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April 20, 2007

**VIA OVERNIGHT DELIVERY AND WEB FILING**

Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive, S.W.
P. O. Box 47250
Olympia, WA 98504-7250

Attention: Executive Secretary

Re: Filing on Behalf of Level 3 in Docket UT-063006

Dear Executive Secretary:

I am filing today electronically Level 3's Response to Qwest's Petition for Review of Arbitrator's Report and Decision in Docket UT-063006. I am also sending by overnight mail an original and 3 copies of the filing. Electronic filing and submission has been previously authorized in this docket, together with a one-day extension for paper copies, in the PreHearing Conference Order issued on March 13, 2006. If you have any questions, please don't hesitate to contact me or Richard Thayer at 720-888-2620. Thank you so much for your attention to this matter.

Very truly yours,

Mary B. Tribby
Holland & Hart LLP

MBT:sc

Enclosures

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**BEFORE THE WASHINGTON STATE**
**UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of the Petition of:<br><br>LEVEL 3 COMMUNICATIONS, LLC,<br><br>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<br>..... | ) | DOCKET UT-063006<br><br>LEVEL 3'S RESPONSE TO QWEST'S PETITION FOR REVIEW OF ARBITRATOR'S REPORT AND DECISION |

Level 3 Communications, LLC ("Level 3") hereby provides its Response to Qwest Corporation's ("Qwest's") Petition for Review ("Petition") of certain decisions in Order 10, the Arbitrator's Report and Decision ("Decision"). Qwest's Petition raises no issues not already argued and briefed by the parties previously in post-hearing briefs. Instead, Qwest attacks the status quo—criticizing the way things have always been done in Washington and berating decisions supported by law, technology, and the goals of this Commission. Qwest presents a solution in search of a problem. Level 3, to the contrary, supports the Commission's current and prior practices and decisions which have properly resulted in solutions supporting competition and meaningful access to internet services. Level 3 encourages the Commission not to deviate from its prior direction, but to remain true to the correct and timeless approach.

For the most part, Level 3 incorporates herein by reference and relies upon the arguments set forth in its Opening and Reply briefs on the oft-briefed issues raised in Qwest's Petition.

Level 3 does address anew, however, the recent ruling by the United States District Court for the Western District of Washington at Seattle ("District Court")[1] regarding compensation for Virtual NXX ("VNXX") internet service provider ("ISP") traffic which bears upon the Arbitrator's Decision and Qwest's Petition.

## I. THE RECENT APPELLATE DECISION CONFIRMS THE COMMISSION'S PRIOR DECISIONS AND ITS FULL AUTHORITY OVER ISP-BOUND TRAFFIC, INCLUDING VNXX.

This Commission has consistently held, without exception, that ISP-bound traffic is a cost-causer and that it should be subject to a uniform compensation regime regardless of whether it is local, toll, long distance, or via VNXX. The Commission knew this to be the proper approach in 2001,[2] 2003,[3] and 2006.[4] It remains the only correct approach in 2007. These prior decisions recognize that the competitive telecommunications market simply cannot survive if the

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[1] *Qwest Corp. v. Washington State Utilities & Transportation Commission,* Case No. C06-956-JPD (W.D. WA. Seattle April 19, 2007) ("Appellate Decision") reversing and remanding Docket UT-053039, Order 06, Order Denying Petition for Reconsideration (June 9, 2006) ("*Level 3 Final Order*").

[2] *In the Matter of the Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc.'s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("ISP Remand Order").

[3] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252,* Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision at ¶ 7 (February 28, 2003) ("*CenturyTel Order*").

[4] *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006) at 24; and Order No. 6 Denying Petition for Reconsideration (June 9, 2006) at 7 (*"Order No. 5"*).

country does not move to the uniform compensation regime promoted by the FCC.[5] There exists no legitimate argument against this critical goal.

While Qwest will undoubtedly argue that the recent Appellate Decision requires the Commission to change its well established position with respect to ISP-bound traffic, the Decision does no such thing. In fact, the Court expressly declines to express an opinion on the various policy arguments related to ISP-bound traffic, properly determining that it "lack[s] the specialized expertise" to do so.[6] Instead, the Court upholds the Washington Commission's jurisdiction over VNXX traffic and determines simply that the Commission must provide justification beyond mere citation to the *ISP Remand Order* for its ruling requiring that the FCC's interim compensation scheme applies to VNXX traffic.[7] The Court expressly acknowledges, on more than one occasion, that it takes no issue with the decision, only with the basis for the decision:

> However, the holding of this Court is limited. By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue. On remand, the WUTC is simply directed to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within *or* outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion. It is plausible that the ultimate conclusion reached by the WUTC will not change.[8]

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[5] *See, e.g., Level 3 Final Order,* pp. 7, 8, 12.

[6] Appellate Decision, p. 25.

[7] Appellate Decision, p. 26.

[8] Appellate Decision, p. 26.

