BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC; PAC-WEST TELECOMM, INC.; NORTHWEST TELEPHONE INC.; TCG-SEATTLE; ELECTRIC LIGHTWAVE, LLC; ADVANCED TELCOM GROUP, INC. D/B/A ESCHELON TELECOM, INC.; BROADWING COMMUNICATIONS, LLC; GLOBAL CROSSING LOCAL SERVICES INC; AND, MCIMETRO ACCESS TRANSMISSION SERVICES LLC D/B/A VERIZON ACCESS TRANSMISSION SERVICES, Respondents.	DOCKET NO. UT-063038 QWEST'S OPENING BRIEF

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I. INTRODUCTION

1 This complaint case was filed by Qwest Corporation ("Qwest") against various CLECs[1] in Washington, alleging that those carriers are violating Washington and federal law by use of VNXX dialing patterns. "VNXX" refers to the assignment of "virtual" NXX codes, or telephone numbers, to customers in local calling areas ("LCAs") where those customers are not physically located. The result is that "while the calls appear to be local, they are not"; thus, through the use of VNXX, "a CLEC provides the customer with the functionality of interexchange service."[2] This case brings technical, legal, and policy questions related to the use of VNXX dialing patterns squarely before the Commission.

2 Qwest contends, and the record supports the conclusion that VNXX dialing patterns are simply a toll bypass mechanism. As such, consistent with the law in Washington regarding toll bypass and access avoidance schemes, VNXX should be declared to be unlawful unless access charges are paid by the carriers – the CLECs who enable such calling by their assignment of VNXX telephone numbers. Alternatively, the parties should be free to negotiate an alternate compensation mechanism for some or all VNXX traffic, as Qwest and Verizon Access have done.

3 VNXX is a mechanism by which CLECs use ILEC networks to enable their customers (generally, internet service providers, or ISPs) to receive interexchange calls from callers around the state, with neither the caller nor the called party paying the toll or access charges that apply to interexchange calls. In this brief, Qwest will discuss various issues associated with VNXX, following the agreed-upon outline for briefing. VNXX numbering runs afoul of industry

[1] The Respondents in this case are as follows: Level 3 Communications, LLC, Pac-West Telecomm, Inc., Northwest Telephone Inc., TCG Seattle, Electric Lightwave, Inc., Advanced Telecom Group, Inc. d/b/a Eschelon Telecom, Inc., Broadwing Communications LLC, Global Crossings Local Services, Inc., and MCI WorldCom Communications, Inc. d/b/a Verizon Access Transmission Services. Unless the reference is to a particular respondent, in which case that carrier will be named, the respondents are hereinafter referred to in this case as "Respondents".

[2] Direct Testimony of Larry Brotherson, Exhibit 1T, at p. 8.

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numbering guidelines, and is not an appropriate "exception" to those guidelines. In addition, and most importantly, VNXX numbering violates Washington law, including statutes, Commission rules, prior Commission orders, and Qwest's filed tariffs. All of these authorities clearly provide that LCAs are geographically defined, that local calls are defined as calls between callers located *within* the same LCA, and that the rating of calls based solely on the number dialed is not the law in Washington.

4 The interconnection agreements ("ICAs") between Qwest and each CLEC in this docket provide that, for purposes of defining traffic to be exchanged between the contracting parties, Qwest's LCAs determine whether traffic is local or toll. As such, circumvention of those LCAs for purposes of intercarrier compensation or reciprocal traffic exchange is unlawful. Furthermore, there is nothing in existing federal law, either in the Act, in applicable FCC decisions, or in binding federal court decisions, that suggests a contrary conclusion for Washington.

5 VNXX is not the same as Qwest's foreign exchange ("FX") service. Qwest's FX service is clearly a limited and de minimus exception to established rules. Qwest has very few FX lines, and there are critical differences between Qwest's FX service and "FX" as some CLECs claim to provide. On the other hand, VNXX is clearly the central business plan for some CLECs, based on the amount of VNXX traffic that Qwest has measured. VNXX is more directly comparable to an inbound 800-type service, allowing "toll free" calling to end users, one whose costs should be, but are not, paid by the parties (the ISPs and CLECs) who enable that toll-free access. Other services, such as call forwarding, "Wholesale Dial," or "One-Flex," are not VNXX services – rather, they honor LCAs and thus support Qwest's contention that VNXX should be subject to access charges.

