ISPs. And this is exactly where Qwest now finds itself.

Compare the straightforward FCC-dictated offer with what Qwest put forward in its brief. According to Qwest, the mirroring rule requires it to give CLECs the option of:

> (1) exchanging all appropriate local traffic (whether ISP or voice traffic) at the $.0007 rate established for local ISP traffic [where "All appropriate traffic' means local ISP traffic subject to the $0.0007 rate and all other local voice traffic subject to section 251(b)(5) (and the voice rate)"] or (2) exchanging local ISP traffic at $.0007 and local non-ISP traffic (*e.g.*, voice traffic) at the voice rate established by the state commission ($.001178 in Washington).

Qwest Brief at 28 (footnote incorporated into bracketed material).

Option (2) is plainly and unequivocally out of compliance with the FCC's ruling. The FCC has made crystal clear that ***neither*** alternative under the mirroring rule allows the ILEC to exchange ISP-bound traffic at one rate and Section 251(b)(5) traffic at another, higher rate. Qwest here is trying to do ***exactly*** what the FCC has forbidden. Option (2) is also out of compliance with the rule because it does not, by its terms,

purport to cover ***all*** traffic subject to Section 251(b)(5). Instead – Qwest's ploy is obvious – it only addresses Qwest's parochial, narrow view of what Section 251(b)(5) covers ("local non-ISP traffic"). But the FCC did not give ILECs any such wiggle room. ILECs have to offer to exchange "all traffic subject to Section 251(b)(5)" at the low rate in order to take advantage of the low rate for ISP-bound traffic. Qwest's Option (2) does not contain those words and does not convey that meaning. To the contrary, Qwest's conditions are intended to narrow the scope of the FCC-mandated offer, just in case Level 3 might point out that "all section 251(b)(5) traffic" is a broader category that "local non-ISP traffic."[30]

Qwest's Option (1) is also out of compliance with the FCC's mandate. Neither the *ISP Remand Order,* which created the mirroring rule, nor the *Core Forbearance Order,* which restated and interpreted it, uses the terms "appropriate local traffic" or "local ISP traffic." To the contrary, they both identify the two categories of traffic as: "all section 251(b)(5) traffic" and "ISP-bound traffic." Qwest's Option (1) does not address either of those two categories. Instead, Qwest narrowly interprets the scope of both Section 251(b)(5) and the *ISP Remand Order* to create a made-up category –

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[30] Under the rules established in the *ISP Remand Order,* Section 251(b)(5) applies to all "telecommunications" that the parties might exchange, other than (i) exchange access or (ii) information access. *See* 47 C.F.R. § 51.701(a). "Information access" is precisely the ISP-bound traffic for which, under the mirroring rule, compensation must "mirror" Section 251(b)(5) traffic. So the ***only*** category of traffic that is ***not*** effectively subject to Section 251(b)(5), either directly or via of the mirroring rule, is "exchange access." Qwest does not want to deal with that broad – though plainly correct – reading of the FCC's rules, which is why its language is so squirrelly. In this regard, the FCC rules quoted above do not make any reference to whether the traffic is "local" or not – a point that the 9th Circuit fully appreciates, as indicated both by *Peevey,* 462 F.3d at 1159, *supra,* and by *Pacific Bell,* 325 F3d at 1130-31, *supra.* Indeed, as noted above, the FCC itself, in the *ISP Remand Order,* found that reliance on the concept of "local" traffic was a "mistake" that created "ambiguities," *id.* at ¶¶ 45-46, which is why the term was purged from its rules.

"appropriate local traffic" – and then applies the FCC's $0.0007 rate to that made-up category. This is a far cry from the simple offer the FCC has mandated.

