BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant v. LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST TELECOM, INC.; NORTHWEST TELEPHONE INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE, INC.; ADVANCED TELECOM GROUP, INC. D/B/A ESCHELON TELECOM, INC.; FOCAL COMMUNICATIONS CORPORATION; GLOBAL CROSSING LOCAL SERVICES INC; AND, MCI WORLDCOM COMMUNICATIONS, INC. Respondents.	Docket No. UT-063038 INITIAL BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

INITIAL BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

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I. INTRODUCTION

1. Virtual NXX or "VNXX" calls involve the assignment of numbers associated with a local calling area to customers physically located outside of a calling area. In this regard, the use of VNXX is not different from other FX and FX-like services that also assign numbers in that manner. Qwest Corporation and CLECs, including Level 3 Communications, LLC ("Level 3"), disagree on the appropriate compensation for these locally dialed calls. Level 3 contends that the issue is settled, yet Qwest continues to reiterate previously unsuccessful arguments to the contrary. Level 3 believes that the paucity of Qwest's assertions will be readily apparent to the Commission once again and asks that Qwest's complaint be denied.

II. "VNXX" LEGAL ISSUES

2. Qwest and Staff began this proceeding alleging that VNXX arrangements violated the law, thereby attempting to eliminate any policy-level consideration by the Commission of whether these arrangements helped or harmed consumers and the market. It is now plain to see

that neither Qwest nor Staff believe that VNXX arrangements are unlawful, since they each are proposing to continue allowing such arrangements. Qwest proposes to allow MCI/Verizon to use VNXX arrangements as long as MCI/Verizon does not charge Qwest for terminating those calls. Likewise, Staff proposes to allow all carriers to use VNXX arrangements for Internet-bound calls but would prohibit those carriers from receiving reciprocal compensation for termination of those calls. Qwest has effectively answered its own complaint, which alleged that "VNXX violates state law and Qwest's tariff and is otherwise contrary to the public interest," because both Qwest and Staff are now asking the Commission to permit these arrangements in circumstances where they deem the price to be right.

3. The price is right, it would appear, when Qwest is allowed to use co-carriers' networks without compensation. This is effectively the result in the MCI/Verizon settlement, and it is the result with Staff's newly proposed mandatory bill-and-keep regime. While it is admittedly a significant improvement over the earlier suggestions of Staff and Qwest that originating access charges should be applied, this result is neither fair to Level 3 and the other co-carriers nor consistent with the law. When Qwest's customers call Level 3's customers, they impose costs on Level 3 that are rightfully and legally the responsibility of Qwest.

A. COCAG and Other Industry Guidelines

1. Extent to Which Guidelines are Binding on the Commission

4. The Central Office Code (NXX) Assignment Guidelines ("COCAG") are voluntary industry guidelines that govern the North American Numbering Plan Administrator ("NANPA") but do not bind state or federal regulators. Section 52.13(d) of the FCC's rules requires that only the NANPA follow the industry guidelines developed by the Industry

Numbering Committee ("INC").[1] It does not require or otherwise imply that state commissions must follow INC guidelines, nor does the COCAG supersede the Commission's rules and regulations, or its authority to develop and enforce such rules and regulations.[2] Instead, the guidelines "were prepared by the industry to be followed on a *voluntary basis*"[3] and are intended to "provide the greatest latitude in the provision of telecommunications services while effectively managing a finite resource,"[4] Finally, the guidelines recognize state commission oversight of numbering regulation: "Applicants for central office codes must comply with all applicable local governmental, state, federal and the NANP Area governmental regulations relative to the services they wish to provide."[5] Although the NANPA is required to follow the guidelines, regulators are not. Thus contrary to the direct testimony of Mr. Linse that the COCAG guidelines must be adhered to,[6] the COCAG are just that: guidelines.

5. Furthermore, FCC rules do not require the Commission to adopt the guidelines established by the Alliance for Telecommunications Industry Solutions ("ATIS"), the INC, or any other industry group as Mr. Linse implies, nor do they supplant the Commission in its role as the regulator of the Washington telecommunications market.

6. Staff similarly argues that COCAG should be binding on the Commission, citing an FCC order concerning state public utility commission reclamation of numbering codes.[7] First, the Commission has not incorporated COCAG by reference. Second, Mr. Williamson has

[1] 47 C.F.R. § 52.13(d) states that "*[t]he NANPA and, to the extent applicable, the B&C Agent*, shall administer numbering resources in an efficient and non-discriminatory manner, in accordance with Commission rules and regulations and the guidelines developed by the INC and other industry groups pertaining to administration and assignment of numbering resources…" (emphasis supplied). The rule does not, in any part, require Washington regulators to follow the guidelines established by ATIS or any other industry group as Mr. Linse implies.

[2] *See* Blackmon, Exh. No. GB-1T, 7:10-22.

[3] COCAG §2.8 (emphasis added).

[4] COCAG § 2.5

[5] COCAG § 3.5.

[6] *See* Linse, Exh. No. PL-1T, 12:1-8.

[7] Williamson, Exh. No. RW-3T, 7:3-13.

misinterpreted the advisory nature of COCAG and the FCC order cited. Specifically, the FCC order allows for voluntary state commission adherence to COCAG noting that state commissions "may" request number reclamation in cases where COCAG is not being followed: "We note that the Commission has delegated some of its authority to state public utility commissions in order that they *may* order the [NANPA] to reclaim NXX codes that are not being used in accordance with the [COCAG]."[8] The FCC, however, did not require states to do so. As such, this statement does not alter the voluntary nature of the guidelines, nor the fact that they are not binding on this Commission.

7. While Qwest attempts to paint these guidelines as "regulations," that is simply not the case. The Commission has previously rejected attempts to automatically incorporate industry guidelines in rules, noting that doing so would be a dereliction of the Commission's duty to regulate the Washington telecommunications market.[9] Accordingly, COCAG cannot be used to prohibit the provision of a service that competes with traditional ILEC FX services.

2. Industry Guidelines and Geographic Issues in Connection with Numbers and Number Assignments

8. Since the Commission has not adopted the COCAG standards, they are not binding on the Commission. But even if the Commission disagreed with this position and adopted the COCAG, that would not resolve the questions at issue in this proceeding. First, the COCAG guidelines recognize that the geographic basis for the administration of numbering

[8] *Developing a Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, ¶115 (rel. April 27, 2001) (emphasis supplied).

[9] For example, when requested by Verizon to incorporate a yet-to-be revised IEEE standard in its regulations, the Commission declined to do so declaring: "The Commission cannot delegate its regulatory authority to an industry standard-setting body, a federal regulatory agency, or any other entity." *In the Matter of Amending, Adopting, and Repealing Rules in Chapter 480-120 WAC, Chapter 480-122 WAC, and Chapter 480-80 WAC Relating to Telecommunications,* Docket No. UT-040015, General Order No. R-516, ¶ 45 (Jan. 7, 2005).

resources is an *assumption* of the guidelines, *not a requirement* of the guidelines.[10] "It is *assumed* from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customers premise physically located in the same rate center that the CO codes/blocks are assigned."[11]

9. While the telephone numbering system is largely geographically based in the sense that every telephone prefix (NXX) is associated with a single, geographically specified rate center, claims that all telephone numbers are assigned to end users statically located within a geographic area at all times oversimplifies the usage of telephone numbers in the United States today.[12] This is illustrated in the COCAG's purpose statement (section 1.0):

> While the ultimate delivery of any call to a CO code (NXX) need not be geographically identified, by necessity initial routing is geographically defined. Therefore, for assignment and routing purposes, the CO code (NXX) is normally associated with a specific geographic location within an NPA, from which it is assigned. For some companies this is also used for billing purposes.

10. Calls have always been rated based on a comparison of the calling and called party numbers, and not based upon the customer's physical location as suggested by Mr. Brotherson.[13] The Wireline Bureau's *Virginia Arbitration Order* recognized this fact, noting that "Verizon has offered no alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes."[14] This is the industry-wide practice, and the COCAG does not address such call rating.

11. Instead, the COCAG guidelines focus exclusively on call *routing*. While the

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[10] *See* Blackmon, Exh. No. GB-1T, 7:10-22.

[11] COCAG, § 2.14 (emphasis supplied).

[12] *See* Blackmon, Exh. No. GB-1T, 8:1-18.

[13] *See* Brotherson, Exh. No. LBB 1-T, 7:1-17. *See also id.*

[14] *See Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039, ¶ 301 (2002) ("*VA Arbitration Order*").

numbering code scheme is used to route calls, it is not necessarily used to rate calls. COCAG § 2.1 states:

> The NANP is the basic numbering scheme for the public switched telecommunications networks in the nineteen countries that are participants in the North American Numbering Plan. NANP resources are used to route calls to subscriber terminals, and *may* be included in the call record for the purpose of rating calls. (emphasis supplied).

12. In sum, the COCAG standards are inapposite to the issues raised in this proceeding. They do not require the use of numbers on a geographic basis, they do not dictate how service providers provision services to end users, and they do not concern the rating of telephone calls, which is the central issue relevant to the Commission's inquiry.

13. As Mr. Williamson points out, "the COCAG is the document that deals with the assignment of NXXs and their relationship to *rate centers*."[15] COCAG does not concern the provisioning of numbers to customers. The industry guidelines for assignment of telephone numbers to end user customers are in a separate document: *Guidelines for the Administration of Telephone Numbers*.[16] Similar to the COCAG guidelines, these guidelines contain several requirements for assignment of numbers but do not restrict the use of numbers on a geographic basis. As with COCAG Section 2.14, the use of numbers to serve customers within the rate center is an *assumption* (stated in Section 1.0) rather than a requirement. Further, like the COCAG, it is qualified to recognize exceptions. Ultimately, neither industry guideline is binding on the Commission, and their relevance to this proceeding is limited.

3. Exceptions/Industry Practices

14. Even if the guidelines were applicable, they provide exceptions and recognize

[15] Williamson, Exh. No. RW-3T, 10:1-2.

[16] *See* Industry Numbering Committee, *Guidelines for the Administration of Telephone Numbers* (Aug. 15, 2003), available at: http://www.atis.org/inc/docs/finaldocs/TN-Administration-Guidelines-Final-Document- 8-15-03.doc. *See also* Blackmon, Exh. No. GB-1T, 7:10-22.

circumstances where numbers may be assigned outside the rate center without violating the COCAG numbering guidelines. For example, the guidelines state that foreign exchange service "offered by tariff" is a permissible use of numbering resources.[17] While Staff testimony appears to conclude that this is *the only* permissible use of a numbering resource outside its assigned rate center,[18] that conclusion is not supported by the language of Section 2.14.[19] If there was only one exception to the physical location assumption in the form of FX services, the statement would not refer to "exceptions" in the plural and would not use the terms "for example" and "such as."[20] By construing Section 2.14 to prohibit any exceptions besides FX services, Staff and Qwest misread the plain language of the COCAG. Mr. Williamson acknowledges that absent a violation of COCAG, there are no other constraints on the Commission's ability to authorize FX-like services.[21] As such, Mr. Williamson's misinterpretation of COCAG renders his objections over FX-like services moot.

15. In reality there are many examples where numbers are assigned outside the rate center. Beyond the example used in the numbering guidelines, a common exception to the general rule is numbering for voice over Internet protocol ("VOIP") service[22] which can provide customers the opportunity to obtain a telephone number in a distant city. Vonage, for example, advertises five different area codes in Washington that it allows each customer to sign up for

[17] The term "tariffed" should not be read literally, for example, to apply only to those services offered through a tariff. Apparently neither Staff nor Qwest would read it literally, either, since they do not contend that Qwest's business foreign exchange service violates the numbering guidelines simply because it is offered on a commercial or contract basis instead of a filed tariff. Rather, this term reflects the understanding of the industry that the numbering guidelines must accommodate, rather than dictate, the decisions of regulators about what services are to be authorized. *See* Blackmon, Exh. No. GB-1T, 9:23-10:4.

[18] *See* Blackmon, Exh. No. GB-1T, 6:14-7:9.

[19] "It is assumed from a wireline perspective that CO Codes/blocks allocated to a wireline Service Provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO Codes/blocks are assigned. *Exceptions* exist, for example tariffed services *such as* foreign exchange service." (emphasis supplied) COCAG §2.14

[20] *See* Blackmon, Exh. No. GB-1T, 7:6-9.

[21] *See* Tr. 482:6-12.

[22] *See* Blackmon, Exh. No. GB-1T, 8:22-9:10.

regardless of their actual physical broadband connection location (206, 253, 360, 425, and 509).[23] Qwest similarly advertises this as a feature of its own VOIP service (termed "Virtual Number"). According to Qwest's VoIP website,

> Virtual Numbers are alias phone numbers that can be associated with your OneFlex® phone number. Your friends and family can dial your Virtual phone number and avoid incurring long-distance charges. For example, if you live in Denver and your primary # is 303.xxx.xxxx and your family lives in Omaha, your family has to call long-distance. With OneFlex, you can get a virtual phone number assigned to your account with an Omaha area code, so your family doesn't have to pay long-distance charges. You can have up to 5 Virtual Phone Numbers attached to one primary OneFlex phone number.[24]

16. There is even a service called IPKall[25] that advertises "Free Washington state phone number to your Internet phone." It uses Washington state numbers to connect computer-to-computer VOIP services like Pulver's Free World Dialup service to the public switched telephone network.[26] These examples all share the characteristic of providing service to customers who have no nexus to the rate center where the numbering resource is assigned.[27]

17. Recognizing the potential for anti-competitive results through discriminatory numbering administration, the FCC established an independent numbering administration organization to prevent such a result. It has made it clear that numbering administration exists to: (1) facilitate entry into the communications marketplace; (2) not unduly favor or disfavor any particular industry segment or group of communications consumers; and (3) not unduly favor one technology over another. *See* 47 C.F.R. § 52.9(b).[28]

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[23] *See* Vonage, Available Area Codes, available at: http://www.vonage.com/avail.php.