And, "[w]hile the WUTC likely had the authority to require interim rate regime compensation for VNXX traffic, the route it chose to arrive at that conclusion violated federal law."[9]

Thus the Appellate Decision, like every other decision issued on the subject of compensation for ISP-bound traffic, recognizes state commission jurisdiction over the proper classification of, and compensation for, ISP-bound traffic, including VNXX. *See* Appellate Decision, p. 17 (the *ISP Remand Order* does not "remove the authority granted state commissions to determine" the proper treatment of ISP-bound traffic); *Verizon California, Inc. v. Peevey,* 462 F.3d 1142, 1158 (9th Cir. 2006) (holding that *ISP Remand Order* did not preempt state commissions from imposing intercarrier compensation for ISP-bound traffic); *Global NAPs Inc. v. Verizon New England,* 449 F.3d 59, 75 (1st Cir. 2006) (holding the FCC did not preempt state regulation of intercarrier compensation for ISP-bound calls, including VNXX calls); *Global NAPS, Inc. v. Verizon New England,* 454 F.3d 91, 99 (2nd Cir. 2006) (finding that FCC did not preempt state jurisdiction over ISP-bound traffic).[10] There is no basis, therefore, in the Appellate Decision or anywhere else, for the Commission to reverse the well-established policy in

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[9] Appellate Decision, p. 25. Of course, it should be remembered that the Appellate Decision is based solely on the language of the Commission's decision in Docket UT-980578, and not that of the Arbitrator's Decision in this docket. It is certainly feasible, given the language in paragraphs 25, 30 and 38 of the Arbitrator's Decision, as well as the 9th Circuit's approval of the California Commission's similar decision in *Verizon v. Peevey,* 462 F.3d 1142, 1155 (9th Cir. 2006) that the Arbitrator's Decision in this case is sufficiently descriptive in its discussion of VNXX traffic that the Decision would not suffer the same fate as the earlier decision just reviewed by the Appellate Court.

[10] These decisions, uphold this Commission's own prior determinations of its proper jurisdiction over this type of traffic. *See, e.g., Level 3 Final Order*, p. 11. This Commission has recognized on numerous prior occasions that it has jurisdiction over ISP-bound traffic, regardless of whether it terminates inside or outside of a local calling area:

> Finally, the Commission determines that decisions by the FCC regarding compensation for traffic bound for Internet service providers do not divest the Commission of jurisdiction over this matter....Our analysis and result leave no [regulatory] gap and are consistent, at least, with the FCC's recent suggestion that state commissions should continue to arbitrate carrier-to-carrier disputes including disputes that involve ISP-bound traffic.

*CenturyTel Order,* pp. 4, 6.

Washington regarding VNXX traffic. To the extent it needs additional justification, however, to support its prior rulings, all of the following arguments support the traditional treatment.

## II. LEVEL 3'S IN-STATE NETWORK FACILITIES USED FOR ISP-BOUND CALLS SUPPORT THE COMMISSION'S PRIOR DECISIONS.

The evidence in this case establishes that the VNXX calls at issue use facilities Level 3 has built in the state over which the Commission has obvious jurisdiction. The only difference between the way Qwest carries its own calls and Level 3 carries VNXX calls is that Level 3 does not necessarily have all types of equipment throughout every single local calling area in the state. No CLEC would build such an inefficient network. Instead, in order to keep customer's costs affordable, Level 3 uses centrally located equipment that performs numerous functions on an integrated basis. Nevertheless, Level 3's network in Washington does extend into nearly every local calling area in the state.[11] Level 3's network provides local connectivity for more than 99% of the traffic it exchanges with Qwest, including ISP-bound calls.[12] Level 3 also serves the entire state via switching facilities located in Seattle.[13]

The Commission has recognized the local network architecture that is in place to transport VNXX calls in issuing its prior decisions. In rejecting arguments that rating of ISP-bound traffic must depend upon the location of an ISP's modem banks, or the ISP "customer" itself, and fully aware of decisions reaching the same conclusion in Arizona, Minnesota and

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[11] Exhibit 32 in this docket showed Level 3's extensive deployment of transport and collocation facilities throughout the state.

[12] *See* Exhibit 42, Reply Testimony of Mack Greene, at MGD 5H.

[13] *See* Exhibit 32-T (Level 3 Network Interconnection and Architecture in Washington (refiled 8/31/06); Transcript of Technical Conference at 115:22-25; 116:1 (Level 3 architecture represented in Ex. 32 in place since 1999).

