

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

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|--------------------------------------|---|---------------------------|
| In the Matter of the Petition of: |) | DOCKET UT-063006 |
| |) | |
| LEVEL 3 COMMUNICATIONS, LLC, |) | ORDER 12 |
| |) | |
| For Arbitration Pursuant to Section |) | FINAL ORDER DENYING LEVEL |
| 252(b) of the Communications Act of |) | 3'S PETITION FOR REVIEW; |
| 1934, As Amended by the |) | GRANTING IN PART AND |
| Telecommunications Act of 1996, and |) | DENYING IN PART QWEST'S |
| the Applicable State Laws for Rates, |) | PETITION FOR REVIEW; |
| Terms, and Conditions of |) | AFFIRMING IN PART AND |
| Interconnection with Qwest |) | MODIFYING IN PART |
| Corporation |) | ARBITRATOR'S REPORT AND |
| |) | DECISION |
| |) | |

1 **SYNOPSIS.** *The Commission modifies the Arbitrator's Report and Decision, Order 10 in this proceeding, as follows:*

- *Clarifying that the Commission will refrain from deciding the issue of how to apply the relative use factor until the Commission resolves the pending complaint in Docket UT-063038 and enters a remand order in Dockets UT-053036 and UT-053039.*
- *Clarifying that the Commission will refrain from establishing compensation for exchanging VoIP traffic under the agreement until the FCC establishes intercarrier compensation for VoIP traffic.*
- *Reversing the Arbitrator's decision on Qwest's proposed language for auditing Level 3's VoIP traffic, and adopting a modified version of Qwest's language.*
- *Adopting a modified version of Qwest's proposed language in Section 9.1.1.4.2 concerning designation of additional non-impaired wire centers.*

The Commission affirms the remainder of the Arbitrator's Report and Decision and requires the parties to file an interconnection agreement consistent with this Order within 30 days of the service date of this Order.

BACKGROUND

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

3 **APPEARANCES.** Erik Cecil, Regulatory Counsel, Broomfield, Colorado, and Scott
Porter, Regulatory Counsel, Tulsa, Oklahoma, Christopher W. Savage, Davis Wright
Tremaine, Washington, D.C., and Lisa F. Rackner, McDowell & Rackner PC,
Portland, Oregon, represent Level 3. Lisa A. Anderl, Associate General Counsel,
Seattle, Washington, Thomas M. Dethlefs, Senior Attorney, Denver, Colorado, and
Ted Smith, Stoel Rives LLP, Salt Lake City, Utah, represent Qwest.

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

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

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

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

¹ Public Law No. 104-104, 101 Stat. 56 (1996). A glossary of acronyms and terms used in this
Order is attached for the convenience of readers.

² WAC 480-07-630 and WAC 480-07-640.

- 8 The Commission held a technical conference in Olympia, Washington, on August 24, 2006, before Arbitrator Rendahl after the parties had filed direct and supplemental direct testimony.
- 9 The Commission held three days of evidentiary hearings from October 24 to October 26, 2006, in Olympia, Washington. The parties filed simultaneous initial briefs on December 12, 2006, and reply briefs on January 23, 2007.
- 10 On March 12, 2007, the Arbitrator entered Order 10, the Arbitrator's Report and Decision, resolving all contested issues. Level 3 and Qwest both filed petitions for review and responses to the petitions.
- 11 The procedural schedule in Order 10 included oral argument before the Commission on May 24, 2007, with a final order to be entered by June 15, 2007.
- 12 On May 22, the Commission cancelled the scheduled oral argument, finding argument unnecessary to resolve the issues after reviewing the Arbitrator's order and the parties' pleadings. On May 23, Qwest submitted a letter providing comments on Level 3's response to Qwest's petition for review, asserting misstatements in the response. The Commission rejected the comments on May 25 as procedurally inappropriate.
- 13 On May 25, Qwest filed with the Commission a motion for leave to file a reply and a reply to Level 3's response. In Order 11 in this proceeding entered on May 30, the Commission granted Qwest's motion for leave to file a reply and provided an opportunity for Level 3 to file a response. Level 3 filed its response on June 4.

MEMORANDUM

- 14 Level 3 and Qwest dispute the Arbitrator's decisions concerning (1) compensation for the exchange of virtual NXX, or VNXX,³ traffic bound for Internet service providers

³ VNXX traffic is telephone traffic that appears local based on the assigned telephone number. VNXX numbers have the same NXX prefix as the local calling area of an end-user customer, but

(ISPs), (2) compensation for the exchange of voice over Internet Protocol, or VoIP, traffic,⁴ (3) the type of trunking facilities used to transport combined local exchange and interexchange traffic, and (4) terms for unbundled access to high-capacity unbundled network elements, or UNEs.