[24] *See* "Virtual Number" under Qwest's OneFlex VoIP Service website, available at: https://cvoip.qwest.com/oneflex/portal/residential/products/voip/pricing.

[25] *See* IPKall, available at: http://www.ipkall.com.

[26] *See* Blackmon, Exh. No. GB-1T, 8:22-9:10.

[27] *See* Blackmon, Exh. No. GB-1T, 8:14-9:10.

[28] *See* Blackmon, Exh. No. GB-1T, 11:13-18.

18. Any policy that prohibits a foreign exchange-like service – the assignment of telephone numbers to a customer who is not physically located in the exchange to which the telephone number is assigned – based merely upon the way in which the carrier's technology and/or network supports that service would be discriminatory and would punish new entrants and incumbents for innovation.[29] The New York Public Service Commission summarized this well in considering the same kind of disputes between independent ILECs and CLECs with respect to ISP-bound foreign exchange-type calls. Specifically, the New York commission found that foreign exchange service should not be defined by "call [completion] [sic] technology," but rather foreign exchange service should be defined "operationally, i.e., making local service possible in an exchange where the customer has no physical presence."[30] The New York commission further noted that an operational focus was more appropriate than a technological focus because "the architecture of new entrant networks will differ from that of incumbents and . . . CLECs need not replicate the incumbent's service offerings, rate centers, or customer mix."[31]

19. As such, the COCAG, and the Commission's regulations more generally, should not be interpreted in a manner that allows Qwest to utilize telephone numbers outside of the geographic rate center to which they are assigned under its FX service, while prohibiting CLECs from utilizing telephone numbers in a functionally similar manner through alternative technologies and methods.

B. Washington State Statutes, Rules, Orders, Tariffs

20. In its Complaint, Qwest asks that the Commission declare FX-like service to be a

[29] *See* Blackmon, Exh. No. GB-1T, 9:15-20.

[30] *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates, at 4 (N.Y.P.S.C. Sept. 7, 2001).

[31] *Id.*

violation of state law.[32] In the remainder of its case, and its settlement agreement with Verizon, however, Qwest focuses almost exclusively on the appropriate compensation for such traffic, rather than an outright prohibition on FX-like service, which even Qwest appears to offer to its customers. Notwithstanding this bait and switch tactic, Level 3 shows herein why FX-like services are consistent with state law, why the state law provisions on which Qwest relies do not support its position, and why the Commission should not interpret state law to prohibit any carrier's service offerings that incorporate FX-like number assignment practices.

1. Washington Statutes (RCW)

21. Qwest has cited no state law that prohibits VNXX service. Because it can find no such law, Qwest twists the plain language of certain enforcement provisions in an attempt to bolster its position that FX-like services are proscribed by state law. Because there is no substantive statute prohibiting FX-like services, Qwest's argument

2. Washington Rules (WAC)

22. Pursuant to WAC 480-120-021, "'[l]ocal calling area' means one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges."[33] Contrary to Mr. Williamson's testimony, the definition of local calling area makes no reference to a customer's physical location.[34] "Exchange" is defined as a geographic area established by a company for telecommunications service within that area.[35] An "exchange" and a "local calling area" are not synonymous in either the Commission's rules or under the interconnection agreement ("ICA").

23. In an effort to support Qwest's claims, Mr. Brotherson conflates the concept of a

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[32] *See* Qwest Complaint, at 4.

[33] WAC 480-120-021.

[34] *See* Williamson, Exh. No. RW-3T, 13:6-8.

[35] *Id.*

geographic exchange area and a local calling area by listing the definitions side by side in his testimony.[36] While it is true that an exchange is "a geographic" area,[37] the definition of a "local calling area" is devoid of any geographical underpinnings.[38] Even Qwest's own tariff provides that a "local calling area" can consist of multiple exchanges, with no requirement that they be contiguous.[39] Level 3 notes that the definition of local calling area provided by Mr. Linse[40] is contradicted by Qwest's tariff definition.[41]

24. WAC 480-120-265 establishes the process that the Commission will follow in deciding whether the scope of a *company's* local area is adequate. The Commission adopted this rule to specify the factors that the Commission will consider in evaluating a local calling area. This rule, however, says nothing about telephone number assignment and simply provides a structure for how the Commission might order a company to increase the number of rate centers included in a given local calling area. In order to attribute to this rule the meaning that Qwest advocates, the Commission would have to find that all FX-like number assignment practices, including traditional ILEC FX service, violate this rule.

25. Mr. Brotherson was less than candid in describing the Commission's position on the definition of a local calling area. Unfortunately, Mr. Williamson also adopted Qwest's

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[36] *See* Brotherson, Exh. No. LBB 1-T, 15-16.

[37] WAC 480-120-021; Brotherson, Exh. No. LBB 1-T, 15.

[38] "Local calling area" means one or more rates centers *within which* a customer can place calls without incurring long distance (toll) charges." WAC 480-120-021; *See* Brotherson, Exh. No. LBB 1-T, 15.

[39] "Local service area" is "[t]he area within which exchange access service under specific rates. The area may include *one or more exchanges* without the application of toll charges." Qwest's Exchange and Network Services Tariff (emphasis supplied); *See* Brotherson, Exh. No. LBB 1-T, 16. Further, the rule does not allow incumbents to dictate the scope of local calling areas that competitive carriers can offer to their customers. Each company – ILEC or CLEC – defines the local calling area when it offers local service to the public. The rule does not require CLECs to mirror ILEC calling areas. *See* Blackmon, Exh. No. GB-1T, 22:24-23-2.

[40] *See* Linse, Exh. No. PL-1T, 3:6-18.

[41] "Local service area" is "[t]he area within which exchange access service under specific rates. The area may include *one or more exchanges* without the application of toll charges." Qwest's Exchange and Network Services Tariff (emphasis supplied); *See* Brotherson, Exh. No. LBB 1-T, 16. *See also* Williamson, Exh. No. RW-1T, 6:19-7:5.

interpretation.[42] While it is true that, in the *AT&T/Qwest Arbitration* cited by Qwest, the Commission stated that AT&T's proposed definition "is too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation,"[43] both Mr. Brotherson and Mr. Williamson failed to relate how narrow this holding was, how it was expressly labeled as dicta,[44] and how, in the same paragraph, the Commission accurately predicted that "Qwest's alternative leaves open the door to disputes if Qwest tries to use this definition to frustrate an effort by AT&T to offer services that are functionally equivalent, from a customer perspective, to Qwest's FX service and *local-number-presence service for ISP bound traffic*."[45] *See* Section II.B.3. below.

3. Washington Orders

26. Commission precedent holds that FX-like services currently offered by CLECs in Washington are the functional equivalent of ILEC FX services and are entitled to intercarrier compensation for the functions performed by the terminating carrier. "Although the results in prior arbitration proceedings are not binding precedent, they do provide guidance to the [Commission] with respect to questions of what is lawful, and what is 'sound public policy' in the Commission's view. To the extent Qwest's arguments here essentially restate the arguments the Commission rejected [in prior arbitrations], they also should be . . . rejected here."[46]

27. Mr. Williamson recognizes that the Commission has previously found FX-like services to be compensable as a matter of public policy: "It is my own view that the FCC did not

[42] Williamson, Exh. No. RW-3T, 5:5-6:2.

[43] *Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation,* WUTC Docket UT-033035, Order No.05, ¶ 15 (Feb. 6, 2004); cited at Brotherson, Exh. No. LBB 1-T, 15.

[44] *Id.* ¶ 16.

[45] *Id.* ¶ 15.

[46] *In re Petition for Arbitration of AT&T with Qwest,* Docket No. UT-0333035 ("*AT&T Arbitration*"), Order No. 4, Arbitrator's Report ¶ 41 (Dec. 1, 2003).

intend to allow LECs to ignore, for ISP-bound traffic, the state-established local calling areas and the COCAG number assignment provisions that reinforce them. I also recognize, however, that this Commission has concluded otherwise in previous arbitrations."[47] Indeed, the Commission has consistently held, without exception, that ISP-bound traffic should be subject to the same compensation regime as voice traffic. The Commission found this to be the case in 2001,[48] 2003,[49] 2005,[50] and 2006.[51] Neither Staff nor Qwest can distinguish these holdings as inapplicable to the instant case.

28. In the *2001 US West Order*, the Commission was presented with the question of how ISP-bound traffic should be compensated when exchanged between two LECs. In that case, the Joint CLECs contended traffic sent to ISPs should be treated as local, and that a contrary determination would permit Qwest to require that CLECs provide more costly special access service to ISPs, while Qwest provides its ISP customers with local exchange service. Such a result would be inconsistent not only with FCC orders but with principles of nondiscrimination and competitive parity. The Commission agreed, holding that "[t]his Commission has consistently ruled that ISP traffic is local and there is no reason to differentiate such traffic on the basis of how the loop carrying that traffic is regulated." *2001 US West Order*, at 28.

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[47] Williamson, Exh. No. No.RW-3T, 20:14-17.

[48] *See In the Matter of the Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc.'s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001) ("*2001 US West Order*").

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

[50] *Pac-West Telecomm, Inc. v. Qwest*, Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition (Aug. 23, 2005) ("*Pac-West Order No. 3*").

[51] *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (February 10, 2006) ("*Level 3 Order No. 5*"). ; and Order No. 6 Denying Petition for Reconsideration (June 9, 2006). *See also Pac-West Telecomm, Inc. v. Qwest,* Docket No. UT-053039, Order No. 5, Final Order Affirming and Clarifying Recommended Decision (Feb. 10, 2006) ("*Pac-West Order No. 5*").

29. Similarly, in the Commission's 2003 *CenturyTel Order*, the fundamental issue was the proper treatment of ISP-bound traffic when the ISP's equipment is physically outside the local calling area. While CenturyTel sought a Commission determination that such traffic should be treated as "local" for purposes of intercarrier compensation only when the ISP is physically located in the same local calling area as the caller, Level 3 argued that "local" treatment should apply to ISP-bound traffic regardless of the physical location of the ISP. The Commission sided with Level 3, noting that there should be no distinction made based on the physical location of the ISP. The Commission similarly found that ISP-bound calls enabled by FX-like services should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. *See CenturyTel Order*, at 4, 10.

30. In 2003, the Commission determined that "ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[52] Qwest stubbornly ignores this determination by arguing that in the *AT&T/Qwest Arbitration*,[53] the Commission "found that although the CLEC must be allowed to offer VNXX services, reciprocal compensation for calls terminating to the CLEC's customers physically located outside the local calling area in which they originate was inappropriate, and thus such traffic should be compensated on a bill and keep basis."[54] However, a careful reading of the orders in that case contradict Qwest's claims.

31. Qwest's argument relies on a paragraph in the arbitration order that merely

[52] *In re Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, ("*Level 3 Arbitration*"), Seventh Supplemental Order: Affirming Arbitrator's Report and Decision ¶ 35 (Feb. 28, 2003).

[53] *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific* Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b), Docket UT-033035 ("*AT&T/Qwest Arbitration*").

[54] *Level 3 Arbitration*, Qwest Answer ¶ 28.

suggested by way of example that bill-and-keep compensation *might* be one way to address the concerns raised by the parties in that docket but noted that there might be other alternatives.[55] The Commission clarified that the Arbitrator's suggestions – including bill-and-keep compensation – were nothing more than that:

> We emphasize that those principles are stated as dicta. They suggest options for implementation (*e.g.*, agreement to bill-and-keep compensation; FX functionality for inbound calls only), but they do not bind the parties to specific arrangements, nor do they bind us if we must ultimately resolve a dispute over implementation.[56]

The Commission, therefore, has not retreated from its determination that compensation for ISP-bound traffic is not dependent on the physical location of the ISP.

32. In the Commission's *Pac-West Order No. 3*, the Commission defined VNXX as "a carrier's acquisition of a telephone number for one local calling area that is used in another geographic area. The call appears local based on the telephone number."[57] The Commission also clarified that under prior Commission interpretation, VNXX service is functionally identical to Qwest's FX service from a customer perspective.[58] This definition and clarification directly contradict what Qwest asks the Commission to do in the instant case. The decision reached by the Commission in *Pac-West Order No. 3* is consistent with the Commission's other orders concerning FX-like services and the treatment of ISP-bound traffic: "Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of

[55] The Report further confuses the issue in a footnote that correctly states that the *ISP Remand Order* "has preempted the states from deciding intercarrier compensation for ISP-bound calls" – which contradicts paragraph 35 – but then mistakenly adds that the FCC "has mandated a bill-and-keep compensation scheme, for the time being, at least." *Id.*, n.21. That is true only "where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of [the *ISP Remand Order*]." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 81 (2001) ("*ISP Remand Order*"). For carriers that were exchanging traffic with Qwest prior to adoption of that Order, the FCC established per minute of use compensation pending further action by the FCC, and that requirement is reflected in the parties' ICA. *See id.* ¶ 77.

[56] *AT&T Arbitration*, Order No. 5, Final Order Affirming Arbitrator's Report, ¶ 16 (Feb. 6, 2004).

[57] *Pac-West Order No. 3*, at 1 n.1.

[58] *See id.*, at 13 n. 37.

determining intercarrier compensation requirements."[59] Although this decision was based on a contract dispute, the Commission denied Qwest's broader state law argument that locally dialed ISP-bound traffic should not be compensable based on the definitions of "local calling area" and "extended area service."[60] Because those definitions have not changed since its prior ruling, the Commission should again find that those definitions do not impact or govern FX-like services.

33. In the Commission's 2006 *Level 3 Order No. 5* and *Pac-West Order No. 5*, the Commission similarly found the FX-like services offered by Level 3 and Pac-West to be compensable under the interconnection agreements between those companies and Qwest. In those orders, the Commission again defined a VNXX traffic arrangement as one that "converts what would otherwise be toll calls into local calls."[61] Once again in these cases, Qwest repeated its often-made claim that FX-like services violate state law, effectively making the very same arguments it had made in all of the prior cases.[62] In addressing these claims, the Commission found Level 3's and Pac-West's FX-like services to be compensable under the interconnection agreement between the parties and Qwest.[63]

34. The five Commission decisions discussed above set forth the approach the Commission should adopt in this case. The Commission has recognized the local network architecture that is in place to transport locally dialed ISP-bound calls in issuing its prior decisions. In rejecting arguments that rating of ISP-bound traffic must depend upon the location of an ISP's modem banks, or the ISP "customer" itself, the Commission has said: "ISP-bound

[59] *Pac-West Order No. 3*, at 14 (internal citations omitted).

