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January 25, 2006

**VIA FEDERAL EXPRESS**

Carole Washburn, Executive Secretary  
Washington Utilities and Transportation Commission  
1300 S. Evergreen Park Drive S.W.  
Olympia, WA 98504-7250

RECEIVED  
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06 JAN 26 AM 9:17  
STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

Re: Level 3 Communications, LLC Petition for Arbitration  
Docket No. UT- \_\_\_\_\_ (New Filing)

Dear Ms. Washburn:

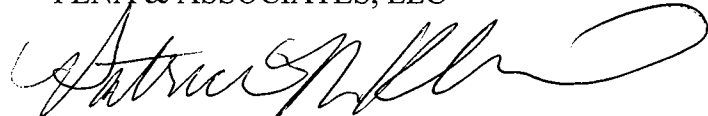
Enclosed for filing are the original and twelve (12), three-hole punched, copies of **Level 3 Communications, LLC Petition for Arbitration**.

Also enclosed is an extra copy of the cover sheet of said Petition. Please file-stamp the cover sheet and return it to us in the envelope provided.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

PEÑA & ASSOCIATES, LLC



Patrice M. Klimo  
Paralegal

pmk  
Enclosures

STATE OF WASHINGTON  
BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF LEVEL 3 )  
COMMUNICATIONS, LLC'S PETITION )  
FOR ARBITRATION PURSUANT TO )  
SECTION 252(B) OF THE )  
COMMUNICATIONS ACT OF 1934, AS )  
AMENDED BY THE )  
TELECOMMUNICATIONS ACT OF 1996, )  
AND THE APPLICABLE STATE LAWS )  
FOR RATES, TERMS, AND CONDITIONS )  
OF INTERCONNECTION WITH QWEST )  
CORPORATION )  
)  
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)  
\_\_\_\_\_ )

Docket No. \_\_\_\_\_

PETITION OF LEVEL 3  
COMMUNICATIONS, LLC

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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

LEVEL 3 COMMUNICATIONS, LLC PETITION FOR ARBITRATION

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January 25, 2006

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## PETITION FOR ARBITRATION

Level 3 Communications, LLC (“Level 3”), by and through its attorneys, and hereby petitions the Washington Utilities and Transportation Commission (“Commission”) to arbitrate, pursuant to WAC 480-07-630 and RCW 80.01.040, and Section 252b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the “Act”), certain terms and conditions of a proposed Interconnection Agreement between Level 3 and Qwest Corporation (“Qwest”) (hereafter, Level 3 and Qwest are collectively referred to as the “Parties”) for the State of Washington. Level 3 respectfully requests that the Commission resolve each of the issues identified in Section V of this Petition by ordering the Parties to incorporate Level 3's position into an Interconnection Agreement for execution by the Parties.

1. This Petition includes background information on the parties, the history of Level 3's interconnection negotiations with Qwest, the Commission's jurisdiction and applicable legal standards, a comprehensive presentation of the unresolved issues including the positions of both Parties on all of the major issues, and each of the requirements set forth in WAC 480-07-630. The Appendices to the Petition set forth the following additional information: (1) the letter stating the date for filing of this Petition, pursuant to Sections 251 and 252 of the Act<sup>1</sup> (attached hereto as *Appendix A*); (2) a Disputed Points List (attached hereto as *Appendix B*); and, (3) the proposed Interconnection Agreement with Level 3's proposed language in **bold/underline** format and Qwest's proposed language in *bold/italics* format (the “Proposed Interconnection Agreement”) (attached hereto as *Appendix C*).

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<sup>1</sup> 47 USC §§ 251 and 252.

## Applicable Legal Standards

2. This Commission has jurisdiction over this Petition for Arbitration pursuant to Section 252(b)(1) of the Act.<sup>2</sup> Under the Act, parties negotiating for interconnection, access to unbundled network elements, or resale of services within a particular state may petition the state commission for arbitration of any unresolved issues during the 135<sup>th</sup> to the 160<sup>th</sup> day of such negotiations.<sup>3</sup> Accordingly, Level 3 files this Petition with the Commission on this date to preserve its rights under Section 252(b) of the Act and to seek relief from the Commission in resolving the outstanding disputes.

3. Pursuant to Section 252(b)(4)(C) of the Act,<sup>4</sup> this arbitration is to be concluded not later than nine months after the applicable request for negotiations, which for purposes of this petition is August 8, 2005. Therefore, the arbitration shall be concluded on or before May 8, 2006.

4. This arbitration must be resolved under the standards established in Sections 251 and 252 of the Act, the rules adopted and orders issued by the Federal Communications Commission ("FCC") in implementing the Act, and the applicable rules and orders of this Commission. Section 252 of the Act requires that a state commission resolving open issues through arbitration:

- (1.) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251; [and]
- (2.) establish any rates for interconnection, services, or network elements according to subsection (d) [of section 252].

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<sup>2</sup> 47 USC § 252(b)(1).

<sup>3</sup> 47 USC § 252(b).

<sup>4</sup> 47 USC § 252(b)(4)(C).

5. The Commission may, under its own state law authority, impose additional requirements pursuant to Section 252(e)(3) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations.<sup>5</sup>

6. The Commission should make an affirmative finding that the rates, terms, and conditions that it prescribes in this proceeding are consistent with the requirements of Sections 251(b) and (c), and 252(d) of the Act.

7. Section 252(d) sets forth the applicable pricing standards for interconnection and network element charges as well as for transport and termination of traffic. Section 252(d)(1) that "[d]eterminations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment. . . and the just and reasonable rate for the network elements . . . shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit." Section 252(d)(2)(A) further states in pertinent part that "a State commission shall not consider the terms and conditions for reciprocal compensation [for transport and termination] to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional

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<sup>5</sup> 47 USC § 252(e); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 13042, ¶¶ 233, 244 (1996) (*Local Competition Order*). See also 47 U.S.C. § 251(d)(3) (contemplating that states may impose additional "access and interconnection obligations" over and above those required by federal law). This Petition sets forth a detailed explanation of Level 3's position on the key legal issues in dispute between the Parties with some references to applicable provisions of the Act, FCC rulings and regulations, and certain state commission rulings. Level 3's analysis of the Commission's prior rulings on these issues will be supplemented in the bench book or briefs submitted to the Arbitrator during this proceeding.

costs of terminating such calls.”<sup>6</sup> In an effort to resolve as many issues as possible and hopefully avoid the need to conduct the arbitration which is the subject matter of this petition, the Parties are continuing to negotiate. Accordingly, Level 3 expects that the Disputed Issues List filed with this petition will be amended prior to any hearings being conducted. In the event there are issues that have been settled between the Parties or further issues that the Parties are unable to agree upon, Level 3 will file an amended Disputed Issues List, along with any other relevant documentation, at least one (1) week prior to the date a hearing is scheduled in this matter.

8. Level 3 also respectfully requests a reasonable opportunity to supplement this Petition to provide any additional information deemed necessary by the Commission.

**A. Name, Address, and Telephone Number of the Petitioner and its Counsel**

9. Level 3 is a Delaware limited liability company with its principal place of business at 1025 Eldorado Boulevard, Broomfield, Colorado, 80021. Its telephone number is 720-888-1000 and its fax number is 720-888-5134. Level 3 is a facilities-based competitive local exchange carrier (“CLEC”) providing local exchange, interexchange and local exchange telecommunications services in this state pursuant to Certificates of Service Authority issued by this Commission. Level 3 maintains tariffs on file with the Commission describing the terms, conditions, and rates for its services, and files annual reports on its operations. Level 3’s certificate of authority from the Commission is on file with the Commission.

10. The names, addresses and contact information for Level 3’s representatives in this proceeding are as follows:

Rogelio E. Peña  
Peña & Associates, LLC  
1375 Walnut St., Suite 220  
Boulder, Colorado 80302

---

<sup>6</sup> 47 U.S.C. § 252(d)(2)(A).



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and

Victoria Mandell, Esq.  
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Tel.: (720) 888-2439  
Fax: (720) 888-5134  
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[Rick.Thayer@level3.com](mailto:Rick.Thayer@level3.com)

**B. Name, Address and Telephone Number of the Other Party to the Negotiation and its Counsel.**

11. Qwest is a Delaware corporation with its principal place of business located at 1801 California Street, Denver, Colorado. Qwest is an Incumbent Local Exchange Carrier (“ILEC”) in this state within the meaning of Section 251(h) of the Act.<sup>7</sup> Within its operating territory, Qwest has been the incumbent provider of telephone exchange service during all relevant times.

12. The names, addresses and contact information for Qwest’s representatives during the negotiations with Level 3 are as follows:

Jeffrey T. Nodland  
Senior Attorney  
Qwest Legal Dept/CD&S  
1801 California St., Suite 900  
Denver, Colorado 80202  
Tel.: 303-383-6657  
E-Mail: [jeff.nodland@qwest.com](mailto:jeff.nodland@qwest.com)

Thomas M. Dethlefs

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<sup>7</sup> 47 USC § 251(h).

Senior Attorney  
Qwest Legal Dept/CD&S  
1801 California St., Suite 900  
Denver, Colorado 80202  
Tel.: 303-383-6646  
E-Mail: [thomas.dethlefs@qwest.com](mailto:thomas.dethlefs@qwest.com)

The primary Qwest negotiators were:

Nancy J. Donahue  
Staff Advocate Policy & Law  
1801 California  
Suite 2410  
Denver, CO 80202-1984  
Tel.: (303) 965-3887  
E-Mail: [Nancy.Donahue@qwest.com](mailto:Nancy.Donahue@qwest.com)

Luba Hromyk  
Qwest Legal Dept/CD&S  
1801 California St., Suite 900  
Denver, CO 80202  
Tel.: 303-383-6544  
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E-Mail: [Luba.Hromyk@qwest.com](mailto:Luba.Hromyk@qwest.com)

### **C. Brief Summary of the Negotiation History**

13. Since its operations in the state began, Level 3 has operated under the terms and conditions of an Interconnection Agreements with Qwest. The current version of that agreement was submitted to this Commission for arbitration in Docket No. UT-023042. The Commission's arbitration decision in that proceeding was issued on February 5, 2003, and the parties' Interconnection Agreement was filed in accordance with the Commission's final order on March 7, 2003.