6 VNXX is contrary to the public interest and is inconsistent with the policy concerns of this Commission and the FCC. Qwest's settlement of the issue with Verizon Access, as well as Staff's proposal, offer a bill and keep-type compromise that allows VNXX traffic to be

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transmitted, but does not distort the compensation system or encourage arbitrage. This result is consistent with the policy considerations set forth in the *ISP Remand Order,*[3] is consistent with the policy of the state regarding cost causation, and will enable companies such as Level 3 and Pac-West to provide services that will enable ISPs to continue to provide dial-up ISP access in Washington, consistent with how they have done so for many years in Colorado, where all ISP traffic is exchanged at a zero rate.[4]

7 Finally, Qwest will discuss the counterclaims of Broadwing and Global Crossing. In both cases, VNXX traffic is at issue, though with Broadwing there are other disputed charges as well. Neither Broadwing nor Global Crossing has met its burden of proof to establish a contractual or other right to be paid for VNXX traffic. VNXX as it is not local traffic and is not otherwise compensable under the parties' ICAs. Further, Qwest's testimony establishes that Broadwing improperly billed Qwest for minutes of use ("MOU") that were not originated on Qwest's network and therefore not subject to reciprocal compensation. Broadwing agrees that it may not bill Qwest for such transit traffic, but has not established that it properly excluded such traffic. Indeed, although the dispute with Broadwing goes back to 2003, Broadwing did not start purchasing transit records that would allow them to exclude transit traffic until late 2005.

8 Qwest asks the Commission to conclude that VNXX is unlawful absent an agreement by the parties who use it as to how that traffic will be exchanged. The Commission should approve the Qwest/Verizon Access ICA amendment that implements the settlement agreement as an agreement that is consistent with Section 252 of the Act. The Commission should deny and dismiss the counterclaims of Broadwing and Global Crossing.

9 Qwest presented evidence, including studies of the traffic of each Respondent, that

[3] Order on Remand, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) ("ISP Remand Order").

[4] Cross Examination of Mack Greene, Tr. 607-08.

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demonstrated that each Respondent uses VNXX in Washington.[5] This evidence was not directly rebutted by Respondents. In addition, the discovery responses of the Respondents provided further support that Respondents use VNXX in Washington.[6] While some parties may claim they do not use VNXX, none of them provided direct responses to this evidence. To the extent individual Respondents make specific arguments that they do not use VNXX, Qwest will address those claims in its reply brief.

II. VNXX LEGAL ISSUES

10 In this section, Qwest will discuss the applicable state and federal law in connection with VNXX. Despite claims to the contrary by other parties, this Commission has never explicitly ruled on the propriety of VNXX traffic, and has not yet determined whether VNXX calls are "local" or "interexchange". Further, the only federal court with direct jurisdiction over issues raised in this case has held that the *ISP Remand Order* is limited in its applicability to ISP calls that are local in nature (i.e., where the calling party and the ISP are located in the same LCA).[7] Finally, regardless of what a handful of other state commissions have decided, the only proposition with any historical support in Washington is the proposition that VNXX calls are interexchange calls, not local calls.

A. COCAG and Other Industry Guidelines

11 VNXX violates industry guidelines when carriers assign VNXX telephone numbers. Relevant to this issue are industry rules that dictate the different types of telephone numbers and how such numbers are to be assigned.[8]

12 In 1995, the FCC created the North American Numbering Council ("NANC"), which makes

[5] Direct Testimony of Larry Brotherson, Exhibit 1T, at pp. 40-49; Exhibits 4C - 12C.

[6] Brotherson Direct, Exhibit 1T, at pp. 49-61; Exhibits 13 – 21.

[7] Qwest Corporation v. Washington State Utilities and Transp. Comm'n, 2007 WL 1071956, at *1 (W.D. Wa. 2007) ("Qwest").

[8] The evidence supporting the discussion in this section is contained in the Direct and Rebuttal Testimonies of Philip Linse, Exhibits 171T (pp. 11-15) and 172T (pp. 15-21), and Exhibit 179.