[60] *See Pac-West Order No. 3*, at 6-7.

[61] *Level 3 Order No. 5*, at 4; *Pac-West Order No. 5*, at 3.

[62] *Level 3 Order No. 5*, at 4; *Pac-West Order No. 5*, at 16-17.

[63] *See Level 3 Order No. 5*, at 24; *Pac-West Order No. 5*, at 21.

traffic is not subject to different interconnection requirements than local traffic..."[64]

C. Interconnection Agreements

35. Neither the Level 3 agreement, the Broadwing interconnection agreement nor the Revised Inter-Carrier Compensation Mechanism Amendment to the Broadwing agreement, define, describe or address "VNXX" traffic. Consequently, it is inaccurate for Qwest to assert that reciprocal compensation for VNXX traffic is barred by those agreements. The Broadwing interconnection agreement establishes that "the characterization of intraLATA traffic as 'local' (local includes EAS), or 'toll' . . . shall be the same as the characterization established by the effective tariffs of the incumbent local exchange carrier as of the date of this agreement."[65] Section 5.1.A.2 of Qwest Tariff WN U-40 provides that "[l]ocal calling refers to calls placed to telephone numbers where message toll charges do not apply." Toll charges do not apply to calls with the same NPA-NXX or between NPA-NXXs assigned to the same local calling area. Consequently, FX-like traffic is, by the terms of the agreement, not toll and therefore subject to reciprocal compensation, in accordance with Section V.D.1.a. of the agreement which states that "[t]he Parties agree that call termination rates as described in Appendix A will apply reciprocally for the termination of Local/EAS traffic per minute of use."[66]

36. The Level 3 agreement is in part the product of an arbitration proceeding in which the Commission confirmed Level 3's assertion that each party is responsible for all costs of bringing its originating traffic to the POI. The single issue in the arbitration involved the apportionment of costs of interconnection trunking between the parties. The Commission held

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[64] *See CenturyTel Order*, at 10.

[65] Meldazis, Exh. No. DEM-4T, 5:21 - 6:1; Broadwing - Qwest Interconnection Agreement § PP. The Level 3 agreement does not define local traffic at all. Section 4.24 of the Level 3 - Qwest agreement defines "Exchange Service" or "Extended *Area* Service (EAS)/Local Traffic" as "traffic that is originated and terminated within the local calling area determined by the Commission." However, as explained previously, the Commission does not determine local calling areas, the companies do. Hence, the definition in the Level 3 - Qwest agreement is a nullity.

[66] Meldazis, Exh. No. DEM-4T, 6:3-7.

that "[t]he originating carrier . . . is obligated to carry the call to the POI between the carriers' networks."[67] Where the parties are sharing a facility provided by one of them, the providing carrier may only charge the other for the costs of the portion of the facilities used by the interconnecting carrier to send traffic that will terminate on the providing carrier's network.[68] The Commission emphasized that when calculating the relative use of the facility, even ISP-bound traffic is to be included as part of an originating carrier's usage.[69]

37. Qwest had argued, as it does here, that because Internet traffic is interstate and not local, it should be excluded from allocations of financial responsibility for interconnection facilities.[70] The Commission rejected that argument then,[71] and it should reject it again here. It held that FCC rules "apportion[] the cost of interconnection trunking based on the amount of traffic *originated* by the interconnecting carrier."[72] To accept Qwest's argument would essentially "charge Level 3 for calls originating with Qwest's customers and terminating on Level 3's network,"[73] in violation of FCC rules.

38. Level 3 is currently arbitrating the terms of a replacement agreement with Qwest, in which FX-like traffic is a major issue in dispute.[74] Regarding general FX-like traffic, the Arbitrator in that proceeding has deferred the issue to this proceeding.[75] In regard to ISP-bound traffic, the Arbitrator has adopted the Commission's previous finding in Docket UT-053039, pending appeal, that ISP-bound, FX-like traffic is compensable under the FCC's ISP Remand

[67] Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp., WUTC Docket No. UT-023042, Final Order at 9 (Feb. 2, 2003)("*Final Order*").
[68] *Id.* at 9-10.
[69] *Id.* at 11.
[70] Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp., WUTC Docket No. UT-023042, Third Supplemental Order at 7 (Nov. 27, 2002).
[71] *Final Order* at 10.
[72] *Id.*
[73] *Id.*
[74] Petition for Arbitration of a Proposed Interconnection Agreement Between Level 3 Communications, LLC, and Qwest Corp., WUTC Docket No. UT-063006.
[75] *Id.*, Order No. 10 at 14 (Mar. 12, 2007).

Order.[76]

D. FCC/Federal Court/Other State Commission Decisions

1. The Telecommunications Act

a. Section 251(b)(5) Provides the Default Intercarrier Compensation System Required for All Telecommunications Traffic, Including Locally Dialed Calls to ISPs And ESPs, And Not Just So-Called "Local" Traffic

39. Even though Qwest has framed this issue as whether FX-like arrangements are permissible, the fundamental debate is the same as in the *CenturyTel Case*, *Level 3 Complaint Order* (UT-053039), *PacWest Complaint Order* (UT-053036), and other prior cases, namely ***the money*** being paid for exchange of FX-like traffic. As discussed above, the Commission has considered variations of these same Qwest arguments multiple times before and it has repeatedly made the correct determination: pursuant to Section 251(b)(5), compensation is due for the transport and termination of FX-like traffic.[77]

40. In its testimony, Qwest repeats its tired refrain that Section 251(b)(5) applies *only* to the exchange of "local traffic."[78] It then goes on to repeat its assertion that Section 251(b)(5) does not apply to locally dialed Internet traffic carried over CLEC FX-like architectures.[79] Unfortunately for Qwest, this argument is foreclosed by the unambiguous text of the Act, was rejected in the D.C. Circuit's *Worldcom* decision,[80] and was repudiated by the FCC in its *ISP Remand Order*.[81]

[76] *Id.*

[77] *Level 3 Order No. 5; Pac-West Order No. 5.*

[78] *See, e.g.*, Brotherson, Exh. No. LBB-1T 19:18-20:23, 21:13 ("The parties do not agree on the means of compensation for VNXX traffic" … "Reciprocal compensation is the payment between Qwest and CLECs for the transport and termination of local traffic to its respective networks." "CLECs do not pay Qwest the access charges").

[79] Brotherson, Exh. No. LBB-1T, 20:18-23.

[80] *WorldCom v. FCC*, 288 F.3d 429 (2002).

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

41. Contrary to Qwest's now familiar efforts to avoid the plain language of the Act, Section 251(b)(5) applies *on its face* to all telecommunications traffic, not just "local" telecommunications traffic. In fact, the Act mandates that traffic is subject to Section 251(b)(5) unless it was temporarily exempted prior to 1996 from this default regime by operation of Section 251(g). Section 251(b)(5) provides that all LECs have the "duty to establish reciprocal compensation arrangement for the transport and termination of *telecommunications*."[82] The locally dialed traffic at the heart of this dispute meets this definition as it involves transmission between points specified by the user without a net change in the form or content of the traffic. Congress deliberately chose the broad statutory term "telecommunications" and *not* "local traffic" or the much narrower term "telephone exchange service" to describe the scope of LEC's termination and intercarrier compensation obligations under Section 251(b)(5). Congress could have limited the scope of Section 251(b)(5) to the transport and termination of communications originating and terminating within the same LEC local calling area as urged by Qwest – but it chose not to.

42. The D.C. Circuit's decision in *WorldCom* underscores that Section 251(b)(5) means precisely what it says. *WorldCom* involved a challenge to the FCC's claim that it could make new rules governing intercarrier compensation for ISP-bound traffic because such traffic purportedly fell within the term "information access" in Section 251(g), and therefore *not* within Section 251(b). In reversing, the D.C. Circuit held that Section 251(g) authorized only "continued enforcement" of pre-1996 Act requirements, and pointed out that there *is no such pre-1996 requirement* as to intercarrier compensation for ISP-bound calls.[83] In its *Declaratory*

[82] 47 U.S.C. § 251(b)(5) (emphasis supplied). "Telecommunications" is defined in the Act as: "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[83] *WorldCom v. FCC*, 288 F.3d 429, 433 (2002).

Ruling, the FCC stated unambiguously that "[t]he Commission *has no rule* governing intercarrier compensation for ISP-bound traffic."[84] The D.C. Circuit also noted that "it seems uncontested - and the [FCC] declared in the [*ISP Declaratory Ruling*] - that there had been *no* pre-[1996] Act obligation relating to intercarrier compensation for ISP-bound traffic.[85] The Court then emphasized that the FCC did not "point to any pre-[1996] Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."[86] Likewise, other Internet Protocol ("IP") enabled communications such as locally-dialed calls to ISPs and ESPs and FX-like calls were also not addressed by relevant pre-1996 FCC rules, to the extent these types of traffic even existed prior to enactment of the 1996 Act. Because Section 251(b)(5) *on its face* covers all telecommunications, including all Internet-bound traffic and there are *no* relevant pre-1996 Act rules, it is plain that intercarrier compensation applies to locally dialed calls to ISPs and ESPs.

b. The Act Permits CLECs to Interconnect At a Single POI Per LATA Rather Than Mimic the ILEC Network

43. The Act and the FCC recognize that CLECs are not required to mimic the traditional hub-and-spoke network design of the ILECs and must be able to determine the most efficient location for the exchange of traffic based on their advanced network architectures.[87] The Act grants CLECs the right to select the POI, which an ILEC must provide at any technically feasible point selected by the CLEC.[88] The interaction between carriers' interconnection duties and their compensation obligations determines the financial responsibilities each party bears for transporting its originating traffic. Both competitive and incumbent LECs are subject to Section

[84] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96-98, 14 FCC Rcd 3689, 3695 (¶ 9) (1999) ("*ISP Declaratory Ruling*").

[85] *WorldCom*, 288 F.3d at 433 (emphasis in original).

[86] *Id.*

[87] Blackmun, Exh. No. GB-1T, 12:5-13-25.

[88] 47 U.S.C. § 251(c)(2)(B).

251(b)(5) which requires that each party: (i) "establish reciprocal compensation arrangements for the transport and termination of telecommunications;"[89] (ii) bear financial responsibility for transporting its originating telecommunications traffic to the point of interconnection selected by the requesting carrier;[90] and (iii) compensate the terminating carrier for the transport[91] and termination services provided to terminate the call.[92] Together, the ILEC's interconnection and compensation duties, sometimes referred to as "the rules of the road," require the ILEC to bear financial responsibility for delivering traffic originated by its customers to the terminating carrier's chosen POI.[93] While denying it every step of the way, Qwest seeks to reverse these long-standing federal "rules of the road" by imposing originating access charges on terminating LECs for locally dialed ISP traffic originating from Qwest's local exchange customers and network.[94]

44. Qwest's efforts to reverse these rules should be rejected. Requiring the originating

[89] 47 U.S.C. § 251(b)(5).

[90] 47 C.F.R. § 51.703(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721 (1999) ("*Local Competition Order*"), at ¶¶ 1042, 1062; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 *et al.*, Memorandum Opinion and Order, DA 02-1731, at ¶ 52 (rel. Jul. 17, 2002) ("*VA Arbitration Order*").

[91] FCC rules define transport as "the transmission... of telecommunications traffic...from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c).

[92] 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701(e), 51.703(e).

[93] *TSR Wireless, LLC. v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001); *VA Arbitration Order* at ¶¶ 66, 67 n. 187. The *VA Arbitration Order* provides a succinct summary of many of the obligations an ILEC bears under federal rules: "(1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent LEC's network at only one place in a LATA; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities." *Id.*

[94] Brotherson, Exh. No. LBB-1T, 40:14-15, 47:20-24 ("Qwest believes strongly that VNXX traffic should be prohibited or subject to originating access charges."); Williamson, Exh. No. RW-1T, 21:8-10 (VNXX "should be rated as intrastate toll service.").

LEC to bear the costs of delivering its originating traffic to the POI selected by the terminating carrier, and to compensate the terminating carrier for the transport and termination functions it performs, is a function of the long-standing calling-party's-network-pays ("CPNP") regime.[95] As the FCC has found, a LEC's costs of delivering its originating traffic to the network of a co-carrier are recovered in the LEC's end users' rates. The FCC has explained its rationale as follows:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and *is responsible for paying the cost of delivering the call to the network of the co-carrier* who will then terminate the call. Under the Commission's regulations, *the cost of the facilities used to deliver this traffic is the originating carrier's responsibility*, because these facilities are part of the originating carrier's network. *The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.* This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[96]

Several federal courts have upheld these rules of the road and interpretations of the Act and the single POI rule.[97]

45. Qwest's proposals to impose access charges and/or new physical presence

[95] *In the Matter of Developing a Unified Intercarrier Compensation Regime* ,CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, at ¶ 9 (rel. April 27, 2001) ("*NPRM*").

[96] *TSR Wireless*, at ¶ 34 (emphasis supplied).