14. On , August 8, 2005, Level 3 sent Qwest a bona fide request to negotiate a successor agreement pursuant to Sections 251 and 252 of the Act. A copy of the letter reflecting the agreement between the parties that such request was made is attached hereto as *Appendix A*. Level 3 and Qwest began negotiations toward a successor agreement. Qwest and Level 3 have

met on numerous occasions with the intent to either come to agreement, or identify for the Commission those issues that remain in dispute between the Parties. These negotiations provided resolution to a number of issues. However, the Parties have not resolved differences over contract language and policy issues that are substantial and critical to Level 3's business plans. Attached as *Appendix B* is the Disputed Points List ("DPL") detailing remaining disputes. Level 3 asks the Commission to arbitrate each of these remaining disputes, to find in Level 3's favor, and to adopt Level 3's Interconnection Agreement.

15. Level 3 will continue negotiating with Qwest in good faith after this Petition is filed, and hopes to resolve issues prior to any arbitration hearing.

**D. Date of Initial Request for Negotiation and Dates 135 days, 160 days and Nine Months After that Date**

16. Level 3 made a request for negotiation on August 19, 2005. The date 135 days after Level 3's request is January 1, 2006; the date 160 days after Level 3's request is January 26, 2006. This arbitration is filed on January 26, 2006 pursuant to WAC 480-07-630.

**E. Issues Resolved by the Parties**

17. The Parties have resolved the issues and negotiated contract language to govern the Parties' relationship with respect to most of the provisions set forth in Exhibit A. These negotiated portions of the Agreement are shown in normal type. To the extent Qwest asserts that any' provisions remain in dispute, Level 3 reserves the right to present evidence and argument as to why those provisions were considered closed and why they should be resolved in the manner shown in Exhibit A.

**F. Unresolved Issues Not Submitted for Arbitration**

18. There are no unresolved issues that are not being submitted for arbitration.

**G. Unresolved Issues Submitted for Arbitration**

19. The Proposed Interconnection Agreement consists of the following:

- Section 1.0: General Terms and Conditions
- Section 2.0: Interpretation and Construction
- Section 3.0: CLEC Information
- Section 4.0: Definitions
- Section 5.0: Terms and Conditions
- Section 6.0: Resale
- Section 7.0: Interconnection
- Section 8.0: Collocation
- Section 9.0: Unbundled Network Elements
- Section 10.0: Ancillary Services
- Section 11.0: Network Security
- Section 12.0: Access to Operational Support Systems (OSS)
- Section 13.0: Access to Telephone Numbers
- Section 14.0: Local Dialing Parity
- Section 15.0: Qwest DEX
- Section 16.0: Referral Announcement
- Section 17.0: Bona Fide Request Process
- Section 18.0: Audit Process
- Section 19.0: Construction Charges
- Section 20.0: Service Performance
- Section 21.0: Network Standards
- Section 22.0: Signature Page

20. The unresolved issues are set forth in the Disputed Points List (“DPL”), which is attached as *Appendix B*. The DPL assigns each issue a number, identifies the section(s) of the Proposed Interconnection Agreement that is (are) affected by the issue, and sets forth the positions and the proposed language for the Interconnection Agreement of the Parties on each issue. As described in the DPL terms and conditions to which the Parties have agreed are in normal text. Level 3’s contract terms that Qwest opposes appear in **bold underline text**. Qwest’s proposed terms that Level 3 opposes appear in *bold italic text*.

21. Level 3 and Qwest have agreed on the format of the attached DPL, which organizes the list of issues according to how they are presented in this Petition. The proposed

language of the actual agreement, which contains all terms – disputed and agreed upon – is attached as *Appendix C*.

22. Level 3 presents the disputed issues according to their relative importance in order to simplify the presentation of the issues. Accordingly, Level 3 ranks only the most fundamental interconnection issues as “Tier I issues”<sup>8</sup>. These issues include, for example, whether Qwest may compel Level 3 to establish more than a single point of interconnection per LATA by forcing Level 3 to assume costs on Qwest’s side of the network and whether Qwest may prohibit Level 3 from exchanging all of Level 3’s traffic over the interconnection trunks established under the Agreement.

23. While Tier II<sup>9</sup> issues are equally as important to Level 3, most are derivative of fundamental points of business, law and policy presented by Tier I issues. Thus, for example, should the Commission agree with the FCC and several state and federal courts that Level 3 may exchange IP Enabled (or Voice over IP – “VoIP”) traffic over interconnection trunks, then approval of Level 3’s proposed definition of “call record” which would allow the Parties to identify and account for the exchange of such traffic is a relatively easy determination.

#### **A. TIER I ISSUES**

24. There are five unresolved Tier I issues, each of which relate to the rates, terms and conditions that will govern how Level 3 and Qwest interconnect their networks and compensate each other for the exchange of various types of traffic:

**Issue 1:** Whether each Party bears its own costs of exchanging traffic at a Single Point of Interconnection per LATA.

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<sup>8</sup> Issues 1 A through J, 2A and 2B, 3A – C, and 4, and 5.

<sup>9</sup> Issues 6 through 22.

- Issue 2:** Whether Level 3 may exchange all traffic over the interconnection trunks established under the Agreement.
- Issue 3:** Whether Qwest's election to be subject to the *ISP-Remand Order* for the exchange of ISP-bound traffic requires Qwest to compensate Level 3 for ISP-bound Traffic at the rate of \$0.0007 per minute of use.
- Issue 4:** Whether Qwest and Level 3 will compensate each other at the rate of \$0.0007 per minute of use for the exchange of IP enabled or Voice over Internet Protocol traffic.
- Issue 5:** Whether the Agreement should incorporate by reference, interconnection terms and conditions that conflict with the specific terms of the Interconnection Agreement at issue in this proceeding.

**1. TIER I – ISSUE NO. 1**

**a. Statement of the Issue:**<sup>10</sup> Whether Level 3 may exchange traffic at a single point of interconnection (“SPOI”) within a LATA in a manner whereby each party bears the cost of interconnection on their side of the point of interconnection.

**b. Sections of the Proposed Interconnection Agreement Affected:**

Sections 7.1.1, 7.1.1.1, 7.1.1.2, 7.1.1.3, 7.1.1.4, 7.1.1.4.1, 7.1.2, 7.2.2.1.1, 7.2.2.1.2.2, 7.2.2.1.4., 7.2.2.9.6., 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2, 7.3.2.2.1, 7.3.3.1, 7.3.3.2.

**c. Level 3 Position.**

25. Level 3 may establish a SPOI in each LATA at any technically feasible point on Qwest's network for the exchange of traffic. These technically feasible points include but are not limited to Qwest end offices and tandem offices. As a result, Level 3 may establish a SPOI

through a Level 3 collocation at a Qwest wire center, a third party collocation at a Qwest wire center, or through the establishment of transport facilities. Each Party is solely responsible for all costs on its side of the Point of Interconnection. In other words, Level 3 would have each party bear the costs of the facilities (*i.e.* the “highways” as it were) as well as the costs of the trunking (*i.e.* the lines on the highways) to the point of interconnection. Where necessary for purposes of network management, however, Level 3 agrees to coordinate trunking from Qwest’s network to Level 3’s network to assist Qwest with moving traffic off its tandems. Because Level 3 has constructed its own all IP network, it requires no such assistance from Qwest on its side of the network.

**d. Qwest Position.**

26. Qwest proposes that Level 3 establish and pay for LIS trunk groups to each Qwest access tandem in a LATA, or establish LIS trunk groups to each Qwest local tandem in a LATA where Level 3 desires to originate or terminate traffic. In addition, Qwest’s terms shift to Level 3 Qwest’s costs of transporting Qwest’s own traffic from its end users to the Point of Interconnection.

**e. Basis for Level 3’s Position.**

**1) Section 252(c)(2) Requires that Qwest Permit a SPOI with Level 3’s Network**

27. A Point of Interconnection (“POI”) is the location where two carriers physically connect their networks for the purpose of exchanging traffic. In this case, it is the place where Level 3 brings its facilities to connect to Qwest’s existing network. Each party has control over its network on its respective side of the POI. This allows each party to provide service according to the technical requirements of its network, on its own side of the POI.

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<sup>10</sup> In the Disputed Points List (DPL) filed contemporaneously with this Petition, there are seventeen (17)

28. Qwest has dozens of switches in each LATA, linked by one or more tandem switches. The tandem and end office switch architecture was constructed by Qwest at a time when monopoly regulation and then existing technology encouraged a dense star and hub architecture. Since then technology and transport have evolved, as has the law. Under the Act, each party bears its own costs to bring traffic to a single POI per LATA (though carriers often aggregate traffic from areas much more vast for purposes of Internet peering). Thus, the most efficient way for Level 3 – or any carrier, including Qwest when it competes out of region – to interconnect is simply to establish a single point of interconnection, usually at or near one of the ILEC tandem switches. Level 3, accordingly, has constructed and interconnected its network in the most efficient manner possible, and desires to continue to do so. Moreover, Level 3 will continue, at its own expense, to bring all traffic bound for Qwest’s end users in a LATA to the SPOI. Similarly, Qwest will, at its own expense, bring all traffic from its end users bound for Level 3 to the SPOI. This efficient arrangement permits Level 3 to interconnect its network to a single point on the incumbent’s network, without the unnecessary expense and delay associated with replicating century-old network architecture.

29. Section 251(c)(2) of the Act permits Level 3 to establish a single point of interconnection for the exchange of all traffic, including interexchange traffic:

251(c). In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network:

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subparts to this Issue Number 1: Issues 1 A through Issues 1J address disputed contract terms that relate to this statement of the issue.



(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

30. Section 51.100 of the FCC's rules requires that Qwest allow Level 3 to exchange all traffic — including information services traffic — over a single point of interconnection it has established for the exchange of telephone exchange service or exchange access traffic under 47 U.S.C. § 251(c)(2):

Sec. 51.100 General duty.

(a) Each telecommunications carrier has the duty:

(1) To interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

\* \* \*

(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well. 47 C.F.R. § 51.100.<sup>11</sup>

31. The FCC has stated definitively that CLECs such as Level 3 have the legal right under Section 252 to select a single point of interconnection or POI on the ILEC's network. In the *Local Competition Order*, the FCC stated:

The interconnection obligation of section 251(c)(2), discussed in this section, *allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent*

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<sup>11</sup> The FCC's specific inclusion of "information services" in this rule is highly significant, because, while information services are always provided by means of "telecommunications," *see* 47 U.S.C. § 153(20) (defining "information services"), they do not necessarily involve "telecommunications *services*." This parallels Section 251(b)(5)'s requirement that LECs such as Qwest establish reciprocal compensation arrangements "for the transport and termination of *telecommunications*." 47 U.S.C. § 251(b)(5) (emphasis added). *See* discussion of Issue Nos. 3 and 4, *infra*.