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recommendations to the FCC on numbering issues and oversees the North American Numbering Plan ("NANP"). The FCC also created the North American Numbering Plan Administrator ("NANPA"), an impartial entity responsible for assigning and administering numbering resources (NPA and NXX codes) in an efficient and non-discriminatory manner, and in accordance with the guidelines developed by INC (the North American Industry Numbering Committee).[9] The INC guidelines are entitled "Central Office Code (NXX) Assignment Guidelines" ("COCAG"). The VNXX method of assigning telephone numbers is in violation of these industry guidelines, which designate NPA/NXX codes as geographically-specific.

1. Extent to Which Guidelines Are Binding on the Commission

13 The INC's COCAG guidelines are more than mere guidelines because the adherence to them is an FCC mandate.[10] As required by the FCC, the NANPA shall administer NANP resources in an efficient, effective, fair, unbiased, and non-discriminatory manner consistent with industry-developed guidelines and Commission regulations. With an eye to accommodating current and future numbering needs, the NANPA is to (1) ensure the efficient and effective administration and assignment of numbering resources, (2) plan for the long-term need for NANP resources (including the use of effective forecasting) to assure the current and future availability of numbering resources, and (3) comply with INC's guidelines, FCC regulations and orders, and the guidelines of other appropriate policy-making authorities. As discussed below, part of this mandate includes adherence to an industry-established geographically based numbering scheme.

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

14 Section 4.2.6 of the COCAG provides that "the numbers assigned to the facilities identified must serve subscribers *in the geographic area corresponding with the rate center requested*." (Emphasis added.) A "rate area" is "the smallest geographic area used to distinguish rate

[9] See 47 C.F.R. § 52.13(b) and (d).

[10] See 47 C.F.R. § 52.13.

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boundaries." A rate center is the point within a rate area that is defined by geographic specific coordinates from which mileage measurements are determined for the application of interexchange mileage rates. The rate center is also the basis of number assignment both from the acquisition of numbering resources and the provisioning of service to customers. Thus, it is a unique geographic area to which the numbers are assigned that is significant for determining the jurisdiction of a call and not the numbers themselves – in other words, it is the geographically defined LCA that determines the assignment of numbers, not the assignment of the numbers that determines the LCA.

15 The COCAG clearly relies on this concept for the basis of geographically defined numbering resources. In the 51 pages of the COCAG, rate centers and rate areas are referenced over 25 times, in addition to other references to the geographic nature of telephone numbers that occurs more than ten times. The geographic nature of telephone numbers is an inherent principle on which the COCAG is based.

16 The COCAG also states that "Geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP," while "Non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800."

17 With VNXX, telephone numbers that are geographic NPA numbers are misassigned – they are numbers that should, according to guidelines, correspond to discrete geographic areas. But with the misassignment of these numbers, they no longer reflect a specific geographic location. Callers who dial a VNXX "local" number do not reach anyone in their LCA – rather, the calls are usually transported over Qwest's network infrastructure to the VNXX carrier's switch, and then on to an ISP who is located in a different LCA in the state, or in another state entirely. This misuse of numbers violates industry guidelines.

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18 The determination of whether a NPA/NXX is geographic or non-geographic is based on the NPA digits that precede the NXX digits. Geographic numbers are the telephone numbers that most people associate with their wireline service. Non-geographic numbers are telephone numbers that have NPA digits such as 800 or 900. If the VNXX method of assigning telephone codes/blocks to switches were taken to its logical conclusion, all switches should recognize all telephone numbers as local. However, the switch technology that is employed by Qwest is designed based on industry standards and regulations which are fundamentally based on the geographic location of end users and the existing local/toll traffic distinctions.

3. Exceptions/Industry Practices

19 Section 2.14 of the COCAG states: "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 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 added).