[97] *MCIMetro Access Transmission Services, Inc. v Bellsouth Telecommunications, Inc.*, 352 F.3d 872, 879-880 (4th Cir. 2003) (CLECs should be allowed to select any POI within the incumbent's network to interconnect. Additionally, ILECs are responsible for the cost of transporting traffic that originates on its side of the POI. 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."); *Southwestern Bell Tel. Co. v Public Utility Com'n of Texas*, 348 F.3d 482, 486 (5th Cir. 2003) (Court found that FCC had previously confirmed that: "[] a CLEC is permitted to choose to interconnect with ILECs at any technically feasible point, including a single-LATA-POI; and, [] an ILEC is prohibited from imposing charges for delivering its local traffic to a POI outside the ILEC's local calling area." CLECs can choose the most efficient points at which to exchange traffic with ILECs and ILECs are prohibited "from assessing 'charges on any other telecommunications carrier for telecommunications traffic that originates on the [ILEC]'s network.'"); *MCI Telecomm. Corp. v Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3d Cir. 2001) ("... CLEC cannot be required to interconnect at points where it has not requested to do so."); *U.S. West Communs. v MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999), cert. denied, 530 U.S. 1284 (2000) (local exchange carriers must permit interconnection at any technically feasible point within their network).

requirements fly in the face of well settled interconnection obligations of originating carriers.[98] Requiring carriers to demonstrate a physical presence in the local calling area stifles innovation and competition and benefits only ILECs with ubiquitous network reach. Without the ability to deploy FX-like architecture of their own, CLECs will be severely hampered in their efforts to offer competitive services to ILECs offering similar services. As applications such as VoIP are increasingly divorced from the facilities on which they ride, it makes little sense to require deployment of "local" facilities that are technologically and economically unnecessary to the services being provided.[99]

46. It is both unlawful and economically inefficient to penalize CLECs through imposition of a local presence requirement.[100] However, if the Commission were to pursue a local presence requirement, it should find that transport facilities a CLEC deploys in local calling areas establishes a "local" presence in the local calling area. As demonstrated at length during the hearing, CLEC transport is the functional equivalent of the private line in ILEC FX services.[101] If "local presence" were somehow deemed necessary for compensation purposes, counting the interconnection transport as the local presence is the only way to avoid penalizing the CLEC for deploying a more advanced network.

c. Any Commission Restriction on the Use of FX-like Number Assignment Would Constitute A Barrier to Entry Under Section 253(a)

47. A prohibition on the use of numbering resources for FX-like services or a requirement to precisely mimic the ILEC network and corporate structure, would constitute an impermissible, direct barrier to CLEC entry into the telecommunications market in violation of

[98] *See, e.g.*, Brotherson, Exh. No. LBB-1T, 17:3-7, 19:18-20, 25:6-10, 40:14-15, 47:20-24 ("Qwest believes strongly that VNXX traffic should be prohibited or subject to originating access charges.").

[99] Blackmon, Exh. No. GB-1T, 12:18-23.

[100] Blackmon, Exh. No. GB-1T, 12-13.

[101] *See*, Linse, TR. 166, 175-178; Greene, Exh. No. MDG-1T, 31-35.

Section 253(a).[102] The demand for Internet access will exist even if Level 3 and other CLECs cannot compete in the market. Consumers would simply be limited to a single choice - the ILEC- for this dial-up capability, with no market pressure to constrain prices.[103] It is not in the public interest to protect ILECs from competition, nor is it in the public interest to constrain competition based upon arbitrary technological differences or on the physical location of the customers utilizing offered services. Such an outcome would not only harm CLECs and end-users, but also would adversely impact VoIP providers (*e.g.*, Vonage, Skype) and ISPs who rely on carriers like Level 3 to provide the network capability underlying their applications and services.

48. Such a result is contrary to the goals of the Act and to Washington law.[104] As the Supreme Court has noted, the intent of the Act was to "uproot" traditional monopolies, to promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises," such as Qwest.[105] Contrary to the goals of the Act and Washington law, adoption of Qwest's proposals would eliminate competition in the support of ISP and ESP services.

2. FCC Orders

[102] 47 U.S.C. § 253(a): "No State or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[103] Blackmon, Exh. No. GB-1T, 15:1-7. A recent study by Pew Research indicates that 22% of Americans rely on dial-up Internet access and of these approximately 60% stated that they cannot afford to or are not willing to switch to broadband. Many of these dial-up users are older and have lower incomes. *See, Home Broadband Adoption 2006,*" available at: http//:www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf.

[104] *See, e.g.*, RCW 80.36.180: "The legislature declares that it is the policy of the state to: ... [p]romote diversity of in the supply of telecommunications services and products in telecommunications markets throughout the state, and ... permit flexible regulation of competitive telecommunications companies and services."

[105] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *Local Competition Order*, at ¶ 1 (The FCC stated that the purpose of the Act is to "remove outdated barriers that prevent competition and affirmatively promote competition.").

a. In the ISP Remand Order, the FCC Repudiated the "Local" Distinction That Qwest Relies Upon and Determined ISP-Bound Traffic is Predominantly Interstate

49. As discussed above, Level 3 maintains that locally dialed calls to ISPs and ESPs are subject to compensation under Section 251(b)(5), and Section 251(g) simply does not apply to such traffic. Qwest misconstrues the CLEC's position by stating that CLECs "have requested that compensation language be added to the definition of VNXX based on the assumption that VNXX traffic is *local* in nature and [thus] should be included in the category of calls entitled to reciprocal compensation."[106] The "local" distinction that Qwest seeks to rely upon has been completely repudiated by the FCC and is inapposite. In the *ISP Remand Order*, the FCC determined that it had "*erred in focusing on the nature of the service (i.e., local or long distance)* ... for the purposes of interpreting the relevant scope of Section 251(b)(5)," rather than looking to the language of the statute itself.[107] Nevertheless, Qwest and Staff now urge this Commission to commit exactly the same error. Instead, this Commission must do what the FCC did and find that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers ... to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[108]

50. While the *ISP Remand Order* repudiated the "local" distinction for determining the scope of Section 251(b)(5) intercarrier compensation obligations,[109] it also reconciled

[106] Brotherson, Exh. No. LBB-1T, 20:20-23.

[107] *ISP Remand Order*, at 9164, ¶ 26 (emphasis supplied).

[108] *ISP Remand Order*, at 9165-66, ¶ 31 (emphasis in original).

[109] The FCC deleted the term "local" from its rules, explaining that "the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order*, at 9165-66, ¶ 31. The FCC stated it was "mistaken to have characterized the issue in that manner [i.e., "local"], rather than properly (and more naturally) interpreting the scope of 'telecommunications' within section 251(b)(5)." By so doing, the FCC stated that it "created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term 'local call.'" *ISP Remand Order*, at ¶¶ 45-46 (The "use of the phrase 'local traffic,' created unnecessary ambiguities, and we correct that mistake here [i.e., the *ISP Remand Order*]").

Sections 251(b)(5) and 251(g): traffic that does not fall within Section 251(g) is governed by Section 251(b)(5). *WorldCom* clarified that ISP-bound traffic does not fall within Section 251(g), because there are no relevant pre-Act rules that Section 251(g) could possibly preserve. Ignoring the plain text of the Act, the FCC's analysis, and this Commission's prior precedent, Qwest stubbornly claims FX-like traffic does not fall within Section 251(b)(5) because it is not "local." The Commission should dismiss Qwest's arguments.[110]

b. The FCC Was Fully Cognizant of the Widespread Use of VNXX Long Before It Issued the ISP-Remand Order

51. The use of so-called VNXX arrangements was widespread prior to the release of the FCC's *ISP Remand Order* and both the FCC and the ILECs were well aware of this practice. Prior to the issuance of that Order, several carriers – both ILECs and CLECs – urged the FCC to resolve disputes concerning intercarrier compensation for FX-like traffic.[111] For example, Level 3 filed an ex parte in that docket stating that: "Most ISPs do not maintain a physical presence in every local calling area, but they do need numbers in every local calling area in order to provide end users the ability to dial into the Internet through a local call."[112] On December 13, 2000, Level 3 met with several FCC Commissioners, including the Chairman, and their staffs and filed an ex parte presentation that informed the FCC that "Use of Virtual NXX is widespread," and

[110] The FCC has determined that all ISP-bound traffic is predominantly interstate and established an interim intercarrier compensation scheme for all ISP-bound traffic. *See, e.g., ISP Remand Order*, at ¶ 1. Thus, the Commission does not have jurisdiction to impose a different compensation scheme or a local presence requirement on ISP-bound traffic including VNXX traffic.

[111] *See, e.g.*, ex parte filings in FCC CC Docket No. 99-68, including: 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 Atwood, at 2-3.; Brotherson, TR. 238:16-239:4 (A. "It would appear that SBC filed comments [in the *ISP Remand* docket] addressing the assigning of NXX codes to switches nowhere near the customer or nowhere near the local calling area.").

[112] *Level 3 Ex Parte Communication, In re: Intercarrier Compensation for ISP-Bound Traffic*, Filed in Docket No. 99-68, Attachment, Attwood Letter at 3 (filed April 10, 2001).

"[m]any ISPs do not maintain a physical presence in each local calling area."[113] The FCC was well aware that virtual NXX was in widespread use at the time it issued the *ISP Remand Order*.

52. Qwest was also aware of CLECs' use of FX-like arrangements. In the same FCC docket, Qwest argued that ISP-bound traffic should be subject to a bill-and-keep intercarrier compensation mechanism. In support of that argument, Qwest submitted a study that purported to show that a CLEC's costs to terminate traffic to ISP customers was negligible, in part because the ISP customers collocated at CLEC's switches.[114] This material was not lost in the record before the FCC; in fact, the FCC cited to this specific Qwest filing in the *ISP Remand Order*. The FCC ultimately disagreed with Qwest's position and found that LECs are entitled to some form of compensation for terminating ISP-bound traffic.[115] Thus, none of the arguments that Qwest makes in this docket are new, nor has the manner in which these calls are carried changed. Instead, the Commission's repeated rulings that all ISP-bound traffic is compensable, and the sound policy justifications for applying a unitary rate, and not access charges, to ISP-bound traffic including FX-like traffic, remain sound today.

c. The FCC Concluded In Its Core Order That Developments Have Substantially "Eased the Concerns" About Arbitrage Relating to ISP-Bound Traffic

53. On October 18, 2004, the FCC released an order in response to a petition for forbearance filed by Core Communications that significantly modified the intercarrier

[113] *Level 3 Ex Parte Communication, In re: Intercarrier Compensation for ISP-Bound Traffic*, Filed in Docket No. 99-68, Attachment, Presentation at 2 and 9 (filed December 13, 2000).

[114] Letter from M. Newman (Qwest) to M. Salas (FCC) dated December 2, 1999 in FCC Docket No. 99-68, *attaching*, "An Economic and Policy Analysis of Efficient Intercarrier Compensation Mechanisms For ISP-Bound Traffic," at ¶19. These materials underlying the FCC's *ISP Remand Order* are easily accessible by means of the FCC's website. *See* http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi .

[115] *ISP Remand* Order, at ¶¶ 92 and accompanying n.189.

compensation regime for ISP-bound traffic.[116] In the *Core Order*, the FCC underscored that "[m]arket developments since 2001 *have eased the concerns* about growth of dial-up ISP traffic that led the [FCC] to adopt the" interim intercarrier compensation regime for ISP-bound traffic, including any concerns about CLEC arbitrage opportunities.[117] Accordingly, the FCC significantly expanded the ISP-bound traffic subject to intercarrier compensation by forbearing from applying the growth caps and new markets rules of the *ISP Remand Order*.[118]The FCC determined that both the growth caps and the new markets rule were no longer necessary and were no longer in the public interest because "arbitrage concerns have decreased" and "are now outweighed by the public interest in creating a uniform compensation regime."[119] By rejecting the growth caps and new markets rules, the FCC rejected bill-and-keep for this ISP traffic and opted instead for a more uniform compensation regime.

54. Thus, Qwest's siren song, which has apparently captivated Staff, that CLEC ISP-bound traffic and use of VNXX create "inappropriate arbitrage opportunities and market distortions" and "wreak havoc to intercarrier compensation relationships" has already been rejected by the FCC.[120] Consistent with the FCC's findings in the *Core Order*, the Commission should dismiss Qwest's arbitrage and market distortion arguments and continue its long-standing practice of requiring the payment of reciprocal compensation for *all* telecommunications,

[116] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, at ¶¶ 1, 7, 9, 15, 20-21 (Oct. 18, 2004) ("*Core Order*"); Qwest admits that dial-up Internet services have been in decline for at least three years, lessening any concerns about so-called "arbitrage." Brotherson, TR. 258:12-25 (A. "I would say yes, we have seen a drop-off from perhaps three or four years ago.").

[117] *Core Order*, at ¶¶ 20-21 (emphasis supplied).

[118] Under the growth caps, the FCC imposed a cap on the total ISP-bound minutes per year for which a LEC could receive compensation, plus a 10 percent growth factor. *Core Order*, at ¶ 7. The new markets rule imposed a bill-and-keep compensation regime on ISP-bound traffic if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP Remand Order*. *Core Order*, at ¶ 8.

[119] *Core Order*, at ¶¶ 1, 7, 9, 20-21 ("Recent industry statistics indicate, however, that this expansion [of arbitrage opportunity] is not likely to occur given declining usage of dial-up ISP services.").

[120] *See, e.g*, Brotherson, Exh. No. LBB-1T, 12:4-8; Fitzsimmons, Exh. No. WLF-1T, 4:1-8. *Core Order*, at ¶¶ 20-21.

including FX-like traffic, as required by the Act, FCC Orders, and its own prior precedent.

3. Federal Court Decisions: Federal Courts Have Affirmed State Commissions' Jurisdiction to Classify FX-Like Traffic and the 9th Circuit Upheld the California Commission's Decision That Reciprocal Compensation Was Owed for FX-like Traffic

55. Three U.S. Courts of Appeals have affirmed the jurisdiction of state commissions to determine compensation for ISP-bound traffic that is FX-like in nature.[121] Because its substantive determination in the *Level 3 Order No. 5* was correct, this Commission should reach the same result both in this proceeding and on remand from the Court, relying on state and federal law (rather than federal preemption by the *ISP Remand Order*).