*LECs*, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic.<sup>12</sup>

32. The FCC has consistently applied the Act to prevent ILECs from increasing the CLEC's costs by requiring multiple points of interconnection, or by ILEC efforts to shift costs to CLECs in exchange for obtaining the right to establish a SPOI. For example, in its order approving Southwestern Bell Telephone's ("SWBT") application for Section 271 authority in Texas, the FCC stated that CLECs have the option to interconnect at as few as one technically feasible point within each LATA:

New entrants may select the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' cost of, among other things, transport and termination.<sup>13</sup>

Further, the FCC stated in that Order:

Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. ***This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.***<sup>14</sup>

33. Federal courts have also held that CLECs may interconnect at a Single Point of Interconnection. In one case, the Third Circuit reversed and remanded a Pennsylvania Public Service Commission decision requiring WorldCom to interconnect in each access tandem serving area in Bell Atlantic-Pennsylvania's network.<sup>15</sup> The Court explained that a CLEC's decision on where or where not to interconnect is subject only to concerns of technical

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<sup>12</sup> *Local Competition Order* at ¶ 172 (emphasis added).

<sup>13</sup> *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, ¶ 78 (2000).

<sup>14</sup> *Id.* (citing *Local Competition Order* at ¶¶ 172, 209) (emphasis added).

<sup>15</sup> *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3<sup>rd</sup> Cir. 2001).

feasibility<sup>16</sup> and held that requiring multiple interconnection points could be costly and would be inconsistent with the goals of the Act.<sup>17</sup> Specifically the Court stated:

To the degree that a state commission may have discretion in determining whether there will be one or more interconnection points within a LATA, the commission, in exercising that discretion, must keep in mind whether the cost of interconnection at multiple points will be prohibitive, creating a bar to competition in the local service area. If only one interconnection is necessary, the requirement by the commission that there be additional connections at an unnecessary cost to the CLEC, would be inconsistent with the policy behind the Act.<sup>18</sup>

34. In another case, US WEST, the predecessor to Qwest, appealed an Arizona Corporation Commission arbitration decision allowing AT&T to interconnect at a SPOI on US WEST's network.<sup>19</sup> The Ninth Circuit held that AT&T could choose to interconnect at a SPOI. The Court stated "[a]n incumbent carrier denying a request for interconnection at a particular point must prove interconnection at that point is not technically feasible" and held that, because US West had not provided evidence that interconnection at a SPOI was technically infeasible, AT&T was permitted to interconnect at a SPOI.<sup>20</sup> And in April 2001, the FCC succinctly stated that "an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."<sup>21</sup>

35. As noted in the cases cited above, there have been no changes in federal law that would require this Commission to revisit this issue. For this reason, the Commission should

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<sup>16</sup> *Id.*, 271 F.3d. at 518.

<sup>17</sup> *Id.* at 517.

<sup>18</sup> *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d. at 517. (internal citations omitted).

<sup>19</sup> *US West Communications, Inc. v. Jennings*, 304 F.3d 950, 960-961 (9<sup>th</sup> Cir. 2002).

<sup>20</sup> *Id.*

<sup>21</sup> *In the Matter of Developing a Unified Intercarrier Compensation Mechanism, Notice of Proposed Rulemaking*, CC Docket No. 01-92 (rel. April 27, 2001) at ¶ 112.

conclude that Qwest is required under federal law to allow Level 3 to interconnect with its facilities through a SPOI in Washington.

**2) Section 252(c)(2) Requires that Each Carrier Bear the Cost to Bring its Traffic to the SPOI.**

36. Section 252(c)(2) further requires that each carrier bear its own costs to bring its originated traffic to the Point of Interconnection. More specifically, Section 51.703(b) of the federal interconnection rules provides that “a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.” 47 C.F.R. § 51.703(b). In the *Local Competition Order*, the FCC explained the basis for its rule.

Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself.<sup>22</sup>

37. The FCC recognized, when it codified Rule 703(b), that the financial responsibilities for interconnection for the exchange of traffic should be borne solely by each carrier on its side of the POI. This rule prohibits carriers from shifting to other carriers the costs of transporting traffic to the POI, instead requiring each carrier to bear the responsibility for the costs of delivering its traffic to other carriers for termination.

38. In its *Virginia Arbitration Order*,<sup>23</sup> the FCC addressed the principles relating to a CLEC’s right to select a POI and the obligation of the originating carrier to pay for its transport costs to the POI. In that case, the ILEC (Verizon) proposed language that would have required AT&T to deliver its traffic all the way to the ILEC end office. The ILEC further proposed that if

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<sup>22</sup> See *Local Competition Order* at ¶ 218.

<sup>23</sup> *In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) (*Virginia Arbitration Order*).

AT&T did not establish a POI at every ILEC end office, it would require AT&T to pay for the transport costs that the ILEC incurred to deliver its own originating traffic from its originating switch to AT&T's switch or POI. The FCC rejected the Verizon's proposed terms and found that 47 C.F.R. 51.703(b) prohibited Verizon from charging AT&T for traffic originating on the ILECs network.<sup>24</sup>

39. Recently, in *Qwest v. Universal Telecom*, 2004 WL 2958421, the court reaffirmed that an originating carrier may not shift charges or costs it incurs in transporting its customers' traffic to a Point of Interconnection. Citing *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCCR 11166, 11189, ¶ 40 (2000)<sup>25</sup>, the court held that FCC decisions prohibit an ILEC, and Qwest in particular, from imposing charges on a CLEC to recover Qwest's costs of transmitting traffic delivered to a CLEC Point of Interconnection.

40. Similarly, in a dispute between BellSouth and MCI on this very point, the Fourth Circuit held:

In sum, we are left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that Bellsouth seeks to impose. ***Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.*** Although we find some surface appeal in BellSouth's suggestion that the charge here is not reciprocal compensation, but rather the permissible shifting of costs attending interconnection, the FCC, as noted above, has endorsed cost-shifting related to interconnection only as it relates to the one-time costs of physical linkage, and in doing so, expressly declined the invitation to extend the definition of "interconnection" to include the transport and termination of traffic.<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Aff'd sub nom. Qwest Corp. v. F.C.C.*, 252 F.3d 462 (D.C. Cir. 2001.)

<sup>26</sup> *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 881 (4<sup>th</sup> Cir. 2003).

41. This specific issue was also litigated and decided in Level 3's favor in the prior arbitration between Qwest and Level 3. In Commission Docket No. 023042, the Commission determined "that Qwest should not be allowed and Level 3 Communications, LLC required to exclude ISP-bound traffic from the calculation of each party's 'relative use' of interconnection facilities under a proposed interconnection agreement between the two companies."<sup>27</sup> In reversing the arbitrator's report and decision, the Commission stated that:

Qwest argues that the FCC amended the relative use rule in its most recent order addressing ISP-bound traffic, with the effect of excluding ISP-bound traffic from relative use calculations. Qwest argues further that because the FCC has exempted ISP-bound traffic from reciprocal compensation obligations, the ISP Remand Order also must be read to exclude this traffic from the relative use calculation to apportion costs of interconnection. The Commission does not accept this conclusion. Nothing in the text of the ISP Remand Order suggests that it applies to any functions other than transport and termination on the terminating side of the POI."<sup>28</sup>

42. For all these reasons, Level 3's Interconnection Agreement reflects the applicable law, and the Interconnection requirements imposed on both Qwest and Level 3 by Section 251. This Commission should rule that this issue has already been decided in Level 3's favor and reject Qwest's attempt to needlessly re-litigate this issue in the present docket.

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<sup>27</sup> *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023042, Fourth Supplemental Order Commission's Final Order (February 5, 2003), at ¶ 37 (herein after referred to as "Level 3 – Qwest Washington Arbitration Order").

<sup>28</sup> *Id.*

**2. ISSUE NO. 2**

**a. Statement of the Issue:**<sup>29</sup> Whether Level 3 may exchange all traffic over the interconnection trunks established under the Agreement.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.2.2.9.3.1, 7.2.2.9.3.2., 7.2.2.9.3.2.1.

**c. Level 3 Position.**

43. Level 3 has constructed a nationwide advanced fiber optic backbone. Where it interconnects with incumbent LECs, such as Qwest, Level 3 has constructed or paid for extensive co-carrier facilities capable of carrying all forms of traffic (*i.e.* interLATA, Local, and IntraLATA). Level 3 asks that the Commission confirm Level 3's right to pass all forms of traffic over this network without having to construct an additional network for various types of calls. Level 3 proposes that the Parties will identify and bill for the various categories of traffic by declaring Percent Local Usage ("PLU"), Percent Interstate Usage ("PIU"), and Percent IP Usage ("PIPU") jurisdictional factors each month, subject to the right to audit and true-up.

**d. Qwest Position.**

44. Qwest seeks to require Level 3 to establish at least two separate trunk groups, one for local and IntraLATA traffic, and a second for InterLATA, ISP-bound and VoIP traffic, unless the ISP and VoIP provider's Point of Presence ("POP") is in the same local calling area as the originating calling party (in which case Level 3 may use LIS trunks to exchange that traffic). Qwest's proposal shifts costs to its competitor. It segregates traffic in a manner that eliminates Qwest's obligation to compensate Level 3 for traffic Level 3 terminates on Qwest's behalf, particularly ISP-bound and VoIP traffic.

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<sup>29</sup> In the Disputed Points List ("DPL") filed contemporaneously with this Petition, there are two (2) subparts to this Issue Number 2: Issues 2 A and B address disputed contract terms that relate to this statement of the issue.

e. **Basis for Level 3's Position.**

45. Section 251(c) of the Act governs the legal duties related to interconnection of the ILEC network. Pursuant to Section 251(c)(2), Qwest is obligated to provide Level 3 with interconnection "at any technically feasible point within its network" for "telephone exchange service and exchange access" transmissions. Section 251(c) reads in part as follows:

(c) Additional Obligations of Incumbent Local Exchange Carriers. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

\* \* \* \* \*

(2) Interconnection – The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other third party to which the carrier provides interconnection; and,

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

46. Section 51.100 of the FCC's rules requires that Qwest allow Level 3 to exchange all traffic, including information and interexchange traffic, when it has established points of interconnection for telecommunications exchange or exchange access traffic:

Sec. 51.100 General duty.