20 Other parties will no doubt claim that VNXX is an exception to the guidelines, much like FX. An exception is "somebody or something that is not included in or does not fit into a general rule, pattern, or judgment."[11] VNXX is far too widely used by CLECs, and those serving ISPs in particular, to be something that can fairly be described as an "exception." Indeed, as applied to ISP traffic, its use is nearly ubiquitous, and Qwest's traffic measurements suggest that for some carriers it is the only way they assign numbers. This is in stark contrast to Qwest's provision of FX, which accounts for less than one quarter of one percent (0.22%) of its total 1.8 million access lines in Washington.[12] As such, the Respondents find no shelter with this provision.

[11] Microsoft Encarta Dictionary: English (North America) edition.

[12] Rebuttal Testimony of Larry Brotherson Rebuttal, Exhibit 24T, p. 13.

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B. Washington State Statutes, Rules, Orders, Tariffs

21 While federal law governs most aspects of this dispute, questions relating to LCAs and call rating are a question of state law.[13] All of the relevant Washington authority mandates that VNXX calls be rated as non-local, interexchange calls. Thus, such calls are properly subject to access charges, regardless of whether the CLECs who offer VNXX calling charge their customers for an 800-type service or not. In addition, VNXX calls that are bound for an ISP are not "ISP-bound" calls within the meaning of the *ISP Remand Order* because the *ISP Remand Order* applies only to local ISP traffic (*i.e.,* where the calling party and the called ISP are physically located within the same LCA).

1. State Statutes

22 R 80.36.080; 80.36.140; 80.36.160; and, 80.36.170 are each relevant to this issue.[14] Respondents' use of VNXX numbering and routing violates all of these state statutes when it is used to mimic local calling. As the Second Circuit recently noted, "*Virtual NXX simply disguises traffic* subject to access charges as something else and would force [the ILEC] to subsidize [the CLEC's] services."[15]

23 The use of VNXX by CLECs without charging their end users for that service violates RCW 80.36.080, which requires rates to be fair, just, and reasonable. Respondents' customers receive the benefit of access to Qwest's extensive local exchange network and to a state-wide toll network, without contribution to the costs of maintaining and supporting those networks.

24 The Respondents' use of VNXX is a practice that is an unjust and unreasonable in violation of R 80.36.140, in that it requires Qwest to incur costs that should be compensated by the Respondents, who may then more appropriately obtain compensation from their end users.

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[13] Global NAPs v. Verizon New England, 454 F.3d 91, 97-101 (2nd Cir. 2006) ("*Global NAPs II*").

[14] See text of these provisions attached as Appendix A.

[15] *Global NAPs II* at 103 (emphasis added).

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25 By implementing and promoting VNXX services with their end users, Respondents are engaging in unreasonable practices, resulting in a failure to utilize the toll networks of all telecommunications carriers equitably and effectively, in violation of RCW 80.36.160.

26 By providing facilities and services to their customers at rates and on terms and conditions that avoid proper payment of access charges and/or toll rates, Respondents are subjecting Qwest and other ILECs in the state to undue prejudice or disadvantage in violation of RCW 80.36.170.

2. State Rules

27 Pursuant to RCW 80.36.230, the Commission is granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies. The Commission has exercised that authority by promulgating rules, including WAC 480-120-021. The Commission defines "Exchange" as a *geographic* area established by a company for telecommunications service within that area. "Interexchange" means telephone calls, traffic, facilities or other items that *originate in one exchange and terminate in another*. "Interexchange company" means a company, or division thereof, that provides long distance (toll) service.

28 The Commission has accepted Qwest's tariffs, which define its exchanges as geographic areas.[16] Qwest defines local calling based on geographic areas, and the location of the customer's premises. All of the Respondents have concurred in Qwest's LCAs.[17] However, to the extent that they allow and enable VNXX calling without payment of appropriate compensation for interexchange calls, Respondents are in violation of Commission prescribed exchange areas.

3. Commission Orders

29 Several prior Commission orders provide guidance on the issue of whether VNXX is local or

[16] See Sections 2 (definitions, discussed below) and 5 (geographic descriptions of local calling areas) of Qwest's Exchange and Network Services Tariff, WN U-40.

[17] See fn. 38, *infra.*

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interexchange traffic, and whether it is in the public interest. There is a long history in Washington of carriers and companies that have attempted to avoid the payment of toll and access charges though various schemes designed to make long distance calls look like local calls. The most common of these schemes has been "toll bridging," where a company takes advantage of overlapping local calling areas or EAS areas by using a "bridging" device that allows customers to avoid payment for what is otherwise a toll call.