56. The *Peevey* case demonstrates that the Commission's substantive finding—FX-like traffic is subject to compensation—is correct. The Ninth Circuit Court of Appeals upheld the California Public Utilities Commission's ("CPUC") decision to require the payment of reciprocal compensation for the transport and termination of FX-like traffic.[122] In reaching this conclusion, the Court upheld the CPUC's reasoning that:

> reciprocal compensation turns on whether a call is local, and determining whether a call is local based on the NPA-NXXs of the calling and called parties, *not the routing of the call*, is consistent with the CPUC's traditional rating regime, *industry-wide practice*, and recognition of essential differences between the parties' network architectures.[123]

57. Thus, the Ninth Circuit not only upheld the CPUC's decision and permitted the use of FX-like codes, it also determined that reciprocal compensation is owed for transport and termination of FX-like traffic.[124] In reaching these determinations, the Ninth Circuit recognized

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[121] *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1158-59 (9th Cir. 2006); *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 99-101 (2d Cir. 2006); *Global NAPS v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006).

[122] *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1155-56 (9th Cir. 2006).

[123] *Id.* at 1155 ("Whether or not a call is 'local' depends solely on the NPA-NXX of the calling and called parties … and does not depend upon the routing of the call, even if its is outside the local calling area.").

[124] *Id.*

that the standard industry practice is to rate traffic based "solely" on a comparison of the NPA-NXX codes of the called and calling parties, and not on the routing of the call.[125]

4. VoIP Preemption/ESP Exemption

58. As Mr. Williamson acknowledges, the Commission does not have jurisdiction over the assignment of numbering resources for VoIP services.[126] Because the Commission is preempted from imposing market entry regulation on VoIP services, it may not do indirectly (through number assignment restrictions) what it is prohibited from doing directly.

59. The FCC ruled that VoIP services, like those offered by Vonage and other VoIP providers, are wholly interstate.[127] The FCC found that it would be impossible to segregate Vonage-like services into interstate and intrastate components and preempted state regulation of VoIP services. State regulation of rates or market entry for VoIP services would conflict with federal rules and policies governing interstate VoIP communications.[128] The Commission is therefore preempted from regulating the manner in which VoIP service providers' gain access to numbering resources that are necessary to market entry.

5. Other State Commission Decisions Have Agreed With The Commission's Prior Decisions Permitting Reciprocal Compensation for Internet Bound And FX-like Traffic

60. The first sentence in the first paragraph of the FCC's *ISP Remand Order* provides, "[i]n this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)." Qwest contends that the Order was more limited, applying only to ISPs whose servers are physically located in the

[125] The Court in *Peevey* also acknowledges that: "it is not unusual" to "separate" how calls are treated for rating purposes from their geographic end points. *Peevey*, 462 F.3d at 1157.

[126] Williamson, Exh. No. RW-3T, 10:4-11:2.

[127] *See generally Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404 (2004) ("*Vonage Order*").

[128] *See id.* at 19 FCC Rcd. 22,423-24.

same local calling area as the customer placing the dial-up Internet access call. As discussed in above, the Commission rejected this same argument in the *CenturyTel* and other cases.[129] The Commission has previously recognized that whether Internet bound traffic "remains in the local area" is not relevant to the compensations scheme that applies. Moreover, the Commission has consistently required the payment of intercarrier compensation for ISP-bound traffic regardless of the physical location of the customer's modems and facilities.

61. Several other state commissions and the FCC's Wireline Bureau have adopted a similar approach. Standing in the shoes of the Virginia commission, the Wireline Competition Bureau rejected Verizon's efforts to change the way carriers compensate each other for exchanging FX traffic, which were based on the same arguments raised by Qwest in the present case.[130] The Wireline Competition Bureau stated:

> 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

[129] In the *Level 3 Arbitration*, the Arbitrator explained after quoting the first sentence of the *ISP Remand Order* that: "The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends. The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that its result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls. Rather, *both emphasize that even when the traffic remains in the local area it is not to be treated for compensation purposes as local traffic.*" *Level 3 Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, ¶ 35 (Jan. 2, 2003) (emphasis supplied).

[130] The Virginia State Corporation Commission failed to act on three Section 252(b) petitions for arbitration against Verizon presented by AT&T Communications of Virginia, Inc., WorldCom, Inc. and Cox Virginia Telcom, Inc. Thus, pursuant to Section 252(e)(5), the Wireline Bureau resolved the arbitration issues arising in these arbitrations, including VNXX compensation issues. *VA Arbitration Order*, at ¶¶ 1-2, 301. The *VA Arbitration Order* is a decision of the Wireline Bureau rendered pursuant to a delegation of authority by the FCC under Section 155(c) and has the same force and effect as a decision by the FCC commissioners. 47 U.S.C. § 155(c)(1)-(3).

time.[131]

Consistent with the Wireline Bureau, the Staff concedes that currently "the billing systems only record the originating and terminating telephone numbers" so that there is no viable means to determine the physical location of another company's customer.[132] The Commission should affirm, as did the Wireline Bureau, that FX-like calls should continue to be subject to intercarrier compensation under Section 251(b)(5) or the FCC's interim regime for ISP traffic in part because there is no viable means to rate calls other than to compare the NXX codes.

62. Like Washington, most states have addressed the proper compensation for FX-like traffic, either explicitly or implicitly acknowledging the lawfulness of the numbering practices used to provide FX-like services.[133] Often, state commissions, when confronted with the same arguments that Qwest makes here, have reached the same result articulated by the FCC's Wireline Bureau in the *FCC Arbitration Order* that reciprocal compensation or the FCC's interim regime for ISP-bound calls should apply to FX-like traffic.

63. The Washington Commission concurred with these states in the majority, stating that "regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost."[134] Further it stated that:

> one reason for [the Commission's] success has been that we follow a simple rule: Set the prices for interconnection and unbundled elements based on costs. Mandatory bill and keep would be a dramatic departure from this policy. It would require that companies terminate Internet-bound calls at no charge even though these calls indisputably have costs associated with them.

[131] *VA Arbitration Order*, at ¶ 301.

[132] Williamson, Exh. No. RW-1T, 9:12-15.

[133] Staff relies on state commission decisions in Oregon and Vermont that impose a ban on VNXX to support its positions. Williamson, Exh. No. RW-1T, 20:1-21:6. However, these cases are outliers as very few states have imposed an outright *ban* on CLEC provision of FX-like services (to our knowledge only these two) or even addressed a ban.

[134] *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Washington Utilities and Transportation Commission Letter to FCC Chairman, at 1 (Dec. 14, 2000).

III. VNXX RELATIONSHIP TO OTHER SERVICES

A. Foreign Exchange Service

1. VNXX Services Are a Technologically Advanced Approach to Providing a Competitive Alternative And the Same Functionality as the FX And FX-Like Services (e.g. OneFlex, Wholesale Dial, MEL) Offered by Qwest.

64. Reduced to its essence, Qwest's position is the same ILEC position presented in the multiple other VNXX cases the Commission has heard. The argument Qwest presents is that CLECs should not be entitled to offer functionally similar services to those offered by Qwest and other ILECs, and should not receive intercarrier compensation for traffic arising from these services, even though ILECs receive intercarrier compensation for terminating FX and FX-like traffic. Qwest's position is blatantly anti-competitive and if accepted, would reduce or eliminate alternatives for dial-up Internet access, third party VoIP services (e.g., Vonage and Skype) and other ESP services outside the major metropolitan areas in Washington. The Commission should once again reject Qwest's arguments, as it has consistently done in the past, and require Qwest to compensate CLECs for terminating *all* telecommunications not excepted by Section 251(g), including locally dialed ISP-bound and ESP-bound traffic, as required by federal law and Level 3's and Broadwing's interconnection agreements with Qwest.

65. FX service "allows a customer in one local calling area to have a local number presence in another local calling area."[135] Qwest unilaterally defines "VNXX as the inappropriate assignment *by CLECs* of local telephone numbers to end user customers who are not located in the LCA to which that telephone number is associated, thus creating an erroneous impression hat a call directed to a local number is a local call."[136] Qwest's definition of VNXX is

[135] *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 32 (Dec. 1, 2003); Brotherson, Exh. No. LBB-1T, 38:1.

[136] Brotherson, Exh. No. LBB-1T, 4:17-21, 7:23-8:2 (emphasis added) (Qwest also states that VNXX is "an arrangement where a *CLEC* assigns a telephone number that it has obtained from NANPA to one of its customers

fundamentally flawed. First, it applies only to a CLEC when the reality is that Qwest and many other ILECs also provide for the assignment of telephone numbers to a customer whose physical location is outside the rate center associated with that number, as Qwest admits with respect to its FX, OneFlex, and other services.[137] Even Qwest apparently concedes that from an end user perspective, Qwest's FX, OneFlex, Wholesale Dial and CLECs' so-called "VNXX" services are functionally indistinguishable.[138] Qwest's attempts to characterize "VNXX" service as different from FX and its own FX-like services only raise distinctions without a difference.

66. Qwest states that with its FX service the "FX customer pays for transport to its answering location at retail private line transport rates" usually by purchasing a dedicated private line transport.[139] However, as discussed more fully below, the DEOT/DTT interconnection trunks utilized by CLECs are functionally equivalent to the PRI trunks used by Qwest in its FX-like services. Thus, this factor does not distinguish Qwest's FX and FX-like services from CLEC FX-like services.

67. How Qwest and CLECs provision their respective services is irrelevant.[140] Many CLECs do not use the legacy "hub-and-spoke" architecture that characterizes Qwest's network

that is not physically located in the LCA associated with the NXX of the assigned telephone number."); Linse, Exh. No. PL-1T, 7:16-20.

[137] *See, e.g.*, Brotherson, Exh. No. LBB-1T, 38:1 (both FX and CLEC FX-like calls "are answered in a different LCA than where the call originated."); Brotherson, TR. 243:17-25 (Q. "a call flow would be considered local between an originating telephone number from that rate center to that terminating number even if the terminating telephone number party *is not physically located in that rate center*. A. What you have just described could *apply to an FX call*."); Linse, Exh. No. PL-1T, 8:12-19 ("the FX customer may place local calls to other local customers located within the LCA of the foreign exchange"); Blackmon, Exh. No. GB-IT, 4:15-20; Brotherson, TR. 244:23-245:1, 247:20-248:5 (Q. "Qwest's web site advertises virtual number capability with its OneFlex service? A. Correct.").

[138] Brotherson, Exh. No. LBB-1T, 38:1 (both FX and CLEC FX-like calls "are answered in a different LCA than where the call originated."); Brotherson, TR. 243:17-25; Linse, Exh. No. PL-1T, 8:12-19; Brotherson, TR. 244:23-245:1, 247:20-248:5(Q. "This to me describes a service where if you're in Omaha, Nebraska, you can get a Denver Telephone number, and you as an end user can call your friends and family in Denver on a local basis. Would you agree that that's what this effectively describes ... A. I would agree that that's a close characterization [of OneFlex].").

[139] Brotherson, Exh. No. LBB-1T, at 38:7-39:2.

[140] *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 36, n.20.

and was traditionally deployed by ILECs.[141] Rather, many CLECs use a smaller number of centrally located switches connected to fiber rings that cover multiple Qwest wire center serving areas.[142] CLECs, including Level 3 and Broadwing, have leveraged technological advances so they do not need to use additional switching and dedicated transport to provide FX functionality, but a CLEC's network architecture does not make the service any different than Qwest's service offering.[143] The Commission has previously agreed, finding "VNXX" service:

> *functionally identical* to Qwest's FX service from a customer perspective. The *differences on which Qwest dwells are related to the different network architectures* employed by the two companies. Encouraging technical innovation and the provisioning of functionally competitive services at lower cost to consumers is central to the goals of the Telecommunications Act of 1996.[144]

68. Providing end users with the ability to reach other end users in remote exchanges with a local call is what Qwest's FX and FX-like services are designed to do is what FX service has always offered (*e.g.*, Qwest's FX, OneFlex, Wholesale Dial and MEL).[145] At bottom, Qwest is attempting to impose discriminatory requirements on its competitors in the market for FX-like services for engaging in numbering assignment and other practices that ILECs have used for years.[146]

69. Moreover, Qwest admits that network routing changes would have to be implemented to route Qwest's FX traffic and CLEC/ILEC FX-like traffic differently from other

[141] Blackmon, Exh. No. GB-1T, 12:18-23.

[142] Blackmon, Exh. No. GB-1T, 12:18-23.; Linse, Exh. No. PL-1T, 8:6.

[143] Blackmon, Exh. No. GB-1T, 12:5-13:25.

[144] *AT&T Arbitration*, Order No. 4, Arbitrator's Report ¶ 36, n.20 (emphasis added).

[145] Greene, MDG-1T, 18:26-19:24 ("Qwest's FX service has historically removed any link between the geographic location of the end user dialing the local number and the geographic location of the customer of the telephone number dialed."). As discussed below, Qwest's offers FX-like services that are competitive alternatives to CLEC VNXX services including Qwest's Wholesale Dial, Market Line Expansion and Remote Call Forwarding Services. Other ILECs have offered FX-like services that compete with CLEC VNXX services such as Verizon's CyberPOP and IPRS services.

[146] Greene, Exh. No. MDG-1T, 12:1-13.

locally dialed traffic. Yet, Qwest does not explain how the needed routing changes would be implemented and admits that it does not have an estimate of the costs.[147] A switch has no way of storing information regarding the ISP server location (or other customer physical location) associated with a phone number assigned to that switch, and likewise has no way of receiving or storing information about the physical location assigned to a phone number of an originating caller. Similarly, the SS7 protocol that sends information between switches for call set-up and billing purposes does not have any parameters to identify the premises locations of calling or called parties.[148]

B. VNXX Traffic Is Not The Same As 800 Traffic

70. Qwest implies that its locally dialed ISP bound traffic terminated by CLECs should be treated like 800 traffic.[149] As Qwest admits, from the consumer's perspective 800, VNXX, FX, ILEC FX-like, and some locally dialed ISP bound services offer similar results -- dial up access to the Internet without the imposition of additional per minute of use charges.[150] But there the similarity ends. Qwest is wrong to suggest that Level 3 and Broadwing are providing 8XX functionality. 8XX calls use the familiar 1+ dialing pattern and consumers expect calls to be routed to an IXC for completion. Dial-up Internet calls have always been predominately locally dialed, which means a 1+ dialing pattern is not used nor are the services of an IXC.[151] Further, 800 services require updates to a national SMS/800 database and a toll-free database dip for routing[152] whereas FX-like services do not use the 800 database. Also, 800

[147] Greene, Exh. No. MDG-1T, 12:17-24, Exh. No. MDG-4 thereto (Qwest Response to Level 3 DR 01-034I in UT-053039 and Broadwing DR 01-02.).