(a) Each telecommunications carrier has the duty:

(1) To interconnect **directly or indirectly** with the facilities and equipment of other telecommunications carriers; and



\* \* \* \* \*

(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well. 47 C.F.R. § 51.100 [emphasis added.]

47. In addition, the federal rules make clear that interconnection may be established for the exchange of all local and interexchange access traffic:

Sec. 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

- (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
- (2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

\* \* \* \* \*

(iii) The trunk interconnection points for a tandem switch;

\* \* \* \* \*

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) That, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection.

48. Section 251(c)(2) does not impose any jurisdictional restriction on the traffic, as Qwest avers with its proposed “local interconnection service” trunk groups. Nor do the FCC's rules impose such a jurisdictional requirement for interconnection. Section 251(c)(2) expressly states that ILECs must interconnect for the exchange of “telephone exchange service” and “exchange access.” The latter is, without question, often jurisdictionally interstate in nature. Similarly, nothing in Section 251(c)(2) or the FCC’s rules under it draws a distinction between “local” and “non-local” traffic for purposes of interconnection obligations or even reciprocal compensation.<sup>30</sup>

49. Section 251(c)(2) does give the requesting carrier, Level 3, the right to choose the manner in which the interconnection will take place. The ILEC, in turn, must provide the facilities and equipment for interconnection at that point.

50. Level 3 has chosen to interconnect via a single physical interconnection facility meeting at a specific point of interconnection in each LATA. Qwest’s proposed contract terms seek to impose a configuration whereby Level 3 must either establish separate facilities to different locations, or to create a number of otherwise irrelevant “trunk groups” of traffic to be carried on the facilities to the single interconnection point, but with no technical justification for doing so. Level 3 understands that when the total amount of traffic between its network and a particular Qwest end office reaches a certain level, sound network engineering calls for the establishment of separate “trunk groups” on each parties’ network that allow traffic to and from that end office to be routed directly, rather than through Qwest’s tandem switch. But the *only*

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<sup>30</sup> The FCC’s intercarrier compensation rules, in 1996, made specific reference to “local” traffic. However, by 2001 the FCC had realized that the term “local” did not actually appear in the relevant portions of the statute, and that using it had led to “ambiguities” and had been a “mistake,” which the FCC undertook to “correct” at that time by amending its rules to delete references to that term. *See In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, CC Docket No. 99-68, FCC 01-131 (rel. April 27, 2001) (*ISP Remand Order*) at ¶

relevant consideration for such trunk groups is the Qwest end office to and from which the traffic is going and coming. There is *no* technically sound reason to divide up traffic to or from the same end office into different trunk groups based on the “type” of traffic it might be. Yet this costly and technically inefficient division of traffic by “type,” as opposed to by destination, is exactly what Qwest is demanding.

51. For this reason, Qwest’s proposed terms have nothing to do with technical trunking requirements or network design concerns. Qwest’s insistence that Level 3 exchange interstate traffic over Feature Group D (FGD) trunks is an attempt by Qwest to obtain *access charges* on all traffic that rides through those trunks, and ISP-bound and VoIP Traffic in particular. This justification, however, is completely without merit; Qwest may not force Level 3 to interconnect in such a manner that is based solely on Qwest desire to collect access charges.

52. Level 3’s Agreement permits the carriers to exchange all traffic over a common set of interconnection trunks, and rely upon allocation factors to determine the compensation due. Carriers nationwide, including Qwest, have traditionally utilized percentage allocations to determine billing and compensation responsibility. Carriers, including Level 3, provide auditable records to verify these traffic percentages.<sup>31</sup>

53. The FCC Wireline Competition Bureau has made clear that ILECs may not force CLECs to use multiple trunk groups as a way to govern the compensation that relates to the traffic that flows through the trunks. In the *Virginia Arbitration Order*, the FCC rejected the Verizon’s efforts to do exactly what Qwest proposes to do through its proposed contract terms provisions:

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45. Of course, it is natural and appropriate to refer to “local” traffic in the context of retail offerings to end users; the term causes confusion, however, when it is used to try to define relationships between interconnecting carriers.

<sup>31</sup> See Section 7.3.9, and Issue No. 14.

We find Verizon's objection to AT&T's use of the term ESIT to be lacking. As AT&T explains, the use of this term merely recognizes the parties' agreement to exchange 251(b)(5) traffic and toll traffic on the same trunk groups, applying a percentage of use factor to determine the portion of traffic subject to reciprocal compensation and the portion subject to access charges. Verizon fails to explain how this does violence to Virginia's regime governing intrastate access.<sup>32</sup>

54. State Commissions that have addressed this issue, have specifically found that “economic entry into the market requires that [the CLEC] be permitted to use its existing trunks for all traffic whenever feasible.”<sup>33</sup>

55. The Minnesota Commission has specifically rejected Qwest’s requirements that would have prohibited Level 3 from exchanging all ISP-bound traffic with Qwest over LIS trunks. Instead, that commission ordered Qwest to permit Level 3 to exchange ISP-bound traffic over LIS trunks.

Qwest and Level 3 disagreed about whether traffic originated by Qwest customers and directed to ISPs served by Level 3 should be included in the calculation of relative use. Level 3 proposed contract language that would include that traffic in the relative use calculation. [...] Contrary to Qwest's assertions, the FCC Rules do not support Qwest's position. 47 C.F.R. § 51.703(b) provides that Qwest is responsible for routing the call from the Qwest customer to the point of interconnection between Qwest and Level 3 and must absorb all costs associated with the origination of traffic on Qwest's side of the network. The rule prohibits Qwest from imposing any charge on Level 3 for traffic that originates on Qwest's network.<sup>34</sup>

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<sup>32</sup> *Virginia Arbitration Order* at ¶ 57.

<sup>33</sup> *In the Matter of the Application of Sprint Communications Company, L.P. for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan*, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997, pp. 4-5. *See also, US West Communications v. MFS Intelenet, Inc.*, 193 F3d 1112, 1124-25 (9<sup>th</sup> Cir 1999).

<sup>34</sup> *In the matter of the Petition of Level 3 Communications, LLC for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC Docket No. P5733, 421/IC-02-1372, OAH Docket No. 3-2500-15076-2 (hereinafter “*Level 3 – Qwest Minnesota Arbitration*”), Arbitrator’s Recommended Decision (Nov. 1, 2003) at 5.

56. Level 3's proposed Interconnection Agreement, consistent with this history, encourages true facilities-based competition by permitting Level 3 to rely on existing network interconnection configurations (built and established under the existing Qwest Interconnection Agreement) to exchange Level 3's customers' traffic with Qwest. State Commissions have held that the costs imposed on CLECs in the development of their interconnection plan are key considerations in defining the terms and conditions of an Interconnection Agreement.<sup>35</sup>

57. Level 3's Section 7.2.2.9.3.1 reflects the applicable law, and the Interconnection requirements imposed on both Qwest and Level 3 by Section 251. Qwest's proposed terms, including the entire SPOP Amendment must be rejected by the Commission.

**3. ISSUE NO. 3.**

**a. Statement of the Issue:**<sup>36</sup> Whether Qwest may exclude ISP-bound traffic from compensation due under the *FCC's ISP Remand Order* through contract terms that seek to create artificial geographic designations of the ISP.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.3.6.1., 7.3.6.3, the Definition of VNXX.

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<sup>35</sup> *Re Southwestern Bell Telephone Company*, Tx. PUC Docket No. 22315, Mar 14, 2001.

<sup>36</sup> In the Disputed Points List (DPL) filed contemporaneously with this Petition, there are three (3) subparts to this Issue Number 3: Issues 3 A through C address disputed contract terms that relate to this statement of the issue.

**c. Level 3 Position.**

58. Existing federal law requires Qwest to compensate Level 3 for terminating all ISP-bound traffic originated by Qwest customers, and terminated to a Level 3 ISP. Under the terms of the *ISP Remand Order*, once Qwest elects to exchange local circuit switched traffic at the rate of \$0.0007, all ISP-bound traffic is subject to that same rate.

**d. Qwest Position.**

59. Qwest asserts that it is permitted to deny intercarrier compensation for ISP-bound Traffic unless the ISP is physically located within the calling area of the originating caller. Qwest proposes terms that would provide for a rate of \$0.0007 per minute of use for calls that originate and terminate within the Qwest-local calling area (which does not govern Level 3's local calling area), and would apply a "bill and keep" arrangement for calls where the ISP is located physically outside of the Qwest-local calling area of the party originating the calls. Qwest's proposed terms are not based on an accurate reflection of the current state of the law. As the FCC found in the *Vonage Order*, Information Services Traffic has no "local" area – all such traffic is jurisdictionally indeterminate.

**e. Basis for Level 3's Position.**

**1) Qwest Opted Into the FCC's *ISP Remand Order* Compensation Regime.**

60. Section 251(b)(5) of the Act imposes on each local exchange carrier ("LEC") "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."<sup>37</sup> With respect to reciprocal compensation obligations, under the Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and

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<sup>37</sup> 47 USC § 251(b)(5).

the called parties are physically located. Section 251(b)(5) applies to “the transport and termination of telecommunications.”

61. In the *ISP Remand Order*,<sup>38</sup> the FCC found that **all** telecommunications traffic is subject to reciprocal compensation arrangements unless it falls within the exemptions established by Section 251(g) of the Act (47 U.S.C. §251(g)). In addition, the *ISP Remand Order* ordered that ILECs have the option of electing to exchange telecommunications traffic under Section 251(b)(5) at the rate of \$0.0007 per minute of use, or the state-commission approved reciprocal compensation rate. For those ILECs that elect to exchange telecommunications traffic at \$0.0007 per minute of use, FCC Rules require them to exchange ISP-bound traffic at the same rate of \$0.0007 per minute of use.

62. Upon information and belief, Qwest has elected to exchange telecommunications traffic under Section 251(b)(5) under the FCC’s *ISP Remand Order* compensation regime. Qwest’s contract proposals, however, provide numerous exceptions to Qwest’s compensation obligations, limit the type of traffic subject to compensation, and selectively use the reciprocal compensation regime that the FCC sought to eliminate in the *ISP Remand Order*:

It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to “pick and choose” intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply *only* if an incumbent LEC offers to exchange all traffic subject to 251(b)(5) at the same rate.<sup>39</sup>

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<sup>38</sup> *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, CC Docket No. 99-68, FCC 01-131 (rel. April 27, 2001.) (*ISP Remand Order*).

<sup>39</sup> *Id.* at ¶ 89 (emphasis in original).