Qwest engages in all its tortured, lawyerly wording for two main reasons. First, Qwest disagrees with this Commission's ruling last year that the *ISP Remand Order* extends to VNXX traffic, so it can't just say that it will exchange "ISP-bound traffic" or "ISP-bound traffic subject to the *ISP Remand Order*." Second, Qwest is frightened by the full scope of the FCC-mandated offer to cover "all section 251(b)(5) traffic," because that definition, under the FCC's rules, covers ***all*** traffic that isn't (a) information access, such as ISP-bound traffic (covered by the mirroring rule), or (b) exchange access, which is statutorily confined to the origination or termination of actual toll calls.[31] But what the FCC required of an ILEC is clear. To take advantage of the cap on rates for ISP-bound traffic, Qwest should have presented an offer that quoted the FCC and clearly covered the two types of traffic the FCC identified. By choosing not to take this course, Qwest has legally foreclosed itself from taking advantage of the rate caps.

Indeed, as Level 3 explained, we were concerned that Qwest had tried to mislead both the Commission and Level 3 by piously asserting at the hearing that it was making whatever offer the mirroring rule might require – to avoid cross-examination on the subject – and then trying to elide, later, what the mirroring rule actually says. *Level 3 Brief* at 5-6 & n.10. Qwest's brief makes clear that this concern was justified. Qwest never had any intention of making the plain, simple offer required by the mirroring rule – again, to treat "all section 251(b)(5) traffic" and all "ISP-bound traffic" the same.

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[31] *See* note 27, *supra*. *See also Level 3 Brief* at 24 n.41, 32-34 (explaining statutory, definitional linkage between "exchange access" and "telephone toll service").

Instead, its intention from the beginning was to try to slither out of making the required offer while still getting the advantage of the low FCC rates for the portion of "ISP-bound traffic" for which it was willing to pay anything at all.

Qwest has made its bed on this topic, and now must lie in it. The only way that the Commission can faithfully apply federal law to Qwest's inadequate offer is to deny Qwest the benefit of the FCC's low rates. Instead, the Commission must, in order to properly implement the requirements of the mirroring rule, either (i) require in the parties' agreement that Qwest will pay Level 3 the Commission's TELRIC rate for all ISP-bound traffic, and all Section 251(b)(5) traffic, that Qwest sends to Level 3 – including VNXX-routed ISP-bound traffic;[32] or (ii) adopt Level 3's proposal to exchange all information services traffic at the lower FCC rate. In return, in the first option, Level 3 will pay Qwest appropriate TELRIC rates for all Section 251(b)(5) traffic that it sends to Qwest.[33] Otherwise the parties will exchange all traffic at the same rate. Any other decision on this point – given Qwest's inadequate offer – is inconsistent with federal law.

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[32] Since Qwest has waived its right to insist on paying only $0.0007 for the ISP-bound traffic it exchanges with Level 3, the question arises whether the TELRIC end office rate or tandem rate applies. The record clearly shows that Level 3's switching device covers a geographic area at least as large as a LATA. *See, e.g.,* Exhibit 33. As a result, the FCC's "rate symmetry" rule requires that traffic that Qwest sends to Level 3 be charged at the higher "tandem" rate, not merely the end office rate. *See* 47 C.F.R. § 51.711(a)(1) ("Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate").

[33] Level 3's proposed contract language is specifically intended to make clear that Qwest must compensate Level 3 at the TELRIC rate for ISP-bound traffic Qwest sends to Level 3 if, in fact, Qwest's offer under the mirroring rule is inadequate.

III. CONCLUSION.

For the reasons stated above and in Level 3's opening brief, and based on the record, the Commission should rule for Level 3 on the disputed issues in this proceeding.

Respectfully submitted

January 22, 2007

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APPENDIX – DEFINITIONAL DISPUTES

1. Definition of VNXX (Issue No. 3B)

Qwest objects to Level 3's proposed definition of "VNXX" traffic. *Qwest Brief* at 13-14. The key distinction between the two competing definitions is that Level 3's turns on the location of Level 3's facilities – that is, where it picks up the traffic from Qwest – while Qwest's turns on the location of the end user customers. *See* Exhibit 4 at 30. Level 3's definition is plainly better. As the FCC has observed, with both ISP-bound calls and VoIP calls, the non-PSTN end point is ambiguous and may be impossible to identify.[1] As a result, Qwest's definition – which depends on the "physical location" of Level 3's customer – will only lead to confusion and disputes. But the parties will always know where Level 3 has facilities, so Level 3's definition will not lead to disputes.[2]