1. Compensation for ISP-Bound VNXX Traffic

15 The primary issue in this arbitration is whether Level 3 and Qwest should exchange VNXX traffic under the parties' interconnection agreement, and if so, what terms, conditions and intercarrier compensation should apply to this traffic.

16 In Order 10, the Arbitrator resolved the question of an appropriate definition for VNXX traffic in the parties' agreement, but declined to resolve other issues concerning VNXX traffic.⁵ The Arbitrator refrained from addressing the propriety of VNXX traffic until the Commission resolves the issue in another docket pending before the Commission.⁶ In particular, the Arbitrator declined to address the issue of compensation for ISP-bound traffic, noting that the very question was pending before the United States District Court for Western Washington. In that case, Qwest sought review of the Commission's decision that the Federal Communication Commission's (FCC) *ISP Remand Order*⁷ established a compensation scheme for all ISP-bound traffic, no matter whether it is local, toll, or long distance.⁸ The Arbitrator also determined that the parties should apply a relative use factor to the traffic on

may terminate in a different calling area, local access and transport area (LATA), or state. *See* Order 10, ¶ 30.

⁴ VoIP is a relatively new technological development enabling persons with specialized customer premises equipment to originate and receive voice communications over the Internet. *See In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211, 19 FCC Rcd. 22404, ¶ 4 (Nov. 12, 2004) [Hereinafter *Vonage Order*].

⁵ Order 10, ¶¶ 29-50.

⁶ *Id.*, ¶ 47. Qwest and Level 3 are currently arguing the issue of whether to prohibit VNXX traffic in a complaint Qwest filed against nine CLECs in Docket UT-063038.

⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd. 9151 (2001) [Hereinafter "*ISP Remand Order*"].

⁸ *Id.*, ¶ 48. On April 9, 2007, a magistrate for the United States District Court for Western Washington reversed and remanded the Commission's decisions in Dockets UT-053039 and UT-053036, involving Qwest, Level 3 and Pac-West Telecomm, Inc.

transmission facilities, but relying on an earlier Commission decision, determined that that ISP-bound VNXX traffic should be included in the calculation.⁹

17 ***Compensation for ISP-bound VNXX traffic.*** Since the Arbitrator entered Order 10, the magistrate for the federal district court entered a decision reversing and remanding the Commission's decision on compensation for ISP-bound traffic.¹⁰ Qwest seeks review of the Arbitrator's decision on the issue of compensation for ISP-bound traffic, asking the Commission to resolve the issue now that the magistrate has entered a decision. Qwest repeats arguments it has made in prior dockets and in earlier briefs in this proceeding.¹¹ Qwest also seeks review of the Arbitrator's decision on the relative use factor. Level 3 argues that the Commission's decision on compensation for ISP-bound VNXX traffic is appropriate and asserts that the magistrate's recent decision supports Level 3's position on the issue.¹²

18 In its reply, Qwest asserts that Level 3 misstates certain facts about the issue of compensation for ISP-bound traffic in its response to Qwest's petition for review. Level 3 responds, disputing Qwest's assertions.

19 We uphold the Arbitrator's decision to refrain from deciding here the issue of compensation for ISP-bound VNXX traffic. We recognize that the federal magistrate has reversed and remanded our decision on compensation for such traffic in another case. It would not be appropriate, however, to resolve that issue in this arbitration proceeding. In addition, before we can address the issues presented on remand and in this proceeding, we must first resolve the underlying issues concerning the nature and propriety of VNXX traffic presently before us in Qwest's complaint in Docket UT-063038. After we resolve that matter, we will address the issues identified in the magistrate's order concerning compensation for ISP-bound VNXX traffic. If the parties have not negotiated terms for their interconnection agreement after the Commission enters decisions in those two proceedings, we will then address any

⁹ *Id.*, ¶¶ 51-57.

¹⁰ *Qwest Corp. v. Washington State Utils. and Transp. Comm'n*, Case No. C06-956-JPD, Order Reversing and Remanding the Final Decisions of the WUTC (West. Dist. WA, April 9, 2007).

¹¹ Qwest Petition, ¶¶ 2-17, Qwest Response, ¶¶ 5-6.

¹² Level 3 Response at 2-16.

remaining questions on compensation for ISP-bound VNXX traffic in this proceeding.