63. Because Qwest has opted into the FCC's compensation regime adopted in the *ISP Remand Order* for Section 251(b)(5) traffic, Qwest is required to compensate Level 3 at the rate of \$0.0007 per minute of use for all ISP-Bound Traffic. The *ISP Remand Order* makes clear that the federal compensation regime of \$0.0007 applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include ***all access traffic*** that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."<sup>40</sup>

64. Level 3's contract terms are supported by the *FCC Core Forbearance Order*, which addressed Core's petition requesting the FCC refrain from enforcing the provisions of the *ISP Remand Order*. In summarizing its *ISP Remand Order*, the FCC stated that:

1. Its Growth Cap rules "imposed a cap on total ISP-Bound minutes for which a LEC may receive this [intercarrier] compensation equal to ***the total ISP-Bound minutes*** for which the LEC was previously entitled compensation, plus a 10 percent growth factor."<sup>41</sup> and,
2. Its New Market rules allowed two carriers to exchange traffic on a bill-and-keep basis if the two carriers were not exchanging traffic prior to adoption of the *ISP Remand Order* and the ILEC "has opted into the federal rate caps ***for ISP-Bound traffic***."<sup>42</sup>

65. The FCC's decisions on ISP-bound traffic reject any differentiation of ISP-Bound traffic based on the location of the originating and terminating NPA-NXX; and reject any differentiation on the basis of the physical geographic location of the calling and called parties. The FCC further found that the Growth Cap and New Market Rules adopted in the *ISP Remand*

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<sup>40</sup> *Id.* at ¶ 44 (emphasis added).

<sup>41</sup> *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (*Core Forbearance Order*), ¶ 9.

<sup>42</sup> *Id.*



*Order* that imposed a bill and keep regime for ISP-Bound traffic "are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."<sup>43</sup>

66. In *AT&T Communications of Illinois v. Illinois Bell Telephone Company*, 2005 WL 820412 (2005), the federal court reversed an Illinois Commerce Commission Arbitration decision that approved language similar to that proposed here by Qwest. The court first noted that the Act requires local telecommunications carriers to connect their networks so that customers of various carriers can call one another, 47 U.S.C. § 251(c)(2), but it does not require carriers to terminate, or complete, each other's calls free of charge. Rather, the Act envisions "reciprocal compensation" in which carriers pay each other a fee to terminate calls to their customers. 47 U.S.C. § 251(b)(5) (stating that each ILEC has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications".)

67. The court further held that ILECs, like Qwest, would not be permitted to "pick and choose" intercarrier compensation rates once they elected to be bound by the ISP rate regime.<sup>44</sup> The court held that the *ISP Remand Order* "explicitly states that ILECs must charge the same rate for ISP-bound traffic, which is excluded from 251(b)(5), as it does for traffic that is subject to that section."<sup>45</sup>

68. The FCC Wireline Competition Bureau has also rejected ILEC efforts to impose bill and keep for ISP-Bound traffic. In the *Virginia Arbitration Order*, Verizon's contract terms were summarized as follows:

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<sup>43</sup> *Id.* at ¶ 24.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, citing *ISP Remand Order* at ¶ 89. See also, *Southern New England Telephone Company v. MCI*, 359 F.Supp.2<sup>nd</sup> 229 (D. Conn. March 16, 2005.)

Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.<sup>46</sup>

69. The FCC rejected Verizon's attempts to impose a bill and keep regime for FX

ISP-Bound traffic:

We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. *We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.* Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.<sup>47</sup> (emphasis added).

70. Just as the FCC Wireline Competition Bureau rejected the ILEC's attempt to impose a bill and keep compensation regime for ISP-Bound FX Traffic, so too should this Commission. In fact, under the FCC's holding in the *ISP Remand Order* mandating that only the FCC can establish intercarrier compensation rules for ISP-Bound traffic, the only manner in which the Commission can address the underlying issue raised in this arbitration is to adopt Level 3's proposal to apply a uniform rate of compensation for all ISP-bound traffic.

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<sup>46</sup> *Virginia Arbitration Order* at ¶ 286.

<sup>47</sup> *Virginia Arbitration Order* at ¶ 301.

**b) There Is No Difference between Qwest's Costs in Handling VNXX ISP-Bound and ISP-Bound Traffic.**

71. Putting aside the fact that the FCC has fixed the rate of compensation for all ISP-Bound traffic, the Commission should still adopt Level 3's proposed terms. Because all traffic originated by Qwest and terminated to Level 3 is routed to the Single Point of Interconnection, Qwest's costs and obligation in terminating its customers' traffic is the same, regardless of the physical location of the terminating ISP. All calls are exchanged with Level 3 at the Point of Interconnection.

72. Consequently, Qwest incurs no additional costs for completing an FX or VNXX ISP-bound call than it would any other type of call terminated at the Level 3 POI. Because Qwest's costs to bring a call to the POI are the same regardless of the nature of the call, there is no economic justification for treating these calls differently from any other locally dialed call.

**c) The Washington Commission has Already Found ISP-Bound Traffic to be Subject to the FCC's Decisions.**

73. While the Commission has not determined what the appropriate treatment of FX or VNXX ISP-bound calls are, the Commission has concluded that ISP-Bound calls are subject to the FCC's compensation scheme set forth in the *ISP Remand Order*.<sup>48</sup> The Commission has also rejected the notion that "local calling area" restrictions associated with reciprocal compensation schemes under Section 251(b)(3) are not for the state Commission to apply in setting the rates of compensation for ISP-Bound traffic.<sup>49</sup> In a more recent decision, the

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<sup>48</sup> *In re Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Fifth Supplemental Order, Arbitrator's Report and Decision ¶ 35 (January 2, 2003).

<sup>49</sup> *Id.*

Commission found that “ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements.”<sup>50</sup>

**d) Other State Commissions Have Found ISP-Bound Traffic to be Compensable and have Rejected Bill and Keep.**

74. Most state commissions that have considered the question of the appropriate rate of compensation for ISP-bound traffic, have reached the same result articulated in the *FCC Virginia Arbitration Order*. For example, the Kentucky Public Service Commission found that a CLEC's FX service should be treated the same as BellSouth's FX service, and both services should be treated as local traffic:

Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic. Accordingly, the Commission finds that foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA a[s] the calling area with which the telephone number is associated.<sup>51</sup>

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<sup>50</sup> *Pac-West Telecomm, Inc. v. Qwest Corporation*, Docket No. UT053036, Order No. 03 Recommended Decision to Grant Petition, ¶ 37, (August 23, 2005).

<sup>51</sup> *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, at 7 (Ky. PSC Mar. 14, 2001).

75. These decisions are consistent with the results reached by, among others, the North Carolina Utilities Commission.<sup>52</sup>

76. Importantly, several state commissions, including the California Commission, have recognized that the *ISP Remand Order* addressed *all* ISP-bound traffic, including traffic to ISPs using FX-like arrangements. The California Commission, like its fellow commissions in New Hampshire and Alabama, recognized the FCC's exclusive jurisdiction over intercarrier compensation for ISP-bound traffic to virtual NXX customers.<sup>53</sup>

77. Similarly, the Public Utilities Commission of Ohio stated, "The Commission agrees . . . that all calls to FX/virtual NXX [numbers] that are also ISP-bound are subject to the inter-carrier compensation regime set forth in the *ISP Remand Order*."<sup>54</sup>

78. The Connecticut Department of Public Utility Control has ruled, also in the context of FX-like traffic to ISPs, "that intercarrier compensation for ISP-bound traffic is within the jurisdiction of the FCC and that on a going forward basis, the Department has been preempted from addressing the issue beyond the effective date of the *ISP Order* [June 14, 2001]."<sup>55</sup>

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<sup>52</sup> *MCI Recommended Arbitration Order* at 67-74.

<sup>53</sup> *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-11-045, A.01-12-026, Opinion Adopting Final Arbitrator's Report With Modification (Cal. PUC July 5, 2002); *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); *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).

<sup>54</sup> *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).

<sup>55</sup> *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2.

79. The Florida Commission also issued a decision regarding intercarrier compensation and virtual NXX issues stating that "due to the FCC's recent *ISP Remand Order*, which removes ISP-bound traffic from state jurisdiction, this issue is limited to intercarrier compensation arrangements for traffic that is delivered to non-ISP customers."<sup>56</sup>

80. The *ISP Remand Order* makes clear that the federal ISP-bound traffic compensation regime applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include *all access traffic* that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."<sup>57</sup> Nowhere does the *ISP Remand Order* limit its regime to "local" ISP-bound traffic.<sup>58</sup> To the contrary, as noted above, the *ISP Remand Order* rejected the use of the term "local" as relevant to intercarrier compensation for ISP-bound calls. Indeed, the FCC found that its initial reliance (in its 1996-era rules) on the non-statutory term "local" had been "mistaken," and had created "ambiguities" on this point.<sup>59</sup> One purpose of the *ISP Remand Order* was to "correct that mistake,"<sup>60</sup> which the FCC did, as noted above, by establishing a uniform rule for compensation of *all* "information access traffic," which includes ISP-bound traffic.

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<sup>56</sup> *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order on Reciprocal Compensation, Phases II and IIA, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sept. 10, 2002), at 26.

<sup>57</sup> *ISP Remand Order* at ¶ 44 (emphasis added).

<sup>58</sup> The FCC was fully aware that CLECs were using foreign exchange-like ("FX-like") arrangements to serve ISPs long before the *ISP Remand Order* was released. Several carriers—both ILECs and CLECs, asked the FCC to include FX-like traffic within the scope of the order. *See ex parte* filings in FCC CC Docket No. 99-68: Letter dated March 28, 2001 from Gary L. Phillips, SBC Telecommunications, Inc., to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, at 3; Letter dated March 7, 2001 from Susanne Guyer, Verizon, to Dorothy Attwood, at 2-3; Letter dated December 13, 2000 from John T. Nakahata, Counsel to Level 3 Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1.

<sup>59</sup> *ISP Remand Order* at ¶¶ 45-46.

<sup>60</sup> *Id.*

81. Consequently, this Commission must reject Qwest's proposed Section 7.3.6.3, and adopt Level 3's contract terms.

**4. ISSUE NO. 4.**

**a. Statement of the Issue:** Whether the Parties will compensate each other the rate of \$0.0007 for the exchange of Voice over Internet Protocol ("VoIP") traffic.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.3.4.1.