North Dakota, the Commission has said: "ISP-bound traffic is not subject to different interconnection requirements than local traffic..."[14] Further, that "[t]he FCC's *ISP Remand Order* applies to all ISP-bound traffic, regardless of the point of origination and termination of the traffic.[15] Other 9th Circuit decisions are in accord. *See e.g., Peevey, supra; U S West v. MFS Intelnet,* 193 F.3d 1112, 1122-23 (9th Cir. 1999) (upholding WUTC ruling requiring compensation for ISP-bound traffic and rejecting the notion that because ISP-bound traffic was interstate, it could not be treated as local for compensation purposes); *Pacific Bell v. Pac-West Telecomm,* 325 F.3d 1114, 1130 (9th Cir. 2003) (upholding CPUC ruling requiring compensation for ISP-bound traffic and rejecting argument that "ISP-bound traffic is not local traffic under federal law"); *Verizon Northwest v. Electric Lightwave,* 2003 U.S. App. LEXIS 6720 (9th Cir. 2003) (affirming Oregon PUC decision to require compensation for ISP-bound calls); *Verizon Northwest v. Worldcom,* 2003 U.S. App. LEXIS 6724 (9th Cir. 2003) (affirming this Commission's decision requiring compensation).

The Commission should exercise jurisdiction over Level 3's facilities in the state and the ISP-bound traffic carried over those facilities in the way it always has:

> The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state....[16]

This Commission's jurisdiction encompasses telecommunications facilities in the state, regardless of what kinds of calls are carried over them. *See, e.g., RCW 80.36.080; 80.36.160;*

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[14]CenturyTel Order, ¶ 35

[15] *Order No. 5,* p. 24.

[16] *CenturyTel Order,* p. 9.

*80.36.260; 80.04.160.* This parallels the way the Commission regulates electricity, maintaining jurisdiction over electric power generation facilities built within the state by utilities subject to Commission jurisdiction, regardless of whether that electricity is ultimately flowed, used or consumed entirely within the state or partially outside the state. *See, e.g., RCW 80.50.060.* In the same way, the Commission retains jurisdiction over in-state facilities used for ISP-bound traffic, regardless of where some of those calls might ultimately terminate. The Commission should continue to assert its jurisdiction to hold that VNXX calls--which may be rated as local but are delivered outside the originating local calling area—be compensated at a single rate based on the call's dialing pattern and end user rating rather than the call's physical routing. As *Peevey* acknowledges, "it is not unusual" to "separate" how calls are treated for rating purposes from their geographical end points.[17]

## III. OTHER STATES HAVE ALSO LONG TREATED ISP-BOUND CALLS LIKE LOCAL CALLS, AND ILECS HAVE ACKNOWLEDGED THAT ALL ISP-BOUND CALLS SHOULD BE TREATED ALIKE.

The Arbitration Decision remains true to the way ISP-bound traffic, including that used for VNXX calls, has been treated across the country. Long before the ILECs artificially created the categories of VNXX or FX calls specifically, states acknowledged the in-state network facilities used to carry such calls and determined that **all** ISP-bound calls should be compensated like local calls rather than like long distance calls.[18] ILECs too acknowledged the facilities used

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[17] *Peevey,* 462 F.3d at 1157.

[18] Of course, since VNXX has specifically become an issue before the states, numerous states, like Washington, have confirmed that VNXX too should be subject to the same compensation regime as other ISP-bound calls. 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*

to transport these calls and argued, unsuccessfully, that all ISP-bound calls should be treated like long distance calls. Nothing in the architecture has changed since these arguments were made. What does not exist historically, and should not be newly created today, is a decision segregating "local" from "non-local" ISP-bound calls.[19] No logical basis exists for such a dichotomy.

At the very height of the controversy over ISP-bound traffic, more than 20 states in 1999[20] and 33 states by 2000[21] had ruled that ISP-bound traffic was indeed local and subject to

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*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).

[19] Despite the position it takes in this case that "local" and "non-local" ISP-bound calls should be treated differently, Qwest has recently reached a voluntary agreement with Verizon whereby it has agreed to forego access charges and to compensate Verizon for all ISP-bound and VOIP calls, including those that are "non-local." *See Qwest Corporation v. Level 3 Communications, LLC, Pac-West Telecomm, Inc., Northwest Telephone, Inc., TCG Seattle, Electric Lightwave, Inc., Advanced Telecom, Inc. D/B/A Eschelon Telecom; Inc., Focal Communications Corporation, Global Crossing Local Services, Inc., And MCI Worldcom Communications, Inc.*, Docket No. UT-063038, Response of Commission Staff to Qwest and Verizon's Proposed Partial Settlement (March 19, 2006) ("However, the agreement does not limit the use of VNXX to ISP-bound traffic, but expressly authorizes the use of virtual NXX arrangements for any customer who might want the ability to receive calls from (and perhaps to place calls to) a physically distant local calling area without incurring toll charges.") In light of this agreement, the Commission should view very skeptically Qwest's objections to treating all ISP-bound traffic as subject to the FCC's interim compensation rate.

[20] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC* Docket 99-68, Comments of California Public Service Commission, pp.1-2 (April 12, 1999) *available at* http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006744069 **(Over twenty states, including California, have treated such [ISP-bound] traffic as local**, and subject to the payment of reciprocal compensation by the local exchange carrier ("LEC") to a competitive local carrier ("CLEC") whose lines the ISP has purchased.)