[148] Greene, Exh. No. MDG-1T, 12:17-13-11.

[149] *See, e.g.*, Brotherson, Exh. No. LBB-1T, 35:9-12; Linse, Exh. No. PL-1T, 8:6-9.

[150] *See, e.g.*, Brotherson, TR. 296:20-297:4, 306:1-307:12; Greene, Exh. No. MDG-1T, at 29:22-24.

[151] Greene, Exh. No. MDG-1T, 24:9-25:2.

[152] *In the Matter of Toll Free Access Codes Database Services Management, Inc. Petition for Declaratory Ruling*, CC Docket No. 95-155, FCC 00-237, at ¶¶ 2-3, 31-33 (rel. July 5, 2000). *In the Matter of Provision of Access for*

services typically offer a wide area of service for toll-free calling with a single 800 number, often nation-wide toll-free calling, whereas FX-like services typically facilitate such calling in a single local calling area.[153]

71. Qwest admits that its FX service and MEL services provide the same functionality as 800 services by, among other items, providing a local presence in a foreign exchange to permit toll-free dialing.[154] Qwest also admits that Qwest receives reciprocal compensation for some calls when a customer calls a Qwest FX or MEL customer that does not actually physically reside in the local calling area.[155] Yet, Qwest seeks to prohibit CLECs from offering functionally equivalent FX-like services and receiving reciprocal compensation for terminating functionally equivalent calls in situations where it receives reciprocal compensation. Qwest's position is blatantly anti-competitive, constitutes unlawful discrimination and should be rejected.

C. <u>Qwest's Market Line Expansion Service Provides The Same Functionality As CLEC VNXX Services</u>

72. In addition to a pure FX service, for example, Qwest offers a Market Expansion Line ("MEL") product, which Qwest effectively admits provides a remote call forwarding capability that allows a customer to call forward their service to a different location without

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800 Service, CC Docket No. 86-10, FCC No. 93-84, 9 FCC Rcd 1423, at ¶¶ 2, 4-5, 19, 25, 41 (rel. Feb. 10, 1993) ("*CompTel Order*").

[153] *Id.* The 800 system also has the capability to perform complex vertical routing including: (1) call validation, which ensures that the calls originate from the subscribed service areas; (2) translation of 800 numbers into POTS numbers; (3) alternative POTS translation, which allows subscribers to vary the destination of 800 calls based on factors such as time of day, or place of origination of the call; and (4) multiple carrier routing, which allows subscribers to use different carriers based on similar types of factor. These functions are not typically offered in CLEC FX-like services. *Comptel Order*, at ¶ 5.

[154] Brotherson, TR. 296:20-297:4 (Q. "Now by providing toll-free calling, is FX at least functionally similar to 800 service? ... But yes, it's a functional equivalent."); Brotherson, TR. 306:1-307:12 (Q. "And to the extent [Qwest MEL service is] forwarded to my telephone number in Seattle, it provides again a functionality equivalent to 800 service? A. Yeah."). *See also* Greene, Exh. No. MDG-1T, at 29:22-24.

[155] Brotherson, TR. 243:3-25 ("What you have described could apply to an FX call."); 247:18-248:5, 296:20-297:25, 299:17-22, 306:1-307:12.

requiring a physical location in that area.[156] The MEL customer pays toll charges for calls forwarded to a different local calling area, but if a CLEC subscriber places a call to the MEL customer, the call is treated as a "local" by Qwest for intercarrier compensation purposes.[157] Even though Qwest alleges a similar CLEC call is an interexchange call and Qwest, based on it positions, appears to provide its MEL customer with an interexchange toll service, the CLEC does not receive the originating access charges to which it otherwise would be entitled. Indeed, the CLEC must *pay* Qwest reciprocal compensation for carrying that toll call. Qwest fails to explain why its MEL product – or any other call forwarding feature that treats toll calls as local calls for intercarrier compensation purposes – is any less "arbitrage" of the intercarrier compensation system than Qwest accuses "VNXX" to be. Qwest's discriminatory position should be rejected by the Commission.

D. <u>One Flex Service</u>

73. According to Qwest's website, Qwest's One Flex service provides "virtual phone numbers" … so a customer "doesn't have to pay long-distance charges."[158] Qwest's One Flex, like its other FX-like services, is functionally similar to CLEC FX-like services,[159] yet Qwest proposes to prohibit only CLEC VNXX and FX-like services and impose access charges on CLEC FX-like services and not its own FX-like services. Qwest's anti-competitive, unlawful,

[156] *See, e.g.,* Brotherson, TR. 306:1-307:12 (Q. "If I am a business in Seattle and I want a local presence in Olympia, if I ordered a MEL product, would that enable me to essentially have a local telephone number in Olympia to which my customers can place calls from Olympia that would then be forwarded to my Seattle telephone number? A. Yes …if it was forwarded within the local calling area it would be treated as a local call, if it was forwarded to Seattle to your office for example, it would be treated as a toll call ….").

[157] Brotherson, TR. 306:1-307:12 ("Correct, it would be just a local call to the local number, [MEL] doesn't measure the call forwarding capability."); Greene, Exh. No. MDG-1T, at MDG-4.

[158] *See* "Virtual Number" under Qwest's OneFlex VoIP Service website, available at: https://cvoip.qwest.com/oneflex/portal/residential/products/voip/pricing. ("With OneFlex, you can get a virtual phone number assigned to your account with an Omaha area code, so your family doesn't have to pay long-distance charges. You can have up to 5 Virtual Phone Numbers attached to one primary OneFlex phone number"). One Flex Service is also discussed herein at Section III.A.

[159] Brotherson, TR. 247:21248:5.

and discriminatory position should be rejected.

E. Qwest's Wholesale Dial and Other Qwest FX-Like Services

74. Qwest seeks an unfair competitive advantage by arguing that CLEC FX-like services should be banned while Qwest's functionally equivalent FX, Qwest Wholesale Dial, Market Line Expansion and other services are permitted.[160] Qwest's Wholesale Dial product is marketed to ISPs to provide a "cost-effective dial-up network infrastructure solution" in competition with CLEC FX-like services.[161] Qwest considers CLEC FX-like traffic to be an improper scheme to convert toll calls to local calls.[162] But Qwest is offering services that provide the very same functionality,[163] so it must recognize the demand and benefits of such an offering. In fact, Qwest admits that it does not place an "ISP server" in each local calling area where it offers its Wholesale Dial service.[164]

75. Both the Level 3 network and the Qwest network provide dial-up service to ISP customers by substantially the same network functionality and are provisioned in a similar manner. Qwest uses PRI trunks instead of the DEOT/DTT trunks that Level 3 uses. The only difference is that the PRI trunks are retail service that is slightly more expensive than the DEOT/DTT trunks.[165] Thus, if the Commission determines to pursue Qwest's unlawful and senseless local presence requirement, it should find that the CLEC local interconnection transport (*e.g.*, DEOT/DTT trunks), establishes a "local" presence in the local calling area. This

[160] Brotherson, Exh. No. LBB-IT, 5:21-24, 25:8-13, 37:12-40:18.

[161] Greene, Exh. No. MDG-1T, 23:12-24:8. Qwest Wholesale Dial is described in more detail on its website at http:www.quest.com/wholesale/pcat/natdial.html and in Qwest's response to Broadwing Data Request No. 01-014.

[162] Qwest's Complaint, at ¶ 16; Brotherson, Exh. No. LBB-IT, 24:18-25:6 ("VNXX avoids carrier access charges and end user toll charges.").

[163] Greene, Exh. No. MDG-1T, 30:10-34:3; Brotherson, TR. 243:3-25 ("What you have described could apply to an FX call."); 247:18-248:5, 296:20-297:25, 299:17-22, 306:1-307:12.

[164] Greene, Exh. No. MDG-1T, 23:12-24:8 and the attached Exhibit MDG-4, Qwest Response to Level 3 DRs 01-020I, 01-023I in Docket No. UT-053039 obtained in response to Broadwing DR No. 01-02. ("However, because there is no server in the local calling area, intercarrier compensation is not due on those calls.").

[165] Greene, Exh. No. MDG-1T, 31-33.

CLEC trunk is the functional equivalent of the private line in ILEC FX and other ILEC FX-like services. Counting the interconnection trunk as the local presence is the only way to avoid penalizing the CLEC for deploying a more advanced network.

76. From a technical perspective, Level 3's use of a POI and/or direct end office transport to assume responsibility for the transport and termination of ISP-bound traffic is not materially different than Qwest's and its subsidiaries' use of PRIs for the same function. There is *no functional difference* between Qwest and Level 3's architecture for the provision of these competing services. Table 1, below, summarizes these network similarities and differences:[166]

TABLE 1

Component	Function	Level 3	Qwest
DID Number Blocks	Provides group of numbers to a customer to use.	**SAME:** Secures own Numbers from NANPA	**SAME:** Secures own Numbers from NANPA
Multiplexer	Allows multiple circuits to be aggregated on a larger circuit for more efficient transport	**SAME:** Owns and Leases	**SAME:** Owns and Leases
Private Line Transport	Provides connectivity for services from one area to another	**SAME:** Owns and Leases	**SAME:** Owns and Leases
Signaling	Allows for call management	**SAME:** SS7 signaling	**SAME:** PRI D Channel signaling is a subset of SS7 signaling.

77. The bottom line is that the CLEC services to which Qwest refers as "VNXX" provide the same functionality as Qwest's FX and FX-like services from the end user's perspective and the CLEC establishes a so-called local presence with its POI and/or DEOT/DTT interconnection trunks that are functionally equivalent to the PRI trunks used by Qwest in its FX-like services. Qwest's proposed prohibition on competing FX-like services and its efforts to

[166] Greene, Exh. No. MDG-1T, 33.

impose originating access on CLEC VNXX services (but not its own FX, MEL, Wholesale Dial and other FX-like services) is blatantly discriminatory and would undermine competition for all Internet-bound and VoIP services in Washington.

IV. VNXX POLICY CONSIDERATIONS

A. Cost Issues

78. As discussed above, the Act grants CLECs the right to interconnect at any technically feasible single point within an ILEC's network.[167] Consistent with that right, a LEC is responsible for the costs associated with transporting calls originating on its networks to that POI[168] and is, in fact, prohibited from assessing charges on any other telecommunications carrier for that traffic.[169] Despite those obligations, Qwest contends that CLECs should compensate it for the FX-like traffic that originates on Qwest's network. Level 3 asserts that the policy of which carrier bears the functional and economic responsibility for transporting traffic that originates on its network has been decided and, therefore, disagrees with Qwest's attempt to resurrect old arguments.

79. Furthermore, Qwest's arguments surrounding its inability to recover the costs associated with transporting that traffic to the POI are unsupported by the facts. For example, while Qwest has testified that "[b]asic local service prices are not designed to compensate Qwest for costs incurred related to non-local traffic,"[170] it has neither detailed those purported costs nor presented evidence that it has added switch or trunking capacity to accommodate that traffic.

80. Qwest states that FX-like calls are "routed . . . over Qwest facilities to a CLEC

[167] *See supra*, Section I.D.1(b); 47 U.S.C. § 252(c)(2)(B).
[168] Greene, Exh. No. MDG-1T, 9:17; Meldazis, Exh. No. DEM-4T, 7:1-17.
[169] 47 C.F.R. § 51.703(b).
[170] Fitzsimmons, Exh. No. WLF-3RBT 5:7-9.

that in turn terminates the calls to destinations in distant local calling areas,"[171] as if Qwest is absorbing the cost of the end-to-end transport. Of course, what it fails to clarify is that Qwest facilities are employed only to the *same POI* used for any other local call. From there, the CLEC transports the call to any distant terminating location *at its own expense*. For example, the LIS trunks depicted in LBB-2 are Qwest facilities, but ordered and paid for by Level 3.[172]

81. As Level 3 testified:

> Qwest's trunking is always to the POI, no matter where the Level 3 ISP or ESP customer is located. It doesn't matter if the Level 3 customer is 500 yards, 2 miles, or 200 miles from the POI. ... Qwest's interconnection trunking to the POI is the same no matter where the called Level 3 customer is actually located."[173]

Since all traffic routed from Qwest to Level 3 must pass through the same POI, from a network, routing, and cost perspective, it makes no difference to Qwest where the Level 3 customer is located as Qwest incurs the same transport and switching expenses whether the Level 3 customer is located ten feet or ten miles from the POI. In fact, Qwest has admitted that when a particular Qwest customer calls a Level 3 customer, Qwest's costs do not vary based on the physical location of the Level 3 customer.[174]

82. Cost causation analysis in the industry is based on the concept of "calling party pays." The costs of a call do not occur unless a customer decides to make a call. While it is true that both parties on a call typically receive benefit for the call, only one of the customers made the decision to initiate the call and impose the costs on the network providers.[175] A Qwest customer causes a cost when he or she dials an ISP or when he or she dials another business;

[171] Brotherson, Exh. No. LBB-1T, 24:22-24.

[172] Greene, Exh. No. MDG-1T, 9:17, 14:8-10, 21-24. One detriment to Qwest's ownership of the facilities is that such ownership enables it to engage in the type of network spying described earlier regarding how Qwest guesses at the amount of FX-like traffic terminated to Broadwing.

[173] Greene, Exh. No. MDG-1T, 16:13-17:2.

[174] Greene, Exh. No. MDG-1T, 26:3-6.

[175] *See* Sumpter, Exh. No. JFS-1T, 17:8-10.

Qwest is not proposing to make other businesses pay for the costs of calls they receive, and the Commission should not single out ISPs as Qwest suggests.