30 The Commission has consistently seen through these schemes and ordered the participants to pay their fair share of the costs associated with the use of the telephone network.[18] VNXX has precisely the same effect as toll bridging, and the same legal principles that have guided the Commission's decisions in cases involving toll bridgers should apply here. The overarching principle in those cases was that avoidance of toll and access charges should not be permitted simply because technological or legal loopholes might allow such avoidance.

31 Toll bridging allows customers to "bridge" overlapping EAS areas, thus avoiding toll charges. The bridging is accomplished by a device that receives calls and allows them to be transmitted to the next LCA. Thus, a caller in Bellevue could dial a Renton number associated with the device (a true local call), that device would answer, generate a second dial tone, and allow a second true local call from Renton to Auburn. However, a direct call from Bellevue to Auburn is a toll call, and the toll bridging scheme was designed to avoid such treatment. While VNXX is admittedly more sophisticated than toll bridging, it is functionally no different – end users can make calls to distant LCAs without incurring toll charges (and carriers obtain free use of an ILEC's network).

[18] See Commission Orders *In the Matter of Determining the Proper Classification of: U.S. MetroLink Corp.*, Second Supplemental Order, Docket No. U-88-2370-J (1989), 1989 Wash. UTC LEXIS_40, at *6-*7 ("*MetroLink*"), and *In the Matter of Determining the Proper Classification of: United & Informed Citizen Advocate Network*, Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, Docket No. UT-971515 (1999) ("*U & I CAN*").

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a) MetroLink

32 In response to these schemes, the Commission has been consistent. T *MetroLink* case says it very well:

> It is, of course, true that should MetroLink come into compliance with Commission laws and rules, it will be obliged to pay its fair share of network costs through an appropriate access charge. These costs will, in turn, necessarily be passed on to MetroLink's customers. Whether MetroLink will continue to be an attractive service alternative when its customers are required to pay all of the appropriate costs of service is not a matter of concern to the Commission. While the policy of the state is to promote diversity in the supply of telecommunications services (See RCW 80.36.300), that policy falls short of a duty to underwrite or subsidize developing competition. Such a subsidy would be the result of a ruling in favor of MetroLink.[19]

33 The Commission also stated that "MetroLink has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network."[20]

b) U & I CAN

34 The Commission was no more sympathetic to the next toll-bridger, U & I CAN. Citing the *MetroLink* decision with approval, the Commission noted that it had previously held that EAS bridging is contrary to the public interest.[21] The Commission also agreed with the Utah commission in a case where it set forth the policy reasons against EAS bridging:

> This is not a case of small, virtuous Davids being set upon by a powerful, evil Goliath out to crush legitimate competition. These respondents are offering no innovation in service or technology.
> ****
> For their own profit, they are enabling some USWC customers to realize savings to which they are not entitled. In the process, these respondents are depriving USWC of revenues which it would collect otherwise, and they are competing unfairly with authorized resellers of MTS [message

[19] *MetroLink* at pp. *6-*7.

[20] *Id.* at p. *7.

[21] *U & I CAN* at p. 9.

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> toll service or long distance] service who abide by the applicable USWC tariffs.[22]

35 As in *MetroLink* and *U & I CAN*, VNXX offers no innovation in service or technology, merely a subterfuge under which carriers avoid paying access charges, and end-users avoid paying toll charges. VNXX should similarly be found to be contrary to the public interest.

36 In a more recent case, the Arbitrator in the AT&T arbitration proceeding expressed significant concerns with AT&T's proposed definition of local service, which would have allowed VNXX, and instead adopted Qwest's definition, based on geographic locations. The Arbitrator noted that disputes such as the one in this case could well arise, but nevertheless rejected AT&T's proposal to base "local" calling on NPA-NXX.[23] The concerns expressed in that order regarding use of VNXX remain, and the Arbitrator's recommendation that compensation should not apply to such calls is reflected in the Qwest/Verizon Access settlement agreement discussed below.