[21] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC* Docket 99-68, Comments of California Public Service Commission, pp.1-2 (July 21, 2000) *available at* http://gullfoss2.fcc.gov/prod/ecfslretrieve.cgi?native or pdf pdf&id_document 6511359905. **("To date, thirty-three states, including California, have treated ISP-**

TELRIC-based reciprocal compensation rates. At the time such decisions were made, these rates were many times higher than the seven one-hundredths of a cent Level 3 is allowed to collect today under the FCC's interim compensation arrangement. The Washington Commission concurred with these states in the majority, holding that "regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost."[22] And further: "that one reason for our success has been that we follow a simple rule: Set the prices for interconnection and unbundled elements based on costs. Mandatory bill and keep would be a dramatic departure from this policy. It would require that companies terminate Internet-bound calls at no charge even though those calls indisputably have costs associated with them."[23]

The 33 states who rejected arguments by Qwest (as well as Verizon, SBC, and BellSouth) in applying reciprocal compensation to ISP-bound traffic understood, as does Washington, that the transport facilities used for such traffic were local,[24] modem banks may be local,[25] customers

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**bound traffic as local,** and subject to the payment of reciprocal compensation by the local exchange carrier ("LEC") to a competitive local carrier ("CLEC") whose lines the ISP has purchased. Two courts of appeals have affirmed a state's authority to treat ISP-bound traffic as local, and thus eligible for reciprocal compensation. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas,* 208 F.3d 475 (5th Cir. 2000); *IllinoisB ell Telephone Co. v. Worldcom Technologies, Inc.,* 1999 U.S. App. LEXIS 20828 (7th Cir. 1999). The D.C. Circuit in turn has rejected the FCC's characterization of ISP-bound traffic as interstate.".

[22] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC* Docket 99-68, Washington Utilities and Transportation Commission Letter to Chairman William Kennard, p.1 (December 14, 1999) *available at:* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512258320. The Commission's view remains the same today given that its rules make no distinction between local and intrastate long distance, but charge terminating access for both at TELRIC rates. WAC 480-120-540.

[23] *Id.* at p. 2.

[24] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket 99-68, Comment of Texas Public Utilities Commission, p.3, n. 6 (April 9, 1999) *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743827. ("[I]f the FCC's investigation regarding the tracing of traffic concludes that local traffic cannot be cost-effectively separated from dial-up ISP-bound traffic, then the FCC should consider applying **any rules it develops for ISP-bound traffic** to **local, non-ISP-bound traffic,** as well.")

may be local, or that the service itself was economically local (i.e., providers did not charge per-minute toll rates and services were accessed via locally-dialed numbers).[26] As the Wyoming Commission said "[t]he terminating function performed on an ISP-bound call is essentially and *operationally identical* to all other local traffic." They concluded that carriers involved in terminating such calls should be compensated accordingly.[27] Throughout 1999 and 2000, each ILEC argued to the contrary that local reciprocal compensation should not apply because, more often than not, CLECs deployed equipment on a regional basis and ISPs collocated at *CLEC switches,* rather than in every local calling area.[28] For example, Qwest's expert, Dr. William Taylor, stated:

> Unlike CLECs, ILECs must be prepared to provide local service to any or all such customers, regardless of their usage or location. In

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[25] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket 99-68, Comment of Indiana Utility Regulatory Commission, p. 6 (April 12, 1999) *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743906. ("In Indiana, many end users subscribe to an **ISP that is located in another exchange.** Rather than paying toll charges to contact the ISP's server, these customers use Extended Area Service (EAS) to reach the ISP. EAS service, which effectively expands the end user's local calling scope, is provided at an averaged monthly rate, thus making the call to an ISP more affordable for rural customers.")

[26] The nation's least populous and largest state, which incidentally is a single-LATA state, noted that "the rulings have been **unanimous** -- traffic bound for an ISP is local in nature and subject to reciprocal compensation. In reaching this decision, the state commissions generally found that the network functionalities employed and the costs incurred for the transportation and termination of an ISP-bound call are the ***same*** as those incurred with respect to other local calls. Therefore, theoretically and actually, the compensation mechanisms and ***compensation rates for local and ISP-bound traffic should not differ."*** *See In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket 99-68, Comments of Wyoming Public Service Commission, pp.1-2 (April 12, 1999) *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006943766.

[27] *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 and 99-68; Reply Comments of the Wyoming Public Service Commission, p. 2 (April 27, 1999).

[28] In a section entitled "Sections 251 and 252 are inappropriately applied to **Internet bound traffic which is not, and has never been, 'local.'"** SBC reminded the FCC that SBC had rejected any attempt to rate ISP-bound traffic as local going back as far as 1997: "SBC does segregate Internet-bound traffic, both to assign it to the **interstate** jurisdiction and to **remove it from local reciprocal compensation billing.** By its actions, SBC clearly indicated its belief that **Internet-bound traffic is interstate, not local,** and never voluntarily agreed to pay local reciprocal compensation for this usage." *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket 99-68, Comment of SBC, p.9-13 (April 12, 1999) *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743796.