83. Even though the calling customer has a relationship with the ISP, it is still true that the costs of a call to the ISP will not be incurred unless the calling party decides to make the call. The Commission has consistently held, without exception, that ISP-bound traffic is a cost-causer and that it should be subject to a uniform compensation regime regardless of whether it is local, toll, long distance, or via VNXX. The Commission knew this to be the proper approach in 2001,[176] 2003,[177] and 2006.[178] "[R]regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost."[179]

84. The Commission should continue to apply accepted principles of cost responsibility that hold the originator of the call responsible for the cost of the call. The cost of origination, transport, and termination of calls originated by Qwest's customers is a matter for Qwest to address with its own retail and wholesale customers. If Qwest truly believes its rates are not sufficient to cover these costs – a fact certainly not demonstrated so far and inappropriate for this docket – then it should focus its efforts on revising its rate structure to correct that problem rather than continuously litigating in an effort to shift its costs to its competitors.[180]

[176] *US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of US WEST Communications Inc.'s Statement of Generally Available Terms,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001).

[177] *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.,* Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision at ¶ 7 (February 28, 2003).

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

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

[180] Blackmon, Exh. No. GB-1T, 19:1-18.

B. Impact on Access Regime/Impact on Competition

1. Access Regime

85. Any suggestion that Qwest somehow loses access revenues as a result of FX-like services is incorrect. Qwest is arguing that it is entitled to cost recovery well above its projected costs, at the expense of Washington consumers. Level 3 and other opponents believe, on the other hand, that the benefits of competition should accrue to consumers.

86. Qwest is not concerned about unrecovered costs, but rather unrealized revenue and leveraging its ILEC network. Rather than articulate a rational cost basis to support geographical call rating, Qwest extols the virtues of traditions harking back 100 years.[181] For example, Qwest defends the "architectural integrity of the network"[182] (i.e. Qwest status quo), "a concept [that] has existed for well over one hundred years,"[183] (i.e. Qwest status quo), "decades of call rating history,"[184] (i.e. Qwest status quo) and decries "a major unprecedented exception to call rating"[185] (i.e. Qwest status quo) and "distort[ion of] the interexchange carrier compensation scheme that has been in place since 1984 (and in other forms since the 1940s)"[186] (i.e. Qwest status quo). Qwest is unwilling to accept that in a competitive marketplace, there is a difference between unrecovered costs and unrealized revenue. Qwest may be entitled to the first, but it must compete for the latter.

87. There is no evidence that FX-like traffic imposes any additional costs on Qwest, nor is there any history of using high access charges on ISP-bound calls to subsidize other phone

[181] Brotherson, Exh. No. LBB-1T, 30:12-24.
[182] Brotherson, Exh. No. LBB-1T, 17:19.
[183] Brotherson, Exh. No. LBB-1T, 34:5.
[184] Brotherson, Exh. No. LBB-1T, 35:2-3.
[185] Brotherson, Exh. No. LBB-1T, 36.
[186] Brotherson, Exh. No. LBB-1T, 21:17-18.

rates.[187] Other state commissions agree. The Illinois commission has stated that "[the ILEC] will incur no more additional cost for transporting a virtual NXX call to the POI than it does for transporting any other Global-bound local call to the POI, and we have already found that such additional cost will be trivial."[188] The Pennsylvania commission cited to the Illinois commission and further agreed "(1) that calls to FX customers are indistinguishable from other local calls; (2) that an FX call is handled and routed the same as any other local call; and (3) that the physical location of the terminating party has no impact on the costs it incurs to transport a call."[189] The Pennsylvania commission explained that:

> Verizon's request for originating access for VNXX does not appear justified based on cost incurrence principles. On the contrary, it appears, based on this record, that the cost to Verizon to deliver traffic to US LEC's POI is the same for an ordinary local call as for a call to a VNXX telephone number. Verizon's network facilities associated with its intraLATA toll facilities do not appear to be taxed differently in any perceptible way for ordinary local traffic, as compared to VNXX traffic. Thus, the basis of Verizon's harm would appear to be alleged lost toll revenues. And, Verizon's entitlement to these foregone toll revenues is primarily based on its position that current rules define what occurs with VNXX as interexchange toll.[190]

88. Qwest's hypocrisy regarding subsidies is particularly galling. For example, Mr. Fitzsimmons maintains that "[t]here is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access,"[191] but he seems happy to support a regime where dial-up Internet users subsidize basic service through access charges.

2. Competition

[187] Blackmon, Exh. No. GB-1T, 15:19-20.

[188] Global NAPs, Illinois Petition for Arbitration, Ill. C.C. Docket No. 02-0253 at 17 (Oct. 1, 2002).

[189] *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc.*, Pa. PUC Docket No. A-310814F7000, Opinion and Order, at 63 (Apr. 17, 2003).

[190] *Id.* at 63-64.

[191] Fitzsimmons, Exh. No. WLF-3RBT, 9:13-15.

89. As described earlier, Level 3's implementation of FX-like service imposes no additional costs on Qwest. Unfortunately, this is not enough for Qwest or the Commission Staff. They will not be satisfied unless Level 3 is required to incur extraordinary and unnecessary costs to emulate Qwest's network and conform to the status quo, however inefficient.

90. Qwest is seeking to prohibit any FX-like service unless it comprises some sort of a switched-based presence in the originating exchange. Qwest and staff have described two network configurations that would meet their definition of a "traditional" FX-like service. The first is one that duplicates the Qwest network. Rather than performing the call switching at a regional switch that serves many exchanges, Level 3 would be required to deploy a switch in every exchange from which it wants to accept FX-like traffic. Calls to the Level 3 customer would be accepted at the POI, then 1) trunked to the locally deployed switch, and then 2) trunked to the customer of the FX-like service.[192]

91. The other suggested alternative, a so-called "zig-zag" or "triple-transport" arrangement, would still allow Level 3 to employ a regional switch, but then it would have to backhaul the call from the regional switch to a remote subscriber loop carrier ("SLC") in the originating exchange to establish a local presence. Calls to a Level 3 customer would be accepted at the POI, then 1) transported to the regional switch, 2) transported to the SLC, and then 3) transported to the customer of the FX-like service.[193] This "there-and-back" arrangement of many miles would be required even if the customer of the FX-like service was located next door to the regional switch to which the call was first delivered![194]

92. Neither of these options makes sense from a practical or economic perspective;

[192] Brotherson, Exh. No. LBB-24RBT, 11:5 - 12:10, Williamson, TR. 537:8-9.

[193] Williamson, TR. 433:6 - 436:10.

[194] Williamson, TR. 437:8 - 438:14.

even Staff admits that the "zig-zag" option makes no engineering sense,[195] and that the locally deployed switch would be even worse.[196] Qwest also admits that its own FX-like service for ISPs does not require an "ISP server" in each local calling area where it offers its wholesale dial-up ISP services.[197] The sole purpose is to hobble the CLECs so as to approximate the legacy network, giving Qwest a distinct competitive advantage in the market for FX-like services.

93. Level 3 and most other CLECs deploy advanced switching equipment and network intelligence on a national and regional basis, rather than duplicating the 100 year old network architecture of the ILECs that places a switch in every exchange area. Not only is this technically practical, it is economically rational for new entrants without a critical mass of customers in any particular geographical area. Qwest is trying to use these differences in network architecture to provide itself a competitive advantage by forcing CLECs to establish a physical presence in every exchange in which it offers FX-like services. Qwest knows that this cannot be done without a fundamental redesign of CLEC network architectures.[198]

94. One of the principal tenets of the Telecommunications Act is that the CLECs should not be required to build out their networks and mirror the networks of the ILECs. Qwest, with support from Commission staff, is attempting to obtain an unfair advantage by prohibiting Level 3's FX-like services while Qwest's functionally equivalent FX, "Qwest Wholesale Dial" and other services are permitted. When Qwest offers these types of services, they are described as a "cost-effective dial-up network infrastructure solution." When, on the other hand, Level 3 offers them, they are an improper scheme to convert toll calls to local calls.[199] The FX-like

[195] Williamson, TR. 438:20-24.

[196] Williamson, TR. 438:9-10.

[197] Greene, Exh. No. MDG-1T, 24:7-8.

[198] *See* Greene, Exh. No. MDG-1T, 22:5-10.

[199] Brotherson, Exh. No. LBB-1T, 18:1-6.

services provided by CLECs are identical from the customer's viewpoint to those of Qwest. They are simply provisioned differently. It is discriminatory to prohibit a service based solely upon the identity of the carrier that provides the service or the technology a carrier uses to provide that service to its customers. Such a policy punishes new entrants for innovation. If CLECs established a local switching presence in each remote exchange, Qwest's costs would not be reduced one iota, and CLECs would incur vast amounts more cost while not improving its revenues. Calls will still be originated by the Qwest customers and the cost of those calls will continue to be recovered through Qwest's local rates.

95. It is not in the public interest to protect Qwest from competition, nor is it in the public interest to constrain competition based upon arbitrary technological differences or on the physical location of the customers. By arbitrarily increasing the cost of dial-up access in remote areas, either by imposing a local presence requirement or assessing access charges, the Qwest and staff proposal will greatly increase the price of Internet access.[200]

C. Consumer Impact

96. Using the Internet access made available through Level 3 and other CLEC FX-like services, Washington residents are able to connect to the Internet to send and retrieve e-mail, obtain information from the Web, make on-line purchases, and even run businesses. Level 3 has deployed an efficient network architecture that allows ISPs to receive dial-up calls from around the state through a centralized location, rather than having to deploy redundant equipment in numerous dispersed facilities. This allows ISPs to keep their dial-up charges affordable for the hundreds of thousands of consumers who either cannot afford, or do not have access to, high

[200] For example, a family using only 30 minutes per day of Internet access would see their Internet cost increase by $45 per month (assuming a very favorable rate of 5 cents per minute). Narrowband (dial-up) access in rural areas would cost more than broadband in urban areas. This result would harm consumers. Blackmon, Exh. No. GB-1T, 14:18-25.

speed Internet access offered by telephone and cable companies.[201]

97. If the Commission were to adopt a policy that forces Level 3 and other CLECs to abandon their efficient network architecture and deploy zig-zag network architecture to mimic traditional ILEC FX service, consumers in Washington would suffer. Being required to implement an unnecessary triple transport architecture will force CLECs to either increase their rates to ISPs or abandon this line of business altogether. As CLECs become unable to provide economical services to ISPs, they, in turn, will be unable to provide rural customers a telephone number to use in order to access the ISP. This will result in limiting consumers to ILEC-affiliated ISPs (including Qwest's dial-up Internet services[202]) in many rural areas. By arbitrarily increasing the cost of dial-up access in outlying areas, Qwest proposes to create the possibility once again that citizens in smaller towns not be able to make an affordable connection to the Internet.[203]

D. Impact on Independent ILECs

98. Independent LECs raise two compensation concerns with respect to CLEC FX-like services. First, they allege a right to originating access charges. However, as shown herein, but for FX-like services, no toll calls would be placed. Therefore, independent LECs are not entitled to recover the cross-subsidies provided by originating access charges for FX-like calls. Second, independent LECs complain about the transit charges the RBOCs impose for transiting traffic exchanged between an independent LEC and a CLEC. But this is a red herring. If the

[201] A recent study by Pew Research indicated that 22% of Americans rely on dial-up. Of those still using dial-up, approximately 60% said they were not willing to switch to broadband if available. *Home Broadband Adoption 2006,* Pew and the American Life Project, *available at* *http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf*). Of the 60% that did not wish to switch from broadband, the report noted that they were older and have lower incomes than dial-up users who express a desire to switch. *Id.* at iv.

[202] *See* http://pcat.qwest.com/pcat/productDetail.do?offerId=6627&salesChannel=Residential.

[203] Paying toll charges for dial-up connections would greatly increase the price of Internet access. *See* Blackmon, Exh. No. GB-1T, 14:13-25 (noting that a typical family, with moderate daily Internet use, may pay up to $45 or more per month in toll charges if they could not dial in to their ISP's modem bank via a local number).

Commission has determined that a RBOC transit charge is appropriate, independent LECs must bear those costs for all locally-dialed calls. FX-like calls are no different.

E. Other Public Policy Considerations

99. This Commission and the FCC have determined many times that a LEC should receive compensation for the termination functions it performs for other LECs. Excluding certain FX-like services from compensation would be unreasonably discriminatory and violate this fundamental compensation policy. The only question left is what level of compensation should be paid to terminating carriers. The legally sound and economically efficient answer is to apply the intercarrier compensation structure already established by the Commission and the FCC for local calls. In other words, all locally dialed ISP-bound traffic should be compensated at the ISP-bound rate established by the FCC. Any other compensation structure creates artificial distortions that will skew the investment and engineering decisions of competing carriers.[204]

100. Additionally, Mr. Williamson side-steps the question of whether prohibiting FX-like services is good public policy by reinterpreting the COCAG and Commission rules. As shown above, Mr. Williamson's interpretation is wrong. But if there is any doubt or ambiguity in the current rules, that ambiguity should be resolved in favor of FX-like services. Consumers currently use these services and the services impose no additional costs to ILECs . On the other hand, a prohibition on FX-like services would harm Washington consumers, impose additional and unnecessary triple transport costs on CLECs, and would unreasonably discriminate in favor of ILECs based on their historic network architecture.

101. The admissions made by Mr. Williamson also show that Staff's position in this docket is not supported by facts or sound public policy. For instance, Staff relies on findings by a New Hampshire staff report to support its position that FX-like voice services must be

[204] Blackmon, Exh. No. GB-1T, 21:14-16.

prohibited. But Staff admits that it has not done any investigation in Washington, that the New Hampshire Commission has not adopted the staff report, and that although New Hampshire has been investigating FX-like services for five or six years, no restrictions have been implemented.[205] As Level 3 explained previously, Staff's reliance on the New Hampshire study is misplaced for many reasons, including the fact that New Hampshire permits LECs to offer FX-like services under certain conditions.[206]

102. Finally, mandatory bill and keep is bad public policy. Staff may not rely on the FCC's avowed preference for bill and keep to argue the contrary.[207] That preference, expressed over six years ago, has been repudiated repeatedly. For example, in the *Core Order*, the FCC ended bill and keep for ISP-bound traffic that was above caps and in new markets, ordering carriers to compensate each other for terminating ISP-bound traffic at a rate of $0.0007.[208] In the still-pending intercarrier compensation reform docket that initially expressed a preference for bill and keep, the FCC has taken no action recently other than to put out for comment the Missoula Proposal.[209] That proposal not only rejects bill and keep, but would require compensation for calls to FX-like customers based on a comparison of the originating and terminating NXXs of the calling and called parties.[210]

V. STAFF PROPOSAL

A. Staff's Proposal Violates Federal Law

[205] Williamson, TR. 524:10-525:9.