20 **Relative use factor.** An ILEC may charge a CLEC for the use of transmission facilities, and will reduce or credit the amount the CLEC must pay by the CLEC's relative use of the facilities.¹³ Under this rule, a relative use factor is applied to the traffic in order to determine the CLEC's use of the facility. As discussed above, the Arbitrator determined that the parties should apply a relative use factor to the traffic on transmission facilities, and relied on an earlier Commission decision to find that ISP-bound VNXX traffic should be included in the calculation.¹⁴

21 Qwest argues that ISP-bound traffic should not be included in the relative use factor calculation and that the Arbitrator's decision is based on an erroneous interpretation of federal law.¹⁵ Level 3 does not address this issue in its response.

22 After reviewing the Arbitrator's decision, we uphold the decision to include a relative use calculation in the agreement. The FCC's rules allow for the calculation of relative use when determining how to allocate the cost of transmission facilities between ILECs and CLECs. However, we modify the order to provide that the Commission will refrain from deciding how to apply a relative use factor until the issues of classification and compensation for VNXX traffic, and compensation for ISP-bound traffic, have been resolved.

2. Combining Traffic on Two-Way Trunks

23 Level 3 seeks to combine local exchange and intrastate toll traffic with interstate toll or interexchange traffic so that it may terminate long distance traffic in addition to ISP-bound and VoIP traffic on the same two-way trunks.¹⁶ The parties dispute whether Level 3 may combine this traffic on Qwest's Local Interconnection Service

¹³ See 47 C.F.R. § 54.709(b).

¹⁴ *Id.*, ¶¶ 51-57.

¹⁵ Qwest Petition, ¶¶ 18-25.

¹⁶ Two way trunks are communication lines between two switching systems used to transmit traffic in both directions, i.e., to and from carriers' switches and networks. See Newton's Telecom Dictionary, 19th Edition, Newton, Harry, CMP Books (2003) at 825, 831.

(LIS) trunks, trunks designed for local exchange service, or on Qwest's Feature Group D (FGD) trunks, designed for switched access or interexchange traffic.¹⁷

- 24 The Arbitrator rejected Level 3's proposal to combine traffic on LIS trunks and use a factors-based analysis to determine carrier billing and charges. The Arbitrator determined that while it is technically feasible to combine traffic on both LIS and FGD trunks, Level 3's proposal would have imposed significant costs on Qwest to reconfigure LIS trunks to record traffic for billing purposes.¹⁸ The Arbitrator also found that implementing Level 3's proposal would affect billing obligations Qwest has with other CLECs and that accurate recording and billing of interexchange calls is important for establishing trust between the two carriers under the agreement.¹⁹
- 25 Level 3 seeks review of the Arbitrator's decision, asserting the order imposes an unlawful, arbitrary and discriminatory regime, forcing Level 3 to absorb unnecessary costs and inefficient network arrangements.²⁰
- 26 Level 3 asserts that combining traffic over local interconnection networks, such as LIS trunks, is a technically feasible method of interconnection that other ILECs in other jurisdictions have allowed. Citing an FCC rule, Level 3 argues that if one ILEC uses a method of interconnection, an ILEC seeking to avoid using that method must prove why it is not technically feasible.²¹ Level 3 also argues that its factors-based method for billing - performing a traffic study and billing based on the percent of local or interexchange use - is permissible and technically feasible.²²

¹⁷ Qwest created LIS trunks specifically for the exchange of local traffic to connect local exchange carriers to other local exchange carriers. *Brotherson, TR 195:5-6*. Feature Group D trunks are trunk groups connecting interexchange carriers to a local exchange carrier with software designed to route traffic to a customer's presubscribed long distance carrier and to record data about each call which is then transmitted to Qwest's billing systems. *Brotherson, TR 195: 1-2; Linse, TR 235:8-22, 245:5-13*. LIS trunk groups do not include the same recording and billing capabilities. *Linse, TR 249:1 - 250:7*.

¹⁸ Order 10, ¶ 76.

¹⁹ *Id.*, ¶ 77.

²⁰ Level 3 Petition for Reconsideration, ¶ 4.

²¹ *Id.*, ¶¶ 6-7, citing 47 C.F.R. § 51.305(e). This rule refers to a request for interconnection at a particular point, not a method of interconnection.

²² *Id.*, ¶ 8-9.