> contrast, the incremental cost of an ISP-bound call does ***not*** reflect such a composite. ***ISPs can place their equipment in high-density, central business locations and frequently can collocate equipment in the CLEC's switch.*** Transport costs for such calls will be lower than for an average of all traffic terminating within the local exchange.[29]

This material was not lost in the record before the agency; instead, the FCC ***cited to this specific Qwest filing*** in the *ISP Remand Order* at ¶ 92 n.189.[30] The FCC further noted the submission of Mr. Fred Goldstein, an expert filing on behalf of a CLEC, describing "the CLEC reduction of loop costs through collocation" by using ISP equipment with centralized CLEC switches. The FCC also acknowledged SBC's comments that (among other things) respond to Mr. Goldstein:

> [I]t has become ***routine practice*** for CLECs to assign NXX codes to switches that are nowhere near the calling area with which that NXX is associated. The CLECs then market themselves to their ISP customers on this basis, boasting that ***the ISP's subscribers will be able to connect to the ISP through a local call.***[31]

Similarly, Bell Atlantic[32] noted that "[h]istorically, state regulators in many jurisdictions have applied to Internet-bound traffic the same reciprocal compensation rates that are used for local

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[29] *See* Letter from Melissa Newman, U S West, to Magalie Roman Salas, Secretary, FCC, Attachment at 8 (Dec. 2, 1999) (emphasis added). These materials underlying the ISP Remand Order are easily accessible by means of the FCC's web site. See http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi.

[30] Of course, Qwest makes these arguments despite the use of its own FX service for which it receives reciprocal compensation from other carriers for locally dialed calls. As argued by Level 3 before, not allowing Level 3 the same would be anti-competitive and discriminatory, in violation of Washington and federal law.

[31] Comments of SBC Communications Inc., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 (filed July 21, 2000) at 43 (emphasis added). Again, these materials are available for review at the FCC's website. *See* note 43, *supra.*

[32] At the time of filing these comments the Bell Atlantic companies ("Bell Atlantic") were: Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Minnesota, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

traffic. **Internet traffic,** however, is **very different from local calls."**[33] It further insisted that **"any federal rules would apply to all Internet traffic."**[34] Indeed, "[n]either the IP address of the [ISP] host nor its domain name links the host to a specific geographical location."[35]

Obviously, none of the arguments Qwest makes are new, nor is there anything novel in the way these calls are carried. Instead, the WUTC's repeated rulings that all ISP-bound traffic is compensable, and the sound policy justifications for applying a unitary rate to ISP-bound traffic, are as true today as ever. There is absolutely no legal, technological or policy justification for suddenly dividing the world into "local" and "non-local" ISP-bound traffic after years of industry and regulator consensus that this traffic cannot be jurisdictionally separated. Level 3 urges the Commission to affirm Level 3's right to compensation for all ISP-bound traffic at the FCC's uniform rate of seven one hundredths of a cent per minute. This is the only decision that can serve the Commission's goals of ensuring that customers pay only reasonable charges for

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[33] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Comments of Bell Atlantic, p.3, (April 9, 1999) available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743790. (emphasis added).

[34] *Id* at p. 8. (emphasis in original).

[35] Hosts that are connected to the Internet **can be located anywhere.** Indeed, the fact that they **are not tied to a particular geographic location** represents one of the fundamental values of the Internet. Neither the IP address of the host nor its domain name links the host to a specific geographical location. Hence, there is **no practical means to identify where the host is physically located.** Neither the ISP's subscriber nor the ISP has any technical or operational tools that would enable them to determine which communications initiated by the subscriber or received by the subscriber are related to hosts that are located within the same local areas as the ISP's local server or in another state or in another country. **The dispersion of servers world-wide** and the lack of duplication attests to the fact that use of the Internet will invariably involve substantial interstate communications. *See In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket 99-68, Comment of BellSouth Corporation (April 12, 1999) *available at:* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006743785; *see also, e.g.,* Level 3 Opening Brief at pp. 5-6; *see also Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 92, n. 189 (2001) (Noting that Ameritech and US West both complain that CLECs can reduce transmission costs by locating their switches close to ISPs.)

telecommunications, and promoting diversity of telecommunications supply and products throughout the state. *See RCW 80.36.300.*