Qwest claims that *Peevey* held that "VNXX traffic is interexchange traffic as a matter of federal law" and "is not subject to the Act's reciprocal compensation rules." *Qwest Brief* at 14. This is not true. As to the first point, the 9th Circuit noted that:

> for rating purposes, [VNXX] traffic is a local call but for routing purposes, it is an interexchange call because it terminates outside of the originating calling area. Separating the two, the [CPUC] says, is not unusual for, as an example, the FCC has done the same thing with high-speed service.

Peevey, 462 F.3d at 1157. In other words, under federal law, VNXX traffic is "interexchange" for some purposes and "local" for others. As to the second point, the 9th Circuit did find that "interexchange" traffic is not subject to the "reciprocal compensation rules" as such. But the court was clear that the compensation regime from the *ISP Remand Order* was "intended to ***substitute for***" reciprocal compensation. 462 F.3d at

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[1] In the *ISP Remand Order,* the FCC made clear that in a single Internet access session – indeed, even when visiting a single web site – there may well be no clear "end point" for the traffic on the Internet. *ISP Remand Order* at ¶¶ 58-59. Similarly, in the *Vonage Order,* the FCC explained why it is essentially impossible to know where a VoIP user might be located. *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 ¶ 24 ("The Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations"); *id.* at ¶ 24 n.89.

[2] For this reason, among others, the Commission should reject Qwest's objections to what it calls Level 3's "POI Theory." *See Qwest Brief* at 26-28. Qwest suggests that there is no basis for using a POI – that is, a location at which two networks interconnect – as a proxy for an end user's geographic location, to the extent that such location matters. *Id.* In fact, as suggested at the hearing, *see* Tr. 625-26, there is longstanding FCC precedent suggesting that – when one end of a call is geographically indeterminate, such as with a wireless call – it is reasonable to use a POI between the affected carriers as the relevant "location" of the affected end of the call. *Local Competition Order* at ¶ 1044. This same geographic indeterminacy exists with respect to both ISP-bound calls and VoIP calls. It is therefore perfectly reasonable to use a POI between Level 3 and Qwest as a proxy for the "Level 3" end of the call in such cases.

1159 (emphasis added). Clearly, therefore, *Peevey* does not say that VNXX-ISP-bound traffic is not subject to the FCC's regime. To the contrary, its central holding was to ***affirm*** the CPUC's ruling ***imposing*** that regime on such traffic. Qwest is simply taking snippets from *Peevey* out of context.

2. Definition of "Basic Exchange Telecommunications Service" (Issue No. 7)

Level 3 objects to the use of the vague and confusing term, "Basic Exchange Telecommunications Service." As discussed below in connection with Issue No. 14, Level 3's interconnection rights, and Qwest's obligations, are defined by federal law, and there is a perfectly serviceable term – "telephone exchange service" – that is already defined in federal law to refer to this type of service. Level 3, therefore, proposes to simply use the already-defined federal law term.

Qwest's support for its proposed definition is simply anemic. It argues that (a) the term appears in three places in the agreement and (b) it is used in other agreements. *See Qwest Brief* at 40. These are pure make-weight arguments. Obviously, if the Commission approves Level 3's proposal to rely on the federal-law term "telephone exchange service" – which it should – in producing the final conforming contract the parties should substitute "telephone exchange service" for "basic exchange telecommunications service" in the three places it appears. And, the fact that other interconnectors might not have argued for the appropriate use of already-defined terms from federal law – or, given the few places Qwest's term appears, might not have cared to raise the issue – is no reason to rule against Level 3's sensible proposal here, given that Level 3 actually has raised it.