- 27 Level 3 also asserts that the Commission should allow its proposal because language in Qwest's Statement of Generally Available Terms (SGAT) and in the proposed interconnection agreement currently allows Level 3 to deliver switched access traffic over LIS trunks through jointly provided switched access (JPSA).²³ Level 3 asserts the Arbitrator's decision discriminates against Level 3, contending that Qwest allows Qwest Communications Corporation, or QCC, Qwest's long distance affiliate, to exchange long distance traffic over LIS trunks through JPSA arrangements.²⁴
- 28 Qwest counters that Level 3 does not have a legal right under the Act to deliver switched access traffic over LIS trunks, as interconnection using LIS trunks is intended for exchange service or access, not for interexchange traffic.²⁵ Qwest asserts that the FCC rule Level 3 relies on does not apply to the use of interconnection for delivering interexchange traffic. Qwest asserts that only FGD trunks have the capability to record switched access traffic and create accurate billing records for its customers.²⁶ Qwest asserts that Level 3 only seeks to use LIS trunks to avoid paying the facilities charge all other carriers pay to exchange switched access traffic, and to avoid recording traffic to evade paying its share of access charges.²⁷
- 29 Qwest asserts that the SGAT and proposed agreement do not allow for delivery of switched access over LIS trunks, but do allow for the exchange of JPSA traffic.²⁸ Qwest asserts that to provide JPSA, however, Level 3 must be operating as a local exchange carrier and Qwest and Level 3 must agree that Qwest's end offices will serve a Level 3 tandem. Qwest asserts that Level 3 does not meet these requirements.²⁹

²³ *Id.*, ¶¶ 10-15; "Jointly Provided Switched Access" is defined in the proposed agreement as "an arrangement whereby two (2) LECs (including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs." Exh. 4, § 4.

²⁴ *Id.*, ¶¶ 16-21.

²⁵ Qwest Response, ¶¶ 12-14.

²⁶ *Id.*, ¶¶ 7-8.

²⁷ *Id.*, ¶ 9-11.

²⁸ *Id.*, ¶ 16.

²⁹ *Id.*, ¶¶ 17-18.

- 30 Finally, Qwest asserts that Level 3's claims of discrimination are baseless, as every interexchange carrier that delivers switched access traffic to Qwest's customers – including QCC – uses FGD trunks.³⁰
- 31 We deny Level 3's petition for review on this issue, finding the Arbitrator's decision lawful and appropriate. Level 3 seeks to combine all traffic, including interexchange or long distance traffic, on LIS transport trunks. Level 3's request is not just a future proposal. Having just acquired WilTel, a large interexchange carrier, Level 3 will likely terminate WilTel's large volume of interexchange traffic on Qwest's network.³¹
- 32 Under Section 251 (c) (2) of the Act, local exchange carriers, such as Qwest, are obligated to provide interconnection with any requesting telecommunications carrier “for the transmission and routing of telephone exchange service and exchange access.”³² Interconnection must be at any technically feasible point in the carrier's network, “at least equal in quality” to the service the carrier provides to itself, an affiliate, or another interconnecting carrier, and on terms that are “just, reasonable, and nondiscriminatory.”³³
- 33 The Arbitrator's decision is consistent with this standard for interconnection. First, Level 3 and Qwest are already operating under an approved interconnection agreement. While the bulk of the traffic Level 3 currently exchanges is ISP-bound and VoIP traffic, the parties presume for this arbitration that Level 3 is exchanging local exchange service traffic under the agreement. Level 3 now seeks to expand the scope of traffic to exchange with Qwest under a new agreement to include interexchange traffic. The order appropriately finds it is technically feasible to combine traffic on either LIS or FGD trunks. Thus, the issue is not technical feasibility.

³⁰ *Id.*, ¶¶ 21-23.

³¹ Level 3 also seeks to be able to compete with Qwest in providing tandem switching services. While we do not discourage Level 3 from competing to provide tandem switching, the issue in this proceeding is not competition for tandem switching, but the appropriate way to combine traffic.

³² 49 U.S.C. § 251(c)(2)(A).

³³ *Id.*, § 251(c)(2)(B) to (D).