## IV. COST CAUSATION PRINCIPLES ALSO SUPPORT THE ARBITRATOR'S DECISION.

In addition to the history and in-state facilities supporting a decision compensating Level 3 at a uniform rate for all ISP-bound calls, simple cost causation principles support the same. The only thing Qwest must do to carry ISP-bound calls is to take the traffic from a local calling area to a Level 3 Point of Interconnection ("POI"), just as with any other local call. Qwest's costs of transporting this ISP-bound traffic originating **anywhere** in the state to Level 3's switching facilities in Seattle, are only **eight one millionths** of a cent per minute of use.[36] This is true because Qwest's costs of termination are affected by where Level 3 picks up and delivers ISP-bound and VOIP traffic, rather than where equipment within Level 3's network is located. In other words, instead of Qwest having to haul the call back to the calling party's local area—which would be extremely inefficient—Level 3 delivers the calls to the ISP from a central location. This avoids needless duplication of facilities, without increasing Qwest's costs in any way. Thus, to the extent VNXX traffic from Qwest originates in any local calling area where Level 3 has a POI, it is punitive to make Level 3 pay Qwest for transporting the traffic from a particular end office within that calling area to the location within the same calling area where Level 3 has a POI. And, if the traffic originates in another local calling area, Level 3 should only have to pay from the edge of the originating local calling area to the point where Qwest hands traffic off to Level 3.

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[36] *See* Exhibit 31-T, Direct Testimony of Mack Greene, p. 21.

In effect, the Commission should ignore the precise originating source of all calls in computing compensation. The actual place of origin of any type of call is irrelevant while the place the call actually enters and exits a terminating carrier's network (i.e., the POI) to the destination of the call should form the basis for the bill. The correct compensation for the POI-to-destination model should be set at the FCC rate for all ISP-bound traffic.

## V. THE COMMISSION HAS PROPERLY DETERMINED THAT TRADITIONAL CATEGORIES OF LOCAL AND LONG DISTANCE CALLS SIMPLY HAVE NO PLACE IN THE ERA OF ISP-BOUND TRAFFIC, AND DO NOT ENCOURAGE ACCESS TO INTERNET SERVICES.

At its core, the dispute between Level 3 and Qwest regarding compensation for ISP-bound traffic determines whether consumers in Washington can obtain affordable dial-up access to the Internet to send and retrieve e-mail, obtain information from the Web, make on-line purchases, etc. Level 3 has deployed an efficient network architecture, discussed above, which allows ISPs to receive dial-up calls from around the state through a centralized location, rather than having to deploy redundant equipment in numerous dispersed facilities. This allows ISPs to keep their dial-up charges affordable for the hundreds of thousands of consumers who either cannot afford, or do not have access to, high speed Internet access offered by telephone and cable companies.[37] This is the kind of competition that the Commission wishes to, and should continue to, encourage.

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[37] According to a recent study by Pew Research, which indicated that 22% of Americans rely on dial-up, but of those, approximately 60% said they were not willing to switch to broadband if available. ("Home Broadband Adoption 2006" Pew and the American Life Project, *available at* http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf). Of the 60% that did not wish to switch from broadband, the report noted that they were older and have lower incomes than dial-up users who express a desire to switch. (Id. at iv.). Additionally, this same report notes that 61 million Americans in December 2005 said they have heard of VoIP services, an 86% increase from the 33 million who said this in February 2004, but that VoIP is still at the early stage of adoption. (Id. at iii.).

In looking at the non-traditional nature of ISP-bound calls, it is not surprising that no Commission has entirely satisfied the appellate courts in explaining the proper compensation for such calls. In truth, neither the traditional concept of a local nor a long distance call applies in its entirety to ISP-bound calls. Rather, as state commissions nationwide have recognized since 1996, these calls are essentially local, they are sold as local service, use local numbers, and use locally deployed equipment but appear to be geographically interexchange because such calls never really go to the ISP at all. Instead, the calls communicate with a global network of computers known as the Internet. In other words, the calls begin with a local consumer making a local call, but, as with all things related to the Internet, they can end anywhere. As the FCC found, consumers dialing into the Internet are "interacting with a global network of connected computers, not with the ISP itself, and thus such calls are not truly local.[38] Nor does VNXX clearly fit the model of a long distance call, where one LEC delivers a call to an interexchange carrier who then transports the call over a "long" distance and then hands it off to another LEC for completion.[39] Instead, it looks much more like a local call where one LEC hands off a call to another LEC.

Given the hybrid nature of these calls, the FCC, like this Commission and many other states, has established a compensation regime for all ISP-bound traffic that generally parallels that applicable to normal "local" traffic. This is not because the FCC believes such calls are local, but because the FCC understands that carriers' costs of handling "local" telephone calls

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[38] *ISP Remand Order,* ¶¶ 18, 58, 63.

[39] *See Implementation of the ocal Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996) at ¶¶ 1034-35; *Bell Atlantic v. FCC,* 206 F.3d 1, 5 (D.C. Cir. 2000).

and ISP-bound calls are essentially identical.[40] Similarly, the Ninth Circuit in *Peevey* has found that because VNXX calls are dialed and rated as local, and end users charged on a local basis, treating them as local for intercarrier compensation is "consistent with ... industry-wide practice" and recognizes "essential differences between the ...network architectures" of ILECs and CLECs.[41] The Ninth Circuit further acknowledges that "the FCC itself [has] abandoned the distinction between local and interstate traffic as the basis for determining" whether reciprocal compensation applies.[42] There is no basis, therefore, for Qwest's argument that access charges should apply to ISP-bound calls, that compensation should not cover costs incurred in terminating such calls, or that the Commission's prior decision should not stand.