**c. Level 3 Position.**

82. Level 3 seeks to use the interconnection network it has constructed and additional facilities it may construct in the future to exchange IP Enabled and VoIP Traffic between its network and Qwest's. Level 3's 16,000 route-mile network within the continental United States is optimized to provide advanced telecommunications and enhanced services.<sup>61</sup> Level 3's network also extends to Europe and is connected with international routes worldwide. Level 3 also designed its facilities to permit connections to the PSTN. Level 3 requires the ability to interconnect with Qwest for a variety of Internet Protocol-enabled signals, including VoIP. Level 3 has invested billions of dollars to build and optimize its network, and provides a service

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<sup>61</sup> Level 3's name evokes the fact that Level 3's network is uniquely designed and operated on an end-to-end basis to optimize the end user customer's ability to fully exploit the benefits of IP technology. More specifically, the name itself "Level 3" refers to the fact that Level 3 provides the three essential building blocks of a fully optimized facilities-based network capable of leveraging all of the benefits that Internet enabled technologies have to offer. At the physical level ("level 1") Level 3 constructed a 16,000 mile fiber optic backbone within the continental United States. Level 3 has also constructed 2 undersea cables connecting the U.S. network to its approximately 9,000 route mile network in Europe. Level 3 amplifies signals traveling within its network every 60 miles and reconstitutes, reconfigures and regenerates signals every 240 miles to ensure the highest quality transmission with the lowest possible degradation in service. Level 3 also provides interconnection and collocation services at Level 3 gateway facilities nationwide. At the data level ("level 2") Level 3 provides the most advanced network capabilities to permit other carriers and end user customers to exchange vast quantities of traffic every day. At the network level ("level 3") Level 3 has optimized the entire network to seamlessly and transparently permit carrier customers and end users the ability to leverage the full benefits of the IP family of protocols unfettered by constraints imposed by circuit switched or other older technologies.

to Qwest by terminating Qwest's originating VoIP traffic. Accordingly, Level 3 seeks compensation for terminating Qwest's originating VoIP traffic.

**d. Qwest Position.**

83. Qwest's position is that regardless of whether VoIP traffic is an information or telecommunications service, if a Qwest customer originates a VoIP call to a Level 3 customer, Qwest is not obligated to compensate Level 3 to terminate that call.

**e. Basis for Level 3's Position.**

**1) VoIP Traffic is a form of Information Service Traffic Like ISP-Bound traffic.**

84. The Act gives the FCC extensive authority over all "common carriers," defined as all persons "engaged as a common carrier for hire, in interstate and foreign communications."<sup>62</sup> Title II of the Act requires, among other things, that common carriers provide service at just and reasonable prices, and avoid unreasonable discrimination among customers. Over the years, the FCC has interpreted Title II to apply only to carriers that provide "basic" service.

85. In the 1960s, the FCC responded to the development of the computer-based data processing industry by distinguishing between regulated telecommunications service and unregulated data processing service. Under its previously effective rules, data processors that used dedicated transport to haul data traffic could be characterized as telecom resellers, subject to full regulation on the state and federal level, and the FCC did not want to subject data processors to this regulatory burden. In addition, the FCC was concerned that telecom common carriers entering the data processing service market might either pass along the cost of their data processing investments to captive ratepayers or take advantage of their telecommunications

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<sup>62</sup> 47 U.S.C. § 153(10).



facilities to unfairly disadvantage their data processing competitors.<sup>63</sup> By 1980, the differentiation between "data processing" and "telecommunications" had become unworkable. Consequently, in its *Computer II* decision, the FCC refined the distinction by developing the categories of unregulated "enhanced service" and fully regulated "basic service."<sup>64</sup>

86. The FCC defined "basic service" as the provision of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."<sup>65</sup> Enhanced services were defined as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."<sup>66</sup> Under *Computer II*, basic services were to be offered under regulated tariffs, while enhanced services were unregulated.

87. The purpose of these categories was to ensure that the "licensed transmission facilities of a carrier are equally available to all providers of enhanced services," to minimize "the potential for a carrier to use its transmission facilities to improperly subsidize an enhanced data processing service without detection," and to benefit consumers by "enabling resale entities to custom-tailor services to individual user needs."<sup>67</sup> Thus, the goal of the FCC in creating the categories was to enhance competition and foster increased technological development in the

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<sup>63</sup> See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 FCC 2d 267 (1971) (*Computer I*).

<sup>64</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (*Computer II*).

<sup>65</sup> *Computer II*, 77 FCC 2d at 420.

<sup>66</sup> *Id.*; see also 47 C.F.R. § 64.702.

computer industry by keeping it free from regulation. Concerns about regulation of enhanced services extended to regulation by state governments, and the FCC prohibited state regulation of enhanced services.<sup>68</sup>

88. When Congress passed the Telecommunications Act of 1996, it generally retained the FCC's basic vs. enhanced distinction. However, the Act used different terminology. The Act defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used."<sup>69</sup> The term "telecommunications" is defined as "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>70</sup> In contrast, the Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include the use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."<sup>71</sup>

89. The FCC's enhanced/basic service regulatory dichotomy was developed to promote the growth of data processing and other computer-related services by excluding them from Title II regulation. The FCC took the same position with respect to enhanced services providers' access to the Public Switched Telephone Network ("PSTN.") Specifically, in

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<sup>67</sup> *Computer II*, 77 FCC 2d at 417.

<sup>68</sup> *Computer II*, 77 FCC 2d at 387. See also *Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, at ¶¶18, 46 (*Computer III*).

<sup>69</sup> 47 U.S.C. § 153(46).

<sup>70</sup> 47 U.S.C. § 153(43).

establishing the access charge system for long-distance calls, the FCC in 1983 treated enhanced service providers ("ESPs") as "end users," rather than as "interexchange carriers."<sup>72</sup> It reaffirmed this decision in 1991, and 1997.<sup>73</sup> In 1997, the Commission expressly recognized that treating ESPs as end users advanced the goals of the Act:

We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs. We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."<sup>74</sup>

90. The FCC has consistently determined that, like ISP-bound traffic, IP-Enabled Services are (1) Information Services and (2) are Interstate in nature.

91. Because IP-Enabled Services traffic is a form of information services traffic, the functions involved in the "transport and termination" of such traffic is legally identical to those same functions when provided in the context of ISP-bound traffic. Indeed, as noted above, the FCC found that ISP-bound traffic is essentially just a subset of the larger set of "information access" traffic that two interconnected carriers might exchange. As a result, the only logical conclusion is that the FCC's \$0.0007/minute compensation regime applicable to ISP-bound traffic would apply to other information services traffic as well, including IP-Enabled Services traffic such as VoIP.

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<sup>71</sup> 47 U.S.C. § 153(20). The Act's definition of "information services" appears to have been drawn more from the Modification of Final Judgment that broke up the Bell System in 1984. See *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

<sup>72</sup> See *In the Matter of MTS & WATS Market Structure*, 97 FCC 2d 682, 711-15 (1983).

<sup>73</sup> *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform Order*).

**2) Intercarrier Compensation at the rate of \$0.0007 per minute of use Would Promote the Public Interest.**

92. As with ISP-bound information services, where the FCC has ordered ILECs to compensate CLECs for the exchange of ISP-bound information traffic, Level 3 proposes language that requires the Parties to reciprocally compensate each other for the exchange of VoIP traffic at the rate of \$0.0007 per minute of use.<sup>75</sup>

93. Qwest's proposal to deny compensation for the exchange of VoIP traffic would disadvantage IP-Enabled service providers and protect ILECs' dominance in local markets. New IP-Enabled services such as cable-based VoIP increasingly offer full substitutes for local calling services. Indeed, IP-Enabled services allow other delivery platforms – such as cable – to compete with ILECs' existing bundled local and long distance service offerings. Against this backdrop, Qwest's proposal to refuse intercarrier compensation for the exchange of traffic is anticompetitive, unworkable and contrary to the goals and objectives of Section 251(b)(5), which establishes a “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”<sup>76</sup> Restricting intercarrier compensation for the exchange of IP Enabled or VoIP traffic would subvert Congress's express goal of encouraging IP-based innovation.<sup>77</sup>

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<sup>74</sup> *Access Charge Reform*, 12 FCC Rcd at 16133.

<sup>75</sup> In the *Vonage Order*, the FCC concluded that it has not yet reached a conclusion on the appropriate compensation for the exchange of VoIP or IP Enabled traffic. Level 3's proposal here is subject to the FCC's final conclusions on this issue.

<sup>76</sup> 47 U.S.C. § 251(b)(5). As noted above, even if information services traffic does not qualify as “telecommunications *service*” traffic, by the very definition of “information services,” such traffic is conveyed “via telecommunications.” At the same time, Section 251(b)(5) requires the establishment of reciprocal compensation, not for the transport and termination of “telecommunications *services*,” but rather for the transport and termination of “telecommunications.” It follows that reciprocal compensation obligations — in this case, the \$0.0007 per minute rate — apply to the exchange of information services traffic such as the VoIP traffic at issue here.

<sup>77</sup> *See, e.g.*, 47 U.S.C. § 230(b)(2) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”).

94. For these reasons, the Commission should adopt Level 3's proposed contract terms that would provide for the exchange of compensation at the rate of \$0.0007 per minute of use, the same rate that applies to the exchange of ISP-bound traffic.

**5. ISSUE NO. 5.**

**a. Statement of the Issue:** Whether the Agreement should incorporate by reference, interconnection terms and conditions that conflict with the specific terms of the Interconnection Agreement at issue in this proceeding.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Each reference by Qwest in the Agreement to Qwest's Statement of Generally Available terms. See for example, Qwest's attempt to adopt terms defined in its SGAT in the definitions section, and Sections 5.8.1, 5.8.2, 5.12.1, 5.12.2, 5.13, 5.15.1, 5.16.9.1.1, 5.16.10, 5.18.3, 5.18.9, 5.23.1, 5.27.1, 5.30.1., 6.2.2.5, 6.2.2.6, 6.2.2.7, 6.2.2.9.2, 6.2.3.1a, 6.2.3.1b, 6.2.3.1c, 6.2.3.1d, 6.2.3.2a, 6.2.3.2d, 6.2.14, 6.4.1, 7.1.2.1, etc.

**c. Level 3 Position.**

95. Throughout Qwest's proposed draft of the Agreement, Qwest attempts to incorporate by reference, without consent by Level 3, varying and undefined terms into this Interconnection Agreement by making reference to the Statement of Generally Available Terms" or "SGAT" on file with the Commission. While Qwest may make Interconnection available to Level 3 through the terms and conditions of its SGAT, Qwest may not modify the terms of this Agreement with unknown and undefined references to its SGAT.