3. Definition of "Interconnection" (Issue No. 10)

Level 3 explained the problem with Qwest's definition of "interconnection," which is that Qwest's language would arbitrarily exclude certain types of traffic, including intraLATA toll traffic carried by 3rd party IXCs. *See Level 3 Brief* at 10 n.17 & 22 n.38. It also makes no mention of VoIP traffic, which Level 3 obviously exchanges today and will continue to exchange. Qwest's language, therefore, is a recipe for disputes about whether particular traffic that Level 3 might seek to exchange with Qwest is permissible or not. Level 3's language is phrased slightly differently to avoid Qwest's proposed limitations. Qwest's brief (at 41) provides no sensible explanation for its restrictive terminology. As a result, the Commission should adopt Level 3's language.

4. Definition of "Exchange Service" (Issue 14)

Qwest proposes to include a definition of "exchange service," defined by reference to Washington law, for use in classifying the traffic that the parties will exchange. *See Qwest Brief* at 41-42. Level 3 has no quarrel with Washington law *per se,* but the nature and scope of its interconnection rights vis-à-vis Qwest are defined by ***federal*** law and, in particular, the Communications Act. The federal law term that corresponds most closely with the state-law concept of "exchange service" is "telephone exchange service," defined in 47 U.S.C. § 153(47). The fact that the agreement itself is formed under, and

will be interpreted under, federal law, strongly counsels the use of federal law rather than state law definitions in this context.

In the specific case of "telephone exchange service," however, there is an additional reason to rely on federal rather than state law. Section 251(c)(2) – the basic provision guaranteeing Level 3's right to interconnect with Qwest – identifies two specific types of traffic that are subject to mandatory interconnection and exchange under that provision: "exchange access" and "telephone exchange service." 47 U.S.C. § 251(c)(2). Since the statute defining Level 3's central interconnection rights uses this specific statutory term, it invites needless confusion down the road to use a different term in the agreement – even if that different term has a defined meaning under state law.

As a result, and for the reasons explained in Level 3's opening brief at 32-33, the Commission should reject Qwest's proposed definition of "Exchange Service" and instead include Level 3's proposed definition of "Telephone Exchange Service." Because the rights being established under the agreement ultimately derive from federal law, it only makes sense to rely on federally-defined terms in laying out the parties' rights and obligations under the agreement.

5. Definition of "Telephone Toll Service" (Issue No. 15)

Level 3 proposes that the parties' agreement should contain the definition of "Telephone Toll Service" that Congress included in the Communications Act (47 U.S.C. § 153(48)) and that the parties' rights and obligations regarding the exchange of traffic that meets that definition should, in fact, conform to its terms. Qwest is evidently dissatisfied with the law Congress passed, since it objects to relying on the statutory definition. *Qwest Brief* at 42-43.

Qwest's specific concern with Congress' language is that, in order to qualify as "telephone toll service," a particular call must meet ***two*** statutory tests. Congress defined this type of traffic as: "telephone service [1] between stations in different exchange areas for which [2] there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48) (bracketed numbers added). Qwest is obsessed with the geographic aspects of telephone calls, and so it naturally focuses on clause [1] of the definition. For those same reasons, it wants to sweep clause [2] under the rug.

As discussed above and in Level 3's opening brief, clause [2] plainly (and logically) recognizes that to be a "toll" call there has to be a "toll" charged. *See Level 3 Brief* at 24 n.41, 32-34. Moreover, this plain, logical fact has economic consequences. A carrier's receipt of a toll charge puts it in an economic position to pay access charges; without the receipt of a toll charge, paying access charges doesn't make any economic or policy sense. Qwest has a difficult time with this basic concept because it leads to the conclusion that it cannot charge access charges any time it wants, but can only do so when it is economically logical.

In support of its objection to the plain implications of Congress's language, Qwest relies on the 2nd Circuit's decision in *Global NAPs II,* discussed above. In that case the CLEC, Global NAPs, argued that it should not pay originating access charges with respect to incoming VNXX traffic because Global NAPs itself did not assess any toll charges with respect to such traffic. *See Qwest Brief* at 42-43. That is true, but it is not Level 3's argument. Level 3's position is that a VNXX call is not a toll call because ***neither carrier*** assesses a toll charge on it. In this regard, the statutory language does not specify which of the multiple carriers involved in a call must impose a separate toll charge in order for the call to be "telephone toll service." It simply requires that "there is made a separate charge."