## VI. THE ARBITRATOR PROPERLY PICKED LEVEL 3'S LANGUAGE REGARDING ITS RIGHT TO SEEK HIGH-CAPACITY LOOPS AND TRANSPORT FROM QWEST

The Arbitrator correctly determined that Level 3's proposed language for Sections 9.1.1.4 and 9.1.1.4.1 governing rights and obligations with regard to access to high-capacity loops and transport in Qwest wire centers is more appropriate and should be included in the agreement, and that Qwest's proposed language in these sections and its proposed Section 9.1.1.4.2 should be rejected.[43] The Arbitrator's Decision is fully in line with the FCC's *TRO Remand Order*[44] as

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[40] *ISP Remand Order,* ¶¶ 77-94

[41] *Peevey,* 462 F.3d at 1155-56.

[42] *Pacific Bell v. Pac-West,* 325 F.3d 1114, 1130-31 (9th Cir. 2003).

[43] Qwest objects to this decision by deflecting attention away from the true impact of its proposed language. The differences between Level 3's and Qwest's proposed 9.1.1.4 and 9.1.1.4.1 lie only in two phrases/sentences added by Qwest and objected to by Level 3. Qwest incorrectly asserts that without its proposed language, Level 3's unbundling rights would be "unlawfully" expanded by "eliminating the 'impairment' requirement" and by "denying the Commission any role" in limiting such unbundling rights. Qwest's assertions are wrong. It is, in fact, Qwest's language that would make meaningless the FCC's impairment rulings by making Qwest the unilateral decision-maker regarding the impairment status of its wire centers.

well as this Commission's recent *Modified Interpretive Statement*.[45] The Arbitrator agreed that Level 3's language accurately reflects the FCC's "provision-then-dispute" requirement providing competitors access to high-capacity UNEs in ILEC wire centers.[46] Qwest's language, on the other hand, would effectively ensure the opposite effect by giving Qwest the ability to withhold provisioning of UNEs to which Level 3 may be lawfully entitled thus imposing both the burden of having to initiate a dispute with Qwest as well as creating business uncertainty because Level 3 would never be able to rely upon its own reasonably diligent inquiries into the availability of UNEs. All of this is contrary to the FCC's intent.

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[44] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("*TRO Remand Order*").

Generally speaking, authority is preserved to this Commission under Sections 251 and 252 of the Act to impose or enforce interconnection, unbundling or other requirements on Qwest. Section 251(d)(3) preserves states' traditional authority to regulate local telephone markets so long as state rules are consistent with requirements of, and do not substantially prevent implementation of, Section 251 of the Act. 47 U.S.C. § 251(d)(3). Additionally, Section 252(e)(3) provides that nothing shall prohibit states from establishing or enforcing other requirements of state law in ICAs. Further, it is widely held that in granting to this Commission the power to approve or reject interconnection agreements under Section 252, Congress included the power to interpret and enforce such agreements. *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (C.A.11 2003) ("the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts"); *see also E.SPIRE Communications, Inc. v. New Mexico Public Regulation Com'n*, 392 F.3d 1204, 1207 (10th Cir.(N.M.) Dec 21, 2004).

[45] In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State, *Modified Interpretative Statement Regarding Designation of Non-Impaired Wire Centers*, Docket UT-053025 (December 15, 2006) ("*Modified Interpretive Statement*"). The Commission determined in its that although Qwest would initially have to identify which wire centers it *believes* meet the FCC's non-impairment criteria, this Commission's role in implementing the FCC's criteria provides a "check" on Qwest's designation. *Id.* at ¶¶. 16-17.

[46] *See TRO Remand Order* at ¶ 234. The FCC made absolutely clear that Qwest "must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."

The Arbitrator's Decision also preserves this Commission's authority to review and approve Qwest's wire center designations as determined in the *Modified Interpretive Statement*.[47] It is Qwest's language which would in fact deny the Commission such authority by allowing Qwest to unilaterally implement its own designations prior to any Commission involvement – Qwest would simply have to add a new wire center to its "list" and it could then deny Level 3 access to UNEs in that wire center. Qwest's act of adding a wire center to the "list" and then denying access is effectively a "final determination" as to its impairment status from the standpoint of Level 3's ability to compete. The FCC's "provision-then-dispute" ruling is intended to prevent such discriminatory action. Qwest implies in its exceptions that its proposed language in 9.1.1.4 is necessary to give Level 3 rights of disputing actions taken by Qwest, but Level 3 already has such rights in the general terms of the agreement.