4. Qwest's Tariffs

37 Qwest's filed tariffs have the force and effect of law.[24] Because the Respondents have concurred in the LCAs identified those tariffs, they are bound by the descriptions and definitions in them with regard to how local calling is defined. Further, for purposes of defining local calling between carriers for purposes of determining the proper intercarrier compensation, each Respondent is bound to the definition in Qwest's tariffs by virtue of provisions in the ICAs between the parties.

38 Qwest's tariffs plainly define calls based on the physical location of the calling and called parties. To the extent that VNXX calls are not local, and they are not, then Qwest's access

[22] *Id.* at pp. 9-10.

[23] Arbitrator's Report, *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 No. UT-033035, Order No. 04, ¶¶ 25-38 (Dec.1, 2003).

[24] *GTE v. Bothell*, 105 Wn.2d 579; 716 P.2d 879; 1986 Wash.

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tariffs apply to determine intercarrier compensation. In all cases, VNXX calls are interexchange calls of a type where Qwest would otherwise be due access charges from the CLEC who acts as an interexchange carrier by enabling VNXX calls.[25]

a) Local Calling as Defined in Tariff Excludes VNXX

39 Qwest's approved tariffs are consistent with the Commission's rules. Qwest's Exchange and Network Services Tariff contains the following definitions[26]:

- "Exchange" is "[a] specified geographic area established for the furnishing of communication service. It may consist of one or more central offices together with the associated plant used in furnishing service *within that area*." (Emphasis added)
- "Local exchange" is an "[e]xchange *in which* the customer's *premises* are located." (Emphasis added).
- "Local service" is "[e]xchange access service furnished *between customer premises* located within the same local service area." (Emphasis added).
- "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." (Emphasis added).

40 Consistent with the Commission's rules, these tariffs focus on the geographic local service area, and the relevant points for call rating are "between customer premises located with the same" LCA. The term "premises" is a temporal term referring to "[a] house or building, along with its grounds."[27] It would be difficult to conceive of a clearer expression of the geographic nature of call rating in Washington; it would likewise be difficult to find a more explicit description of the fact that call rating is based on the actual physical location of customers.

41 Furthermore, the very existence of Qwest's FX service in tariff, allowing service to ultimately be provided to a customer location outside the assigned LCA for a particular telephone number, supports the general rule of geographic assignment of numbers. If geographic assignment were not the general rule, then there would be no need for an FX tariff or service offering at all, and

[25] Cross Examination of Glenn Blackmon, Tr. 749:1-750:12.

[26] WN U-40 Exchange and Network Services § 2.1, at original page 6, (emphasis added).

[27] Black's Law Dictionary (8th edition).

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there would be no need for established local exchange and LCAs either, as numbers could be indiscriminately assigned however customers requested, with (509) numbers in Olympia and (360) numbers in Yakima. Yet that is clearly not the rule in Washington.

42 Finally, Qwest's tariffs differ markedly from Verizon's tariffs that formed the basis for the decision in *Peevey*.[28] The difference between *Peevey* and this case is the difference in how calls are classified in California and Washington. In a 1999 decision, the California Public Utilities Commission ("CPUC") ruled that "VNXX traffic should be rated to consumers as a local call."[29] The CPUC reached that conclusion on the basis of Pacific Bell's tariffs that, unlike Qwest's Washington tariffs, classified calls based on NXXs, and not customer location: "Each rate center, in turn, is identified *by tariff* with a unique NPA NXX code. Thus, it is the applicable rate center as identified by telephone number prefix, not the physical location of the calling or called party that is used to rate calls."[30] But Washington's test for classification of calls is customer location. Washington statutes, rules, and Qwest tariffs uniformly hold that the classification of calls in Washington is based on the geographic location of the parties to call.

b) <u>Qwest's Access Tariff</u>

43 If calls are not local, then access charges apply to them. There are lawful methods by which Respondents may offer their end users the ability to receive calls from throughout Washington so that the calling party would not be charged for a toll call. In order to do so, Respondents could purchase one of two services from Qwest's Access Tariff. Respondents could purchase the "800 Data Base Access Service" from Qwest's Access Service Tariff, WN-U 44, Section 6.2.6, or they could purchase an FX product with Feature Group A access, under Section 6.2.1.