- 34 The Arbitrator correctly applied the FCC's requirement that a requesting carrier seeking technically feasible but overly expensive interconnection must bear the costs of the interconnection.³⁴ In this case, Level 3 is asking Qwest to use interconnection trunks that have not been designed to carry interexchange traffic. One way to address this is to allow Level 3 to use LIS trunks and pay for the modifications Qwest requires to allow it to appropriately record call data and bill its customers. As we discuss below, however, this option would likely allow Level 3 to avoid paying facilities and access charges. As FGD trunks are already designed to carry combined interexchange and local traffic, and the method is technically feasible, it is more appropriate to require Level 3 to bear the cost of exchanging the additional traffic by paying for the use of FGD trunks. In addition, Qwest demonstrates that requiring Level 3 to use FGD trunks to combine traffic is equal in quality to the service it provides itself, its affiliate, QCC, and all other interconnecting carriers that combine similar traffic.
- 35 The remaining standard is whether requiring Level 3 to use FGD trunks to combine traffic is just, reasonable and nondiscriminatory. Although Level 3 claims the Arbitrator's decision is discriminatory, we believe otherwise. Qwest does not have arrangements with any other carrier to combine traffic using LIS trunks. Qwest requires all carriers combining interstate with local exchange traffic to use FGD trunks. The fact that Level 3 has reached agreements with other ILECs in other jurisdictions to use LIS trunks with a factors-based billing process does not make Qwest's practice or the Arbitrator's decision discriminatory.
- 36 In addition, allowing Level 3 to combine traffic on LIS trunks would allow Level 3 to avoid paying facilities charges for delivering switched access traffic. Federal tariffs governing the exchange of such traffic include a facilities charge. Qwest's rates for using FGD trunks include these charges, while rates for LIS trunks do not. If Level 3 were allowed to combine traffic on LIS trunks without paying facilities charges, Qwest's arrangement with Level 3 would be discriminatory to other carriers exchanging switched access traffic on FGD trunks.

³⁴ Order 10, ¶ 76, citing *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 199 (1996), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999) [Hereinafter *Local Competition Order*].

37 Finally, we find the issue Level 3 raises about the SGAT and proposed agreement allowing jointly provided switched access, or JPSA, on LIS trunks to be a red herring. Availability of JPSA under the agreement does not make the Arbitrator's decision discriminatory. JPSA is not the primary way to terminate switched access traffic. Moreover, Level 3 may provide JPSA with Qwest only after it meets certain industry standards, and Qwest and Level 3 agree that Qwest's end offices will serve Level 3's tandem switch. While Level 3 has expressed a desire to do so, there is no evidence in the record it has actually met these criteria.

38 Thus, we find that the Arbitrator's decision is lawful, based on solid facts and policies, and does not discriminate against Level 3 or any other carrier. We uphold the Arbitrator's decision on this issue.

3. Compensation for and Audits of VoIP Traffic

39 Similar to their dispute over VNXX traffic, Level 3 and Qwest dispute the definition, classification, and compensation for VoIP traffic exchanged under the agreement.

40 The Arbitrator proposed a definition for VoIP traffic that includes traffic from the public switched telephone network (PSTN) to IP networks, as well as traffic from IP networks to the PSTN. The definition is based on the FCC's description of VoIP.³⁵ Qwest does not seek review of this decision.

41 ***Compensation for VoIP traffic.*** The Arbitrator declined to classify VoIP traffic finding that the FCC intends to address classification and compensation of VoIP in an FCC proceeding.³⁶ In its *Vonage Order*, the FCC determined that it is responsible for establishing the appropriate regulatory treatment for VoIP and other IP-enabled services and preempted states from imposing "traditional common carrier economic regulations" on VoIP services.³⁷ To allow the parties to exchange VoIP traffic under

³⁵ Order 10, ¶¶ 60-65. The FCC has described VoIP as "services that ... permit users to receive calls and terminate calls to the PSTN." *In the Matter of Universal Service Contributions Methodology, et seq.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶ 36 (2006); ; *In the Matter of E911 Requirements for IP-Enabled Service Providers, et seq.*, WC Docket No. 05-196, First Report and Order and Notice of Rulemaking, FCC 05-116 ¶ 24 (2005).

³⁶ *Id.*, ¶¶ 65, 67.

³⁷ *In the Matter of Vonage Holdings, Corporation*, WC Docket No. 03-211, 19 FCC Rcd. 22404,

the agreement, the Arbitrator proposed that the agreement include a category of traffic referred to as VoIP traffic, and that the parties exchange VoIP traffic on a “bill and keep” basis until the FCC establishes a form of compensation for VoIP.³⁸

42 Qwest opposes the Arbitrator’s bill and keep proposal as unlawful. Qwest asserts that access charges would apply whether VoIP is classified as an enhanced service or a telecommunications service, and that a bill and keep approach would preclude payment of access charges in violation of federal tariffs.³⁹ Qwest objects to the Arbitrator recommending a solution not proposed by either party and asserts that a bill and keep approach is appropriate only for local traffic, not all VoIP traffic.⁴⁰ Qwest requests the Commission reject the Arbitrator’s decision on this issue, or modify the decision to allow bill and keep only on local VoIP traffic.⁴¹ Level 3 did not address this issue.