96. The parties have already agreed in Section 5.2.2.1 of the Agreement that Level 3 may obtain Interconnection services under the terms and conditions of a then-existing SGAT or agreement to become effective at the conclusion of the term or prior to the conclusion of the term

if Level 3 so chooses. However, Qwest may not pick and choose unspecified and possibly inconsistent terms and conditions from the SGAT to modify its obligations under the Agreement.

97. The Commission should strike from the Agreement any attempt by Qwest to incorporate into this Agreement, unspecified provisions of the SGAT.

**B. TIER II ISSUES.**

98. The Tier II issues concern language within the Agreement that requires modification so that the Agreement is internally consistent, commercially reasonable, and in compliance with applicable laws.

**6. Issue No. 6**

**a. Statement of the Issue.**

Because Level 3 does not have “Switch Technology”, should the Agreement provide that Automated Message Accounting (“AMA”) records are inherent in the parties’ network.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “Automated Message Accounting.”

**c. Level 3 Position.**

99. Automated Message Accounting is term of art that generally refers to the sequence of information associated with calls. Qwest seeks to impose a definition of Automated Message Accounting or “AMA” on Level 3 that provides a billing record structure that is currently inherent in circuit switches. However, Level 3 operates Gateways and softswitches, not circuit switches. Therefore, if both parties are to provide message accounting, the

Agreement should not indicate that such “AMA” structures are an inherent part of both parties’ networks.

**7. Issue No.7.**

**a. Statement of the Issue**

Whether the Agreement should provide that End User Customers are those customers that are on the public switched telecommunications network, and that end users only exchange calls to or from the public switched telecommunications network.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “Basic Exchange Telecommunications Service.”

**c. Level 3 Position.**

100. Level 3 provides IP Enabled services whereby Level 3’s customers complete Voice over IP telecommunications. Qwest’s proposed definition would describe the services subject to this Agreement as only those communications where an end user that obtains service from the public switched telecommunications network, place calls to, or receive calls from, other stations on the public switched telecommunications network. This definition is unnecessary, and excludes the types of IP Enabled traffic that is exchanged with Level 3. Level 3 opposes the definition in its entirety.

**8. Issue No.8.**

**a. Statement of the Issue**

Should the Parties’ be permitted to agree on the types of call record information.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “Call Record.”

**c. Level 3 Position.**

101. This issue is directly linked with Level 3's proposals for the exchange of intercarrier compensation. Level 3 proposes that the parties use "Call Records" in exchanging billing information. The "Call Record" reference allows for more flexibility for the Parties to agree to new or different technologies in recording. Qwest's proposed "CPN" reference limits the Parties to only that form of technology. Further, the technology does not exist that will allow for "CPN" to be included in the call flow of IP-Enabled Traffic. Qwest's proposed definition of "Call Record" locks in place the types of information that the Parties will exchange to track calls, monitor compensation, and establish billing records. Under Qwest's proposal, "Call Record" shall include only the following: charge number, Calling Party Number ("CPN"), Other Carrier Number ("OCN"), Automatic Number Identifier ("ANI"), or Originating Line Indicator ("OLI"). Level proposes that the Parties leave open the option to exchange additional information that may be relevant and useful.

102. In light of the FCC's *Vonage Order*, which addresses and defines VoIP services, Qwest's proposed term cannot be sustained. Qwest would have the Commission adopt a set of billing and record standards that cannot apply to IP-PSTN traffic. Level 3's terms merely allow the Parties the ability to be flexible in the exchange of call records and formats that will allow them to adapt to the changing environment.

**9. Issue No. 9.**

**a. Statement of the Issue**

What is the proper definition of "exchange access".

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, "Exchange Access."



**c. Level 3 Position.**

103. Level 3 proposes to define the term “Exchange Access” in accordance with Section 153 of the Act: The term “Exchange Access” means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. It is not clear the basis for Qwest’s opposition to this definition.

**10. Issue No. 10.**

**a. Statement of the Issue**

Should the definition of “Interconnection” include terms that would exclude the Parties from exchanging VoIP traffic, and certain ISP-bound traffic.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “Interconnection.”

**c. Level 3 Position.**

104. Qwest’s proposed definition of “Interconnection” describes the types of traffic that may be exchanged by the Parties. However, Qwest’s definition excludes VoIP traffic. Qwest’s proposed definition should be rejected because it is a back-door attempt to regulate the types of traffic that may be exchanged between the Parties. Level 3’s definition of Interconnection identifies all forms of traffic that may be exchanged between the Parties, and most closely matches the terms of the Act.

**11. Issue No. 11.**

**a. Statement of the Issue**

Should the definition of “Interexchange Carrier” be defined by relying on a type of traffic that is defined by the federal Communications Act.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, "Interexchange Carrier."

**c. Level 3 Position.**

105. Level 3's contract defines an Interexchange Carrier as a carrier that provides Telephone Toll Service, a type of service that is actually defined by the federal Communications Act. Qwest's proposed definition should be rejected because it relies upon other ambiguous terms that are not found in the federal Act. It is unclear what Qwest's objection is to Level 3's definition, which most closely matches the terms of the Act.

**12. Issue No. 12.**

**a. Statement of the Issue**

Whether the Agreement should define the term "IntraLATA Toll Traffic" using terms defined in the federal Communications Act.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, "IntraLATA Toll."

**c. Level 3 Position.**

106. Level 3's proposed agreement defines the term "IntraLATA Toll Traffic" by reference to a type of traffic, "Telephone Toll", which is defined in the federal Act. Qwest's proposed definition should be rejected, however, because it relies upon terms that are not found in the federal Act, and are vague and ambiguous.

**13. Issue No. 13.**

**a. Statement of the Issue**

Whether the Agreement should contain a definition of a term that is used by Qwest to shift to Level 3 the costs of Qwest's facilities on Qwest's side of the point of interconnection.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, "Local Interconnection Service or "LIS" Entrance Facility"

**c. Level 3 Position.**

107. Qwest's definition of Local Interconnection Service must be rejected. Qwest's definition is another attempt to shift to Level 3 the costs of Qwest's network on Qwest's side of the Point of Interconnection. Qwest has the obligation under Section 251 to interconnect its network for the exchange of traffic between the parties. Qwest also has the obligation to interconnect in a manner that allows Level 3 to exchange traffic at a single point of interconnection, without having Qwest's costs of interconnection imposed on Level 3.

**14. Issue No. 14.**

**a. Statement of the Issue**

Should the definition of "Telephone Exchange Service" be defined based on the unknown geographic physical location of the originating and terminating caller, or should it mirror the terms of the Act.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, "Telephone Exchange Service."

**c. Level 3 Position.**

108. Level 3's proposed definition of "Telephone Exchange Service" is derived directly from the Act. 47 U.S.C. § 153. Qwest's proposed definition of "Exchange Service" is not derived from the Act, and should be rejected by the Commission. Qwest's proposed

definition of “Exchange Service” is another back-door attempt to regulate the types of traffic that may be exchanged between the Parties.

**15. Issue No. 15**

**a. Statement of the Issue**

Should the definition of “Telephone Toll Service” be defined based on the Act’s definition.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “Telephone Toll Service.”

**c. Level 3 Position.**

109. Level 3 proposes to define the term “Telephone Toll Service, and to adopt the definition set forth in the Act. 47 U.S.C. § 153. Qwest offers no explanation for its opposition to Level 3 defining this term.

**16. Issue 16.**

**a. Statement of the Issue.**

Assuming that the Agreement will define “Voice over Internet Protocol” or “VoIP”, should the definition of “VoIP” contain substantive terms that limit the circumstances in which the Parties will exchange traffic, and the compensation that will be derived from the exchange of VoIP traffic.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Definitions, “VoIP.”

**c. Level 3 Position.**

110. Level 3 is agreeable to identifying a definition of VoIP traffic that is reasonably related to the FCC's *Vonage Order*. Qwest's proposed definition not only does not match the definition of VoIP adopted by the FCC, it goes far beyond just defining the traffic. Qwest's proposed definition of VoIP directly controls the substantive rights and obligations to exchange traffic based on the physical geographic location of the originating caller. A key and fundamental component of the FCC's definition of VoIP service is that the location of the end users are not generally known. Therefore, Qwest's proposed definition fails.

111. Moreover, Qwest's proposed definition seeks to create compensation terms and conditions, and structure the routing obligations of this traffic. It is improper for Qwest to attempt to govern the compensation and routing obligations of parties through definitions. The Commission should reject Qwest's proposed definition of VoIP in its entirety.

**17. Issue 17.**

**a. Statement of the Issue.**

Is Level 3 required to forecast and manage the capacity requirements of Qwest's network facilities and trunks on the Qwest side of the Point of Interconnection.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Sections 7.2.2.8.4, 7.2.2.8.6.1, and 7.2.2.8.6.2.

**c. Level 3 Position.**

112. In Sections 7.2.2.8.4, 7.2.2.8.6.1, and 7.2.2.8.6.2 Qwest proposes a series of terms and conditions that require Level 3 to assume costs for forecasting trunk capacity requirements for the interconnection and exchange of traffic with Level 3. While Level 3 has long exchanged forecasts with Qwest for purposes of ensuring reliability on Qwest's side of the network, Level 3

cannot assume responsibility for Qwest's costs. Moreover, these forecast requirements are not for the facilities and network requirements on Level 3's side of the Point of Interconnection. Qwest's proposed terms would require Level 3 to assume costs for forecast and manage trunks and facilities on Qwest's side of the POI. Moreover, Qwest seeks to impose financial penalties and security deposit requirements if Level 3 does not properly advise Qwest how to manage its own Interconnection facilities on Qwest's side of the POI. The entire premise of these sections is based upon Qwest's improper attempt to shift to Level 3 Qwest's own network cost. In addressing this same issue, the Minnesota Commission found:

This issue is simply another example of Qwest's attempt to ignore the clear holding in the *Level 3 – Qwest Minnesota Arbitration Order*. As noted above, this Commission has already determined that Qwest must bear all costs it incurs in bringing the traffic originated on its network to the point of interconnection with a competing carrier.<sup>78</sup>

113. For these reasons, the Commission should rule that this issue has also been decided in Level 3's favor as part of its prior arbitration decisions.