44 Either service would enable the Respondents' end users to receive calls from throughout

[28] *Verizon California v. Peevey* ("*Peevey*"), 462 F.3d 1142, 1159 (9th Cir. 2006).

[29] *Peevey,* 462 F.3d at 1148 *citing* CPUC Decision No. 99-09-029, *Re Competition for Local Exchange Service,* 1999 WL 1127635 at *11 (CPUC, September 2, 1999) ("*California VNXX Order*").

[30] *California VNXX Order,* 1999 WL 1127635 at *11 (emphasis added).

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Washington without the calling party being charged – in the same way that VNXX does today, but with lawful and proper compensation paid to Qwest for the use of its ubiquitous network. Failure to purchase the appropriate services out of the access tariff places Respondents in violation of Qwest's tariffs as well as state laws.

5. Other Companies' Tariffs/Price Lists

45 CLECs in Washington are no longer required to file tariffs or price lists with the Commission. As a result, it is somewhat difficult to ascertain exactly what services CLECs offer to their end users, how those end users are charged, and the extent to which the CLECs make a distinction between local and interexchange calling. However, it is clear that most CLECs recognize geographically based LCAs. For example, the price list filed by Level 3 in April 2004 identifies 52 Local Service Areas that are described this way: "Local Service are provided (pursuant to Section 9.2) in the following *geographic areas*."[31] After listing the areas, Level 3 states: "The Company will *match Local Calling Areas* for the above exchanges as defined in Qwest Corporation's Network and Exchange Services Tariff WN U-40, Section 5, and Verizon Northwest, Inc.'sariff WN-7." (Emphasis added). The pages that follow these statements then list the other exchanges that can be called toll-free from those exchanges (thus defining the LCA for each exchange).[32] That section of the price list is introduced as follows by Level 3: "*Geographically-defined Local Calling Areas* are associated with each Local Service provided under Section 9.2. Local Services shall have the following local calling areas . . ."[33]

46 Pac-West likewise filed a price list dated June 10, 2003 which contained a "Service Area Map" that Pac-West described in these terms: "The Company provides local exchange service in Washington within the service territories of Verizon and Qwest. *The Company concurs in and hereby incorporates by this reference all current and effective service territory and local*

[31] Exhibit 474, at Original Page 64 (emphasis added).

[32] *Id.* at Original Pages 65-68.

[33] *Id.* at Original Page 65 (emphasis added).

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exchange boundary maps filed with the [Commission] by Verizon and Qwest."[34] Pac-West's definitions are all consistent with geographic LCAs. For example:

- "'Exchange' means a *geographic area* established by a company for telecommunications service *within that area*."[35]

- "'Local calling area" means one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges."[36]

- "'Interexchange' means telephone calls, traffic, facilities or other items that *originate in one exchange and terminate in another*."[37]

C. Interconnection Agreements ("ICAs")

47 In addition to the numerous Washington authorities that support the conclusion that VNXX calls are not local, the ICAs between Qwest and the Respondents establish that VNXX calls are not local. The ICAs are consistent – all of them state that local traffic is defined for purposes of the ICA in the same way as defined in Qwest's tariffs.[38] As discussed above, Qwest's tariffs are clear that local calling is geographically defined, not defined based on the NPA-NXXs of the calling and called numbers.

48 The Commission cannot modify the definitions contained in the parties' ICAs. Indeed, the Commission has already heard the issue of whether local calls should be based on geography or numbers, and Qwest's interpretation of both the ICAs and its own tariffs is consistent with the Commission's answer on this issue four years ago in the AT&T arbitration. If calls were rated based on NPA-NXXs, then AT&T's position in the arbitration would have carried the day. But

[34] Exhibit 518 at Original Page 13 (emphasis added).

[35] *Id.* First Revised Page 21 (emphasis added).

[36] *Id.* First Revised Page 22 (emphasis added).

[37] *Id.* (emphasis added).