43 We reverse the Arbitrator’s decision on the issue of compensation for VoIP traffic. Where the parties cannot agree on the classification and hence compensation for VoIP traffic, a bill and keep compensation arrangement would allow the parties to continue to exchange traffic without classifying it. However, the FCC has clearly stated its intent to preempt state regulation of VoIP traffic. We should refrain from establishing compensation and terms and conditions for exchanging VoIP traffic until the FCC resolves the issues of classification and compensation in its pending proceedings on intercarrier compensation.⁴²

44 ***Auditing provisions.*** The Arbitrator also rejected Qwest’s provisions for auditing Level 3’s exchange of VoIP traffic. Having modified Qwest’s proposed definition

¶¶ 1. 33-35 (Nov. 12, 2004).

³⁸ Order 10, ¶ 68. “Bill and keep” is described in the Commission’s rules governing telecommunications carriers as “a compensation mechanism where traffic is exchanged among companies on a reciprocal basis. Each company terminates the traffic originating from other companies in exchange for the right to terminate its traffic on that company’s network.” WAC 480-120-540(4)(c). In a bill and keep environment, no money changes hands, but the parties may continue to exchange traffic.

³⁹ Qwest Petition, ¶¶ 26-28.

⁴⁰ *Id.*, ¶¶ 29-30.

⁴¹ *Id.*, ¶ 31.

⁴² Should the FCC classify VoIP traffic as a service subject to access charges, a bill and keep arrangement would deprive the parties of payment of access charges.

and refrained from classifying VoIP traffic, the Arbitrator found it unnecessary to audit traffic to determine whether VoIP traffic originates or terminates on the PSTN or in an Internet Protocol, and whether the traffic is local or switched access.⁴³

45 Qwest objects to the Arbitrator's decision to reject its provisions for auditing Level 3's VoIP traffic to ensure the traffic meets the definition and is properly classified for billing purposes.⁴⁴ Level 3 does not address Qwest's arguments.

46 We reverse the Arbitrator on this issue. The Arbitrator's decisions defining VoIP traffic and refraining from classifying the traffic do not rule out the need for audit language. The proposed audit provisions would allow Qwest to monitor the VoIP traffic Level 3 exchanges with Qwest as a record keeping function, until the FCC classifies VoIP service. The audit provisions will allow both Qwest and Level 3 to better understand the nature and volume of VoIP traffic exchanged under the agreement. We accept Qwest's proposed language in Section 7.1.1.2 and modify Qwest's proposed language in Section 7.1.1.1, as follows, given that that VoIP traffic is not classified or compensated under the agreement:

Section 7.1.1.1 CLEC agrees to allow Qwest to conduct operational verification audits of those network elements controlled by CLEC and to work cooperatively with Qwest to conduct an operational verification audit of any other provider that CLEC used to originate, route and transport VoIP traffic that is delivered to Qwest, as well as to make available any supporting documentation and records in order to ensure CLEC's compliance with the obligations set forth in the VoIP definition and elsewhere in this Agreement. ~~Qwest shall have the right to redefine this traffic as Switched Access in the event of an "operational verification audit failure". An "operational verification audit failure" is defined as: (a) Qwest's inability to conduct a post-provisioning operational verification audit due to insufficient cooperation by CLEC or CLEC's other providers, or (b) a determination by Qwest in a post-provisioning operational verification audit that the CLEC or CLEC's end users are not originating in a manner consistent with the obligations set forth in the VoIP definition and elsewhere in this Agreement.~~

⁴³ Order 10, ¶ 69.

⁴⁴ Qwest Petition, ¶ 32.

4. Access to High-Capacity UNEs

- 47 Level 3 and Qwest dispute language in the proposed agreement concerning the parties' rights and obligations when Level 3 seeks access to high-capacity (DS1 and DS3) loops and transport UNEs from Qwest. This issue arises from the FCC's decision in its Triennial Review Remand Order, or TRRO, restricting unbundled access to certain high-capacity UNEs depending upon the characteristics of wire centers serving the UNEs.⁴⁵
- 48 The Arbitrator found Level 3's language concerning access to high-capacity UNEs appropriate for inclusion in the agreement, rejecting Qwest's language. The decision also found appropriate Qwest's language for treatment of UNEs if Qwest mistakenly designates wire centers as nonimpaired, rather than including Level 3's language.⁴⁶
- 49 The effect of the decision is to follow the requirements of the TRRO to allow Level 3 to request access to high-capacity UNEs after conducting a "reasonably diligent inquiry," and to require Qwest to first provide the UNEs and thereafter dispute the matter should it choose.⁴⁷ Qwest's and Level 3's language is nearly identical, except that Qwest includes additional wording that would restrict Level 3's ability to request UNEs and dispute Qwest's actions.
- 50 Qwest's proposed language in an additional section, Section 9.1.1.4.2, addresses the process for requesting UNEs and the conversion to alternative services if Qwest designates additional wire centers as non-impaired. Level 3 did not propose alternative language and Order 10 did not address Qwest's language.