Similarly, Qwest's proposed language in 9.1.1.4.1 improperly places conditions on Level 3's access to UNEs that are contrary to the FCC's rules. As the Arbitrator recognizes, the FCC requires only that Level 3 certify that it has made a reasonably diligent inquiry into the impairment status of a wire center before ordering a high-capacity UNE.[48] There are no other conditions to be able to access high-capacity UNEs under FCC rules, but Qwest's proposed

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[47] There is no dispute that this Commission has the authority to determine the impairment status of a wire center, as even Qwest admits that "the Commission will make the final decision" regarding the availability of high-capacity UNEs in Qwest's wire centers. *See* Qwest Exceptions at ¶ 34. The FCC explicitly affirmed the states' authority to decide disputes over the impairment status of wire centers in the *TRO Remand Order* by making clear that such disputes would be brought before state commissions if dispute resolution procedures so provided in the parties' interconnection agreement. *TRO Remand Order* at ¶ 234. *See also BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (C.A.11 2003) ("the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts"); *E.SPIRE Communications, Inc. v. New Mexico Public Regulation Com'n*, 392 F.3d 1204, 1207 (10th Cir.(N.M.) Dec 21, 2004).

[48] *TRO Remand Order at ¶ 234.*

language in 9.1.1.4.1 would in fact impose additional conditions by giving Qwest the right to refuse provisioning of a UNE if Qwest alone believes the wire center meets the FCC's non-impairment thresholds. And as previously described, the FCC was clear in mandating the Qwest *must* provision a UNE ordered upon Level 3's certification. The Arbitrator's Decision on this issue is correct and should be approved.

Finally, the Arbitrator's Decision is further supported by this Commission's recent determination that if Qwest seeks to designate additional wire centers as non-impaired, Qwest "must notify the Commission of the proposed designation and submit data consistent with the interpretations in this statement," at which time the Commission will open a docket to consider the data.[49] Qwest's proposed language in 9.1.1.4 and 9.1.1.4.1 are clearly at odds with the Commission's *Modified Interpretive Statement* because it would allow Qwest to unilaterally implement a change in wire center status by refusing to accept new orders. Likewise, although Qwest asserts that it is unsure of the decision regarding Section 9.1.1.4.2,[50] Qwest's proposed Section 9.1.1.4.2 establishes a process by which Qwest will unilaterally implement new wire center designations contrary to the FCC's "provision-then-dispute" requirement as well as this Commission's *Modified Interpretive Statement*, all as described previously. The Arbitrator's decision should be approved.

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[49] *Modified Interpretive Statement* at ¶ 29.

[50] Qwest is incorrect that Section 9.1.1.4.2 is not addressed by the Arbitrator. The decision clearly approves Level 3's proposed language for the issue pertaining to Section 9.1.1.4.1, and Qwest's proposed 9.1.1.4.2 was a part of that issue. Even assuming arguendo that the Arbitrator's Decision does not directly address 9.1.1.4.2, the basis of the decision as to 9.1.1.4 and 9.1.1.4.1 support the conclusion that Qwest's proposed 9.1.1.4.2 should be rejected because it conflicts with the Commission's *Modified Interpretive Statement*.

## VII. CONCLUSION

The Arbitrator's Decision, and all prior Commission decisions holding that ISP-bound traffic, including VNXX, should be compensated at the same rate, are as legally and factually valid today as they ever were. Those decisions properly reflect the costs to terminate such calls but acknowledge that these calls are locally dialed, offered as local service, and supported by a local network architecture. In addition this Commission has never penalized carriers for not deploying additional equipment unnecessary to the provision of service. Rather, in accordance with sound public policy favoring a diverse array of service choices at the lowest possible price for Washington consumers, the Commission encourages the use of advanced equipment that packs stunning functionality into a single device. Thus, any requirement that Level 3 deploy very high functioning and extremely expensive devices that are necessary to support dialup Internet (but in Level 3's case simultaneously support VoIP calls) in any locations other than where it makes economic and network sense to use them –(a single device approximately 2 feet wide by 3 feet long supports 8,000 calls simultaneously) –simply because federal law on ISP-bound compensation is unclear would seriously undermine implementation of pro-consumer policy goals. Fortunately, the Commission has long determined that regardless of the imperfect fit between state law, federal law and technology, that the FCC's rate of $0.0007 for all ISP-bound traffic supports these policy goals while being extremely fair to all concerned. Thus, the Commission should hold to its prior decisions and adopt the Arbitrator's Decision with respect to the treatment of VNXX calls, and apply the FCC's interim compensation rate of $.0007 for all such calls. This decision provides for an efficient technology-neutral infrastructure, just as a decision allowing Level 3 to use interconnection trunks for all types of traffic does the same. Finally, the Arbitrator properly determined the rights and obligations regarding Level 3's right to

seek access to high-capacity UNEs, consistent with this Commission's and the FCC's relevant orders, and the decisions should be upheld.

RESPECTFULLY SUBMITTED this 20th day of April, 2007.

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## CERTIFICATE OF SERVICE

I certify that on April, 20, 2007, I served a copy of the foregoing document to the following by:

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