Moreover, the 9th Circuit in *Peevey* adopted a very different analysis than did the 2nd Circuit in *Global NAPs II.* In *Peevey,* the 9th Circuit affirmed the CPUC's decision to ***align*** intercarrier compensation for VNXX traffic with the retail charging applicable to it. That is, in part because VNXX traffic is rated to the end user as local, not toll, the basic intercarrier compensation regime applicable to VNXX traffic is reciprocal compensation (or, technically, the FCC's "substitute" for reciprocal compensation, $0.0007/minute), not access charges.

While *Peevey* also approved the CPUC's imposition of some relatively modest call origination charges for such traffic, these were not "access" charges, which may only properly be associated with toll calls.[3] To the contrary, the CPUC called on the originating ILEC to absorb the costs of originating switching and originating transport for a distance of 12 miles (which the CPUC deems an appropriate "local" area),[4] As well as paying terminating compensation to the CLEC receiving the call. The CLEC is obliged to pay TELRIC-based high-capacity transport rates for transport beyond that distance. This represents the CPUC's effort to fairly allocate the costs of transport in the context of VNXX arrangements. It is not the imposition of "access charges" on VNXX traffic, which is what Qwest would like to accomplish here.[5]

In light of these differences between the 9th Circuit's analysis in *Peevey* and the 2nd Circuit's analysis in *Global NAPs II,* it is not surprising that Qwest would urge this Commission to rely on a 2nd Circuit case rather than a 9th Circuit case. Obviously, however, this Commission should be guided by *Peevey,* not *Global NAPs II,* and nothing in *Peevey* remotely suggests that the Commission should reject Level 3's proposal to use the definition that Congress actually used in the Communications Act to classify traffic as "telephone toll service" or not.

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[3] Section 153(16) of the Communications Act defines "exchange access" as being limited to the use of exchange services and facilities to originate or terminate "telephone toll service."

[4] The CPUC affirmed this ruling in its decision underlying *Peevey,* but actually established it in *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Decision D-02-06-076 (June 27, 2002)at 28.

[5] In this regard, Qwest's costs of transporting traffic from its end office switches to Level 3's central locations in a LATA are extremely modest.

6. Definition of "Traffic" (Issue No. 26; Section 4)

Given the near ubiquity of the term "traffic," it makes sense to include a definition of it. *See Level 3 Brief* at 33-34. Level 3 proposes that "traffic" would refer either to "telecommunications" or "information services" – both defined terms under the Communications Act. Including this definition would eliminate needless disputes with Qwest about whether particular "types" of traffic could be exchanged. *See id.* Qwest raises no cogent objection to any of these points. *See Qwest Brief* at 46-47. To the contrary, it takes the absurd position that tying language in the agreement to language Congress used in the Communications Act would "create confusion." *Id.* at 47. This could only be true if Qwest wants terms in the agreement to be used ***inconsistently*** with the language of the Communications Act. For the reasons stated in our opening brief, Level 3 urges the Commission to adopt Level 3's proposed definition of "traffic."

7. Definition of "UNE" (Issue No. 27; Section 4)

The disagreement on this issue is simple: Level 3's language recognizes that this Commission may identify UNEs that must be unbundled, beyond the FCC's minimum list of UNEs. Qwest claims that this Commission may not do so. *Qwest Brief* at 47-48. Qwest's argument is that, because the FCC has found that certain UNEs are no longer available and that states may not require an ILEC to provide ***those*** UNEs, states may not require ILECs to provide ***any*** UNEs that the FCC has not specifically authorized. *See id.* But as we already explained, this reads Section 251(d)(3) and Section 261(c) out of the law. *Level 3 Brief* at 28-30. Level 3 rests on that discussion here and urges the Commission to approve Level 3's language on this issue.