⁴⁵ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005). [Hereinafter "*Triennial Review Remand Order*" or "*TRRO*"].

⁴⁶ Order 10, ¶ 113.

⁴⁷ TRRO, ¶ 234.

- 51 Qwest objects to the decision to adopt Level 3’s language arguing the language expands Level 3’s unbundling rights and seeks clarification of whether its proposed language for Section 9.1.1.4.2 should be included in the agreement.⁴⁸
- 52 Level 3 did not seek review of the Arbitrator’s decision on this issue, but asserts that the decision follows the FCC’s guidance in the TRRO that ILECs must first provision and then dispute access to high-capacity UNEs.⁴⁹ Level 3 asserts that Qwest’s language would allow it to withhold access to UNEs and require Level 3 to initiate dispute resolution, contrary to the FCC’s decision. Level 3 asserts that the Commission established a process in Docket UT-053025 for Qwest to designate additional wire centers and that Qwest’s language in Section 9.1.1.4.2 is unnecessary.
- 53 The FCC clearly states in the TRRO that a CLEC must make a “reasonably diligent inquiry” and self-certify that it is entitled to unbundled access to high-capacity elements.⁵⁰ If the CLEC submits such a certification, the ILEC must provide access to the elements and only then may dispute the CLEC’s access to the UNEs. If the ILEC believes wire centers are nonimpaired and thus not available for unbundled access, the ILEC may not refuse to provide access to the UNE. Qwest’s proposed language is contrary to the TRRO, and thus, Qwest’s petition for review on this issue is denied. While we understand Qwest’s concern that Level 3 may seek unbundled access to UNEs in wire centers already found to be nonimpaired, we find that unlikely.
- 54 The Arbitrator did not address Section 9.1.1.4.2 specifically in her order. We grant Qwest’s petition to clarify whether its proposed language should be included in the agreement. After reviewing the proposed language, we find it should be included in the agreement with the following changes:

9.1.1.4.2 Additional Non-Impaired Wire Centers. If Qwest designates additional ~~Qwest~~ Wire Centers ~~are found to meet~~ as meeting the relevant factual criteria discussed in Sections V and VI of the FCC’s Triennial Review Remand Order under which Qwest is no longer required to offer Unbundled DS1 or DS3 Loops, and/or if Qwest

⁴⁸ Qwest Petition, ¶¶ 33-35.

⁴⁹ Level 3 Response at 16-19; *see also* TRRO, ¶ 234.

⁵⁰ TRRO, ¶ 234.

~~designates additional Qwest Wire Centers are reclassified~~ as Tiers 1 or 2, thus impacting the availability of Unbundled DS1, DS3, or Dark Fiber transport, Qwest shall provide notice to CLEC and the state commission of its intent to reclassify such Wire Centers. Thirty (30) Days after notification from Qwest, CLEC will no longer order impacted high capacity or Dark Fiber UNEs in or between those additional Wire Centers subject to CLECs' rights under Section 9.1.1.4 above. CLEC will have ~~ninety (90) Days~~ one year to transition existing DS1 and DS3 UNEs ~~to an alternative service. CLEC will have one hundred eighty (180) Days to transition~~ and Dark Fiber transport to an alternative service. Qwest and CLEC will work together to identify those circuits impacted by such change. Absent CLEC transition of impacted UNEs within the transition period above, Qwest will convert facilities to month-to-month service arrangements in Qwest's Special Access Tariff or begin the disconnect process of Dark Fiber facilities. CLEC is subject to back billing for the difference between the UNE and Tariff rates beginning on the ~~ninety first (91st)~~ 366th Day as well as for all applicable nonrecurring charges associated with such conversions.

55 It is appropriate to include in the agreement language addressing notice of additional wire centers that Qwest seeks to designate as nonimpaired, and Level 3's transition to alternative facilities. The modifications we make to Qwest's language are consistent with the TRRO and the process we identified in our Modified Interpretive Statement in Docket UT-053025. The Modified Interpretive Statement provides that Qwest must notify the Commission as it designates additional wire centers and supply data supporting its non-impairment designation to allow the Commission to evaluate the status of the wire center.⁵¹ The Modified Interpretive Statement also provides that a one-year transition period is appropriate for designation of additional wire centers.⁵² In our interpretive statement, we found a one-year transition period consistent with our decisions in Docket UT-043013, and the FCC's one-year transition period in the TRRO.

⁵¹ *Id.*, ¶ 29.