[206] *See* Level 3 Reply, ¶¶ 10-11.

[207] Williamson, Exh. No. RW-3T, 21:17-22:12.

[208] *See* Section II.D.2.b.

[209] *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, DA 06-1510 (rel. July 25, 2006).

[210] *See* Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, to Chairman Kevin Martin, FCC, CC Docket No. 01-92 (filed July 24, 2006) (attaching the "Missoula Plan").

103. Staff's rebuttal acknowledges the weaknesses of its original analysis and proposes an entirely new resolution in which VNXX arrangements would be permitted in some circumstances, prohibited in others, and never compensated. This proposal violates Sections 251, 252, and 253 of the Act and would be a stark departure from Commission precedent and current industry practices. The Commission should reject Staff's recommendation.

104. Staff believes that assigning numbers to customers purchasing FX-like services violates COCAG and Commission rules.[211] Staff initially recommended that intrastate access charges be applied to FX-like calls.[212] Staff is now recommending that CLECs be (1) *prohibited* from assigning numbers to FX-like customers for voice service, and (2) permitted to assign numbers to FX-like ISP customers, subject to a bill and keep intercarrier compensation mechanism.[213]

105. As explained in Section II.D., any rule that requires a CLEC to mimic the ILEC's network architecture and pricing structure is a barrier to entry in violation of Section 253. Staff's proposal would do just that. In order to assign numbers to FX-like customers purchasing voice services, a CLEC would be required to mimic the traditional ILEC FX network architecture and pricing structure. As shown at hearing, and explained in more detail in Sections III and IV herein, this would require CLECs to deploy inefficient zig-zag network architecture that would have no basis in network engineering[214] and would impose additional, unnecessary costs on CLECs. The Commission has already determined that FX and FX-like services are functionally equivalent. Adopting Staff's proposal would contradict and repudiate that finding.

106. As for dial-up Internet access, Staff would not require CLECs to mimic traditional

[211] Williamson, Exh. No. RW-1T; 18:13-23.

[212] Williamson, Exh. No. RW-1T; 21:8-10.

[213] Williamson, Exh. No. RW-3T, 21:4-9; Staff Response to Proposed Settlement at 4; Williamson, TR. 471:4-20.

[214] Williamson, TR. 438:1-439-1, 512:15-25.

ILEC FX networks, but it would require such duplication in order for the CLEC to *receive compensation* for terminating calls to ISPs. As such, Staff's ISP proposal also violates Section 253 by setting different standards for compensation. Compensation would be based on the design of the network used by the terminating carrier, even though those design differences have no effect on the costs incurred or avoided by the originating carrier. This Commission has steadfastly refused to impose such anti-competitive restrictions in the past and it should refuse to do so here. Instead, the Commission should continue its policy of recognizing the functional similarity between FX and FX-like services and treating such services in a non-discriminatory manner.

107. Mandatory bill and keep would also violate Section 252(d)(2) of the Act and Commission precedent. Section 252 requires the "mutual recovery of costs" between carriers terminating each other's traffic. Mr. Williamson admitted that there is a cost associated with transporting and terminating traffic to ISP customers of FX-like services.[215] When traffic is out of balance, bill and keep does not provide for the mutual recovery of these costs. Staff witness Mr. Williamson testified that traffic is one-way, or out of balance.[216] As the Commission has long recognized, "[m]andatory bill and keep does not result in adequate compensation where traffic is not in balance."[217]

108. Bill and keep also fails the standard of section 252 because it would not permit a LEC to recover the "additional costs of terminating such calls." The Commission cannot reconcile a mandatory bill and keep arrangement with the plain language of the Act, a conclusion

[215] Williamson, TR. 495:24-496:2.

[216] Williamson, TR. 495:14-23.

[217] *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, WUTC Letter to Chairman William Kennard, at 1 (Dec. 14, 2000) ("WUTC Dec. 14, 2000 Letter"), available at http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512258320.

the FCC came to in 1996 in the *Local Competition Order*.[218] This Commission has agreed, arguing that "regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost."[219] In 2000, the Commission urged the FCC not to adopt bill and keep for ISP-bound traffic because it would be "harmful to local competition, to consumers, and to the economic health of the Internet itself."[220] The Commission should heed its advice and reject bill and keep.

109. The Act anticipated that carriers may wish to "waive mutual recovery" of costs.[221] The word "waive," however, requires some affirmative, voluntary, and intentional action on the part of a carrier;[222] the Commission cannot order a carrier to "waive" its rights under the Act. As Mr. Williamson testified, Staff's position is that the Commission should impose a "mandated compromise" of bill and keep.[223] Parties may mutually agree not to seek compensation, but the Commission cannot order a party not to collect compensation from a carrier sending traffic to it for termination under section 251(b)(5). Accordingly, the Commission must reject Staff's suggestion of mandated bill and keep.

B. Staff's Proposal Applied to VoIP is Both Unlawful and Illogical

110. As shown in Section II.D.4, the Commission must not restrict VoIP providers' access to numbering resources because VoIP services are interstate in nature and therefore not subject to the Commission's jurisdiction. Any Commission requirement that a LEC provide traditional FX service to a VoIP provider before it is permitted to assign them numbering

[218] *Local Competition Order*, ¶¶ 1033-1034.

[219] WUTC Dec. 14 2000 Letter, at 2.

[220] *Id.* at 2. More recently, the Commission clarified that the bill and keep principle included in an Administrative Law Judge's interconnection arbitration ruling was a suggested option that bound neither the parties nor the Commission. *AT&T Arbitration*, Order No. 5, Final Order Affirming Arbitrator's Report, ¶ 16 (Feb. 6, 2004).

[221] 47 U.S.C. §252(d)(2)(B)(i).

[222] Webster's New College Dictionary defines "waive" as "to give up or relinquish (a right or claim) *voluntarily.*" Similarly, a "waiver" is "*Intentional* relinquishment of a right, claim, or privilege." (emphasis supplied).

[223] Williamson, TR. 501:5-11.

resources would indirectly regulate VoIP services in violation of federal law.

111. The confusion over VoIP services evidences the fact that Staff's position is not well reasoned. At the hearing, there was much confusion over whether Staff's general position on prohibiting FX-like services applies to all voice traffic, including VoIP.[224] Ultimately, Mr. Williamson clarified that Staff had not made any recommendations with respect to VoIP services that utilizes FX-like services provided by CLECs.[225]

112. An examination of VoIP services demonstrates that a literal application of Staff's proposed traditional FX test does not make sense when applied to VoIP. First, because a VoIP end user customer can use the service anywhere there is access to a broadband Internet connection, the physical location of the end-user customer is not static. Rather, a VoIP customer can use their IP-enabled phone anywhere they choose to connect the phone to a computer with a broadband Internet connection. Therefore, the customer could be physically located in the rate center associated with a particular phone number or could use the service from a different Washington rate center, a different state or even a different country. Further, as with other FX-like services, there is no technical way to determine when an end-user may be physically located in the rate center associated with the telephone number or not. Accordingly, the actual physical location of the VoIP customer at a particular point in time is not relevant for purposes of number assignment; instead, like wireless services, the billing or registered address must be used for customers of VoIP services.

113. Similarly, any requirement that a CLEC mimic the ILEC's network architecture is illogical when applied to VoIP. VoIP gives an end user customer the freedom to choose a service provider using *any* third-party provided broadband Internet access service,

[224] Williamson, TR. 472:3-473:20.

[225] Williamson, TR. 521:6-25.

disaggregating the voice application from the physical facility on which it rides. As such, neither the CLEC nor the VoIP provider needs to have owned or leased a facility to the VoIP end user physically located in the rate center associated with number in order to provide voice service to the customer.[226] Yet if the Commission were to apply the traditional FX test to the network architecture the CLEC uses to serve the VoIP provider, it would be ignoring the end user customer's physical connection to the rate center.[227] Either way, the Commission would be taking a step backwards and penalizing VoIP providers based on the fact that their network design does not mimic traditional ILEC network design.

114. Staff admittedly has not studied or considered any of these issues, or the impact on VoIP customers of prohibiting FX-like number assignment. Accordingly, it is imperative that the Commission allow LECs to continue to assign telephone numbers to VoIP service providers without imposing artificial physical location restrictions or unnecessary and unlawful new interconnection requirements. It may be appropriate for the Commission to review these and other VoIP-related issues, but adopting Staff's late-breaking and ill-considered proposal would be a mistake.

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT

A. Standards for Approval of Negotiated ICA

115. Section 252(e)(2)(A) of the Act states that a State commission may only reject a negotiated interconnection agreement if that agreement "discriminates against a telecommunications carrier not a party to the agreement ... or ... the implementation of such

[226] Additionally, it is possible that Level 3 could provide facilities to the VoIP end user's broadband Internet service provider or other carriers affiliated with the end user's Internet service provider, which, while not traditional dial-tone local loops, would also demonstrate a local investment in facilities that are ultimately used by an end user.

[227] Staff has not considered whether the VoIP provider's physical presence or the VoIP end user customer's physical presence should be counted when determining whether the LEC is providing a traditional FX service. Williamson, TR. 469:12-24, 472:3-473:16.

agreement … is not consistent with the public interest ….”[228]

B. Terms and Conditions

116. Level 3 does not object in principle to voluntarily negotiated settlements that resolve intercarrier compensation and interconnection disputes. In fact, Level 3 has entered into many seminal settlement agreements regarding intercarrier compensation.[229] Nevertheless, Level 3 is concerned that the settlement between Qwest and Verizon violates the standards that govern Commission approval of voluntarily negotiated agreements by discriminating against carriers not party to the agreement.

117. Particularly, Level 3 is concerned that this settlement discriminates against other Washington CLECs because of Verizon's very low percentage of FX-like traffic and the high percentage of its compensable traffic in the State.[230] The end result is that the settlement rate is skewed in favor of carriers with network characteristics unlike those of CLECs. In other words, no other CLEC would be able to match Verizon's presence in Qwest's rate centers because Verizon only achieves its presence through its historic ILEC facilities. This is important because if another CLEC adopts this agreement, its FX-like percentage is likely to be much higher and, thereby, it would not be adequately compensated for the termination of traffic on its network.

118. Finally, it goes without saying that if the settlement is approved by the Commission then the fundamental basis for Qwest's original complaint becomes moot. Qwest filed complaints against all CLECs in Washington that it believed offered "VNXX" service based upon the Commission's statements in the recent *Level 3 Order No. 5* and *Pac-West Order*

[228] 47 U.S.C. § 252(e)(2)(A).

[229] *See* Level 3 Reply to Response of Commission Staff to Qwest and Verizon's Proposed Partial Settlement (March 29, 2007).

[230] Level 3 deduces that Verizon's low percentage of FX-like traffic is a function of Verizon's incumbent network architecture in the State which in turn leads to the much higher percentage of traffic that qualifies for compensation in Washington (82%) versus the remaining Qwest states where Verizon is not an incumbent (0-10%).

No. 5, that in finding that intercarrier compensation was due for terminating FX-like traffic it was not addressing the propriety of "VNXX" under Washington law. By entering into an agreement that specifically contemplates the exchange of "VNXX" traffic, Qwest acknowledges there is no basis for a claim that such arrangements are illegal.

VII. CARRIER-SPECIFIC ISSUES

A. Level 3/Broadwing Counterclaim

119. Level 3 supports the positions of Broadwing concerning these issues, as set forth in Broadwing's Initial Brief in this proceeding.

B. Global Crossing Counterclaim

120. Level 3 hereby reserves the right to address this issue in its forthcoming Reply Brief in this proceeding.

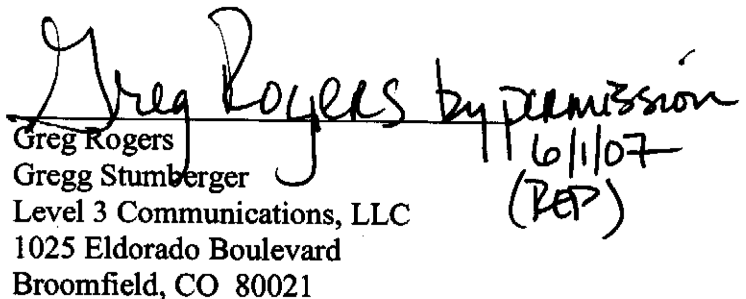
C. Other Carriers (Listed Individually)

121. Level 3 hereby reserves the right to address this issue in its forthcoming Reply Brief in this proceeding.

VIII. CONCLUSION/RECOMMENDATIONS

122. For the reasons stated herein, Level 3 contends that Qwest's complaint regarding FX-like traffic is without merit, and respectfully requests that the Commission dismiss the instant matter accordingly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jennifer Powers, hereby certify that on the day of June 1, 2007, true and correct copies of Level 3 Communications, LLC's Initial Brief were served on all parties of record in this proceeding listed below via United States first class mail, postage prepaid and electronic mail. In addition, the original plus three (3) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Mace.

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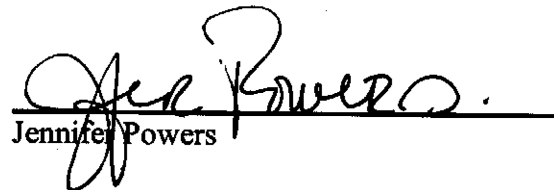

Jennifer Powers

Dated this 1st day of June, 2007