**18. Issue 18.**

**a. Statement of the Issue.**

May the Parties rely upon jurisdictional allocation factors to identify the compensation for the types of traffic exchanged.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.3.9, 7.3.9.1, 7.3.9.1.1, 7.3.9.1.2, 7.3.9.1.3, 7.3.9.2, 7.3.9.2.1, 7.3.9.2.1.1, 7.3.9.3, 7.3.9.3.1, 7.3.9.4, 7.3.9.4.1, 7.3.9.5, 7.3.9.5.1, 7.3.9.5.2, 7.3.9.6.

**c. Level 3 Position.**

114. Irrespective of the applicable rate of compensation for ISP-bound and IP-Enabled traffic, the Commission must address and resolve the logistical issues of how the Parties will interconnect their networks and bill each other for the exchange of traffic. Level 3's Section 7.3.9 of the Agreement allows the Parties to accurately measure and exchange compensation based on allocation factors that rely upon call records. Unlike Qwest's vague and ambiguous proposed terms, Level 3's contract establishes clear instructions on how the Parties will measure and report Interexchange, ISP-bound and IP-Enabled traffic, irrespective of the rate of compensation to be established by the Agreement.

115. There can be no dispute by Qwest that allocation factors are regularly used to apportion compensation for the exchange of traffic. Qwest's own proposal would rely upon allocation factors to apportion the costs of facilities and trunks on Qwest's side of the Point of Interconnection. The companies can establish Percent of Local Use ("PLU") and Percent of Interstate Use ("PIU") allocators to account for the calls exchanged between the networks. Level 3 proposes to create an additional allocator called Percent of IP Use to measure the percent of IP-Enabled Traffic that is exchanged between the Parties.

116. Jurisdictional allocation factors are not new to the industry. For decades, the FCC has relied on these factors to track and bill for compensation.<sup>78</sup> For instance, in the 1989 *Joint Board Recommended Decision and Order*, the federal-state Joint Board on Universal Service created a reporting process to track what percent of usage of the ILEC's network was interstate

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<sup>78</sup> *In the matter of the Petition of Level 3 Communications, LLC for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC Docket No. P5733, 421/IC-02-1372, OAH Docket No. 3-2500-15076-2, Arbitrator's Recommended Decision (Nov. 1, 2003) at 5..

<sup>79</sup> The FCC established rules for the calculation of "PIU" factors more than two decades ago, allowing interexchange carriers and LECs to interconnect without establishing separate trunk groups for interstate and intrastate traffic. *See Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082 (1984). *See also*, Petition, ¶¶ 39, 42.

and what percent was intrastate for billing purposes. It is referred to as the "Percent Interstate Usage" or "PIU" method. The core of the "PIU" method is that compensation is based upon the jurisdictional percentage of the traffic that is exchanged over the trunks. Audits confirm the allocation so that charges may be properly allocated.<sup>80</sup> The "PIU" audit and reporting process was meant to protect *both* the ILEC and its IXC customer in the event of a dispute, and has done so since its inception.<sup>81</sup> The FCC adopted this Joint Board recommendation and instructed the ILECs to include "PIU" audits as a part of the dispute resolution mechanism in their access tariffs.

**19. Issue 19.**

**a. Statement of the Issue.**

Whether the Parties should use the FCC's 3:1 ratio to determine what traffic is ISP-bound traffic or whether they should use Qwest's method for tracking ISP-bound traffic where the Commission has previously ruled that Qwest's method is sufficient.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.3.6.2.

**c. Level 3 Position.**

117. ISP-bound traffic should be identified using the FCC's rebuttable presumption that traffic which exceeds a 3:1 terminating to originating ratio is deemed to be ISP-bound traffic. Qwest's inclusion of language concerning a prior commission ruling is inappropriate given that Qwest has voluntarily opted into the FCC's ISP-bound compensation framework, a key aspect of which is the 3:1 ratio. Furthermore, the Agreement should not reference

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<sup>80</sup> See Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Recommended Decision and Order*, 4 FCC Rcd 1966 (1989) (*Joint Board Recommended Decision and Order*).

<sup>81</sup> *Id.* at ¶ 76.



unspecified “prior” commission rulings. These vague and ambiguous terms will only lead to disputes.

**20. Issue 20.**

**a. Statement of the Issue.**

In identifying IP enabled traffic, should the parties allow for call records that will include information other than calling Party number.

**b. Sections of the Proposed Interconnection Agreement Affected. Section 7.3.8**

**c. Level 3 Position.**

118. Level 3’s proposed terms and conditions allow the parties to exchange records that may include information other than just the Calling Party Number of the originating caller. Level 3 proposes relying on “Call Record” to identify the data within the call records. The “Call Record” reference allows for more flexibility for Level 3 and Qwest to agree to new or different technologies in recording. Qwest’s proposed “CPN” reference limits the Parties to only that form of technology.

**21. Issue 21.**

**a. Statement of the Issue.**

Whether, when ordering Interconnection, Level 3 could be deemed to be implicitly agreeing to pay the costs of the trunks and facilities on Qwest’s side of the POI.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 7.4.1.1

**c. Level 3 Position.**

119. As noted in Issue 1, Level 3 is not required to pay the costs of the trunks and facilities on the Qwest side of the POI. However, Qwest's proposed agreement contains terms that may imply that Level 3 is obligated to pay for a portion of Qwest's costs incurred on the Qwest side of the POI. Again, this is an issue which the Commission has already decided in favor of Level 3 in the *Level 3 – Qwest Washington Arbitration Order*.<sup>82</sup> Level 3's proposed Section 7.4.1.1 is necessary to clarify and confirm that Level 3 is not required to pay these costs.

**22. Issue 22.**

**a. Statement of the Issue.**

Whether Qwest may compel Level 3 to incur special construction charges for work completed on Qwest's facilities and network on Qwest's side of the POI.

**b. Sections of the Proposed Interconnection Agreement Affected.**

Section 19.1.1.

**c. Level 3 Position.**

120. Through Section 19.1.1 of the agreement, Qwest seeks to impose special construction charges on Level 3 for costs incurred by Qwest in building out its network for interconnection with Level 3. Section 19.1.1 is necessary to clarify that Qwest may not compel Level 3 to pay for costs on Qwest's side of the POI.<sup>83</sup>

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<sup>82</sup> *Level 3 – Qwest Washington Arbitration Order*, ¶ 37.

<sup>83</sup> *Id.*

**H. Proposed Contract Language Reflecting the Parties' Positions**

121. The proposed contract language is reflected in **Appendix C** to this Petition.

**I. Explanation of Petitioner's Position with Respect to Disputed Issues**

122. The explanation of Level 3's position with respect to the issues remaining in dispute is set forth above in Section G of this Petition.

**J. Terms and Conditions that the Petitioner Recommends Imposing**

123. In order to resolve the remaining disputed issues, Level 3 recommends imposing the contract language for the sections referenced in Section G of this Petition, as set forth in **Appendix C**.

**K. Proposed Schedule for Implementing Terms and Conditions Imposed in the Arbitration**

124. Level 3 proposes that terms and conditions imposed in the arbitration take effect immediately upon their approval by the Commission. In the event Level 3 and Qwest are not able to resolve disagreements over how to implement the Commission's decision in contract language, Level 3 and Qwest should still make the filing with the Commission within such thirty (30) day period. This filing should contain the entire interconnection agreement with all provisions that have been either agreed to or conformed to the Commission's order. It should also identify those contract provisions about which the parties are unable to agree, regarding how to implement the Commission's order, including an explanation of the positions of each party and a request for the Commission to resolve these final differences. The Commission should promptly resolve these remaining differences and approve the final interconnection agreement.

**L. Recommendation as to What Information Other Parties to the Negotiation Should Provide**

125. Level 3 does anticipate that discovery will be required in this proceeding. Level 3 will issue its discovery requests in accordance with the schedule adopted by the Commission.

**M. Proposed Agreement Reflecting Petitioner's Recommendation of Disputed Issues**

126. Level 3's proposed terms and conditions are set forth in **Appendix C**.

**N. Documentation in Petitioner's Possession that is Relevant to the Dispute**

127. Level 3 intends to present testimony in support of its positions outline in Section G. Level 3 requests that it be permitted to submit pre-filed written direct and rebuttal testimony in support if its position consistent with a procedural schedule to be established.

**O. Procedural Recommendations**

129. Level 3 requests that a procedural schedule be established pursuant to which it will submit direct testimony, Qwest will submit reply or response testimony, and Level 3 will submit rebuttal testimony.

**P. List of Witnesses and Exhibits**

131. Level 3 intends to call the following witnesses in support of its Petition, and in reply to Qwest's testimony: Mack D. Green and Timothy Gates. Each of these witnesses may have documentary evidence to submit at the hearing. In addition, Level 3 reserves the right to call additional witnesses.

**Q. Request for Consolidation**

132. Level 3 does not request that this matter be consolidated with any other proceeding.

## CONCLUSION

In its Proposed Interconnection Agreement (attached hereto as *Appendix C*), Level 3 has presented reasonable modifications to the Prior Interconnection Agreement that are consistent with the FCC's Rules, this Commission's Orders, public policy, and with the public interest, convenience, and necessity. Level 3's Proposed Interconnection Agreement will help benefit the evolving telecommunications services and economic development within the state.

WHEREFORE, Level 3 Communications, LLC respectfully requests that this Commission:

1. Conduct an arbitration pursuant to Section 252(b) of the Federal Act, 47 U.S.C. § 252(b);
2. Resolve the above listed items, disputed between the Parties, in Level 3 Communications, LLC's favor;
3. Find that Level 3 Communications, LLC's contract proposals are consistent with the applicable law and commercially reasonable;

4. Issue an Order adopting the Proposed Interconnection Agreement of Level 3 Communications, LLC, attached hereto as *Appendix C*; and,
5. Grant such other relief as is fair and justified.

Respectfully submitted,

January 25, 2006

LEVEL 3 COMMUNICATIONS, LLC

By: 

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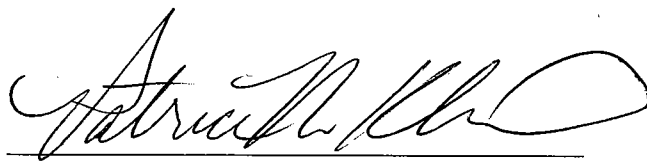
**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of January, 2006 the original and twelve (12) copies of the foregoing LEVEL 3 COMMUNICATIONS, LLC PETITION FOR ARBITRATION were sent for filing, via Federal Express, addressed to the following:

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

and that I have served this document upon all parties in this proceeding, via Federal Express, addressed to the following:

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