⁵² *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*, Docket UT-053025, Modified Interpretive Statement Regarding Designation of Non-Impaired Wire Centers, ¶¶ 16-17, 28-29 (Dec. 15, 2006).

FINDINGS OF FACT

56 Having discussed above in detail the evidence received in this proceeding concerning
all material matters, and having stated findings and conclusions upon issues in dispute
among the parties and the reasons therefore, the Commission now makes and enters
the following summary findings of fact, incorporating by reference pertinent portions
of the preceding detailed findings:

57 (1) The Washington Utilities and Transportation Commission is an agency of the
state of Washington vested by statute with the authority to regulate the rates
and conditions of service of telecommunications companies within the state,
and to take actions, conduct proceedings, and enter orders as permitted or
contemplated for a state commission under the Telecommunications Act of
1996.

58 (2) Qwest Corporation is an incumbent local exchange carrier, providing local
exchange telecommunications service to the public for compensation within
the state of Washington.

59 (3) Level 3 Communications, LLC, is authorized to operate in the state of
Washington as a competitive local exchange carrier.

60 (4) Local interconnection service (LIS) trunks were designed for the exchange of
local traffic to connect local exchange carriers to other local exchange carriers.
LIS trunk groups do not include the same recording and billing capabilities as
Feature Group D trunks.

61 (5) Feature Group D trunks are trunk groups connecting interexchange carriers to
a local exchange carrier with software designed to route traffic to a customer's
presubscribed long distance carrier and to record data about each call which is
then transmitted to Qwest's billing systems.

62 (6) All carriers interconnecting with Qwest and combining local exchange and
interexchange traffic use Feature Group D trunks to exchange the combined
traffic with Qwest.

- 63 (7) It is technically feasible to combine local exchange and interexchange traffic on local interconnection service and Feature Group D trunks.
- 64 (8) Qwest's proposed audit provisions would allow Qwest to monitor the VoIP traffic Level 3 exchanges with Qwest until the FCC classifies VoIP service for intercarrier compensation purposes and will allow both Qwest and Level 3 to better understand the nature and volume of VoIP traffic exchanged under the agreement.
- 65 (9) On April 9, 2007, a magistrate for the United States District Court for the Western District of Washington entered an order reversing and remanding the Commission's decisions in Dockets UT-053036 and UT-053039 concerning compensation for ISP-bound traffic.
- 66 (10) A complaint Qwest filed against nine CLECs concerning use of VNXX traffic is pending before the Commission in Docket UT-063038.

CONCLUSIONS OF LAW

- 67 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:
- 68 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 69 (2) The Commission normally will refrain from deciding issues in one proceeding that are pending for decision before the Commission in another proceeding, or over which the FCC has asserted preemption.
- 70 (3) The FCC has approved the use of a relative use calculation to allocate costs of transmission facilities between ILECs and CLECs.

- 71 (4) Section 251(c)(2) of the Act requires local exchange carriers to provide interconnection with any requesting telecommunications carrier “for the transmission and routing of telephone exchange service and exchange access” at any technically feasible point in the carrier’s network, “at least equal in quality” to the service the carrier provides to itself, an affiliate, or another interconnecting carrier, and on terms that are “just, reasonable, and nondiscriminatory.”
- 72 (5) A requesting carrier that seeks technically feasible but expensive interconnection must bear the costs of the interconnection. *Local Competition Order*, ¶ 199.
- 73 (6) Allowing Level 3 to use LIS trunks to combine local exchange and interexchange traffic would be discriminatory to other carriers exchanging similar combined traffic with Qwest.
- 74 (7) Allowing Qwest to audit Level 3’s VoIP traffic to monitor and collect data for intercarrier compensation purposes pending the FCC’s determination of VoIP classification and compensation is reasonable.
- 75 (8) CLECs may request access to high-capacity UNEs after conducting a “reasonably diligent inquiry,” and the ILEC may dispute the CLECs access to the UNEs only after providing unbundled access to the UNEs. *TRRO*, ¶ 234.
- 76 (9) The parties’ agreement should include language governing the parties’ rights and responsibilities when Qwest designates additional wire centers as nonimpaired for access to high-capacity UNEs.

ORDER

THE COMMISSION ORDERS:

- 77 (1) Qwest’s Petition for Review of the Arbitrator’s Report and Decision is granted, in part, and denied, in part, consistent with the findings and conclusions in this Order.

- 78 (2) Level 3's Petition for Reconsideration is denied.
- 79 (3) Qwest Corporation and Level 3 Communications, LLC, must file an Interconnection Agreement with the Commission, consistent with this Order, no later than 30 days after the service date of this Order.

Dated at Olympia, Washington, and effective June 7, 2007.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.