[38] See definition sections in Exhibits 242; 434; 447; 477; 519; 548; 561; and 562. For example, Exhibit 434 (ELI's ICA) states that local traffic "means traffic that is originated by an end user of one Party and terminates to an end user of the other Party as defined in accordance with Qwest's then current EAS/local serving areas, as determined by the Commission." The ICAs for Pac-West, NTI, Eschelon, Level 3, and TCG contain identical or substantially similar language. Broadwing and Global Crossing both have provisions that state that "traffic type" is the "characterization of intraLATA traffic as 'local' (local includes EAS) or 'toll' which 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."

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it did not. The Commission's concern in that docket – that NPA-NXX rating would be too far-reaching – has proven to be a legitimate concern, as evidenced by VNXX traffic volumes.[39]

D. FCC/Federal Court/ Other State Commission decisions

49 One of the two main issues in this docket relates to the scope of the *ISP Remand Order*: whether it applies only to local ISP traffic or to all ISP traffic. *Qwest,* the recent Washington federal district court decision, definitively resolved that issue in Washington by examining the language of the *ISP Remand Order* and by adopting the same conclusion as five federal circuit court decisions that hold that, as a matter of federal law, the *ISP Remand Order* applies only to calls delivered to an ISP located in the same local calling area as the caller. The following sections provide a brief overview of the relevant FCC and court decisions that serve as the backdrop to the *Qwest* decision.

50 The second issue relates to the definition of VNXX traffic. This issue typically focuses on how local and interexchange calls are defined in a particular state. Qwest has already demonstrated, in section II. B., *supra,* that under Washington law call rating is defined by the relative physical location of the parties to the call. If the parties to the call are physically located within the same LCA, the call is local (and if the call is an ISP call, it is subject to compensation at $.0007). If, however, the parties to the call are located in different LCAs, the call is an interexchange call and the traffic is not subject to the compensation regime of the *ISP Remand Order.*

1. The 1996 Federal Act

a) The Commission's Role Under the Telecom Act

51 The issues in this case (with one major exception: the definition of what traffic is "local") are fundamentally issues of federal law under the 1996 Act. Interconnection arrangements between ILECs and CLECs are imbued with issues governed by the Federal Act. Thus, in this docket, as

[39] Exhibits 4C – 12C, showing the minutes of use associated with VNXX traffic. *See also* Exhibits 25 – 28, which show the large traffic imbalances between Qwest and four of the Respondents. For Level 3 and Pac-West, well over 99 percent of the traffic is one-way.

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in a docket to arbitrate an ICA or a complaint proceeding to enforce an ICA, a state commission operates under delegated federal authority under the Act.[40] In such cases, state commissions are "deputized federal regulators,"[41] and thus must apply federal court interpretations of the Act.[42] The federal Hobbs Act states that federal courts of appeal have "exclusive jurisdiction to . . . determine the validity of (a) all final orders of the [FCC] made reviewable by section 402(a) of title 47."[43] It thus vests exclusive interpretive jurisdiction over FCC decisions to the federal appellate courts – federal district courts and state commissions are obligated to apply and abide by the appellate courts' interpretation of FCC rules and orders. The U.S. Supreme Court ruled that the fundamental obligation of state commissions is to regulate "in accordance with federal policy."[44] Thus, in its decisions in this matter, the Commission must regulate "in accordance with federal policy" by applying "controlling . . . federal law."

b) Intercarrier Compensation Under the Act

52 The Federal Act was never intended to destroy the decades-long distinction between local and interexchange calling nor the intercarrier compensation regimes that govern each type of calling. The Act, for example, retains definitions of "telephone exchange service" ("service within a telephone exchange") and "telephone toll service."[45] Thus, the Act continues to recognize a distinction between local and interexchange traffic.

53 Further, section 251(g) is clear that all local exchange carriers providing wireline services have a duty to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information services provides in accordance the same equal access

[40] There are some issues that are decided under state law, including the definition of LCAs and the proper manner for the classification of different types of calls (e.g., local or long distance). *Global NAPs II,* 454 F.3d at 97-101.

[41] *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 344 (7th Cir. 2000).

[42] *U S West Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002), quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

[43] 2 U.S.C. § 2342(1); (emphasis added).

[44] AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 378, n.6 (1999).

[45] 47 U.S.C. §§ 153(48) & (49).

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and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment" of the Federal Act. The meaning of this is clear: Congress did not intend to interfere with pre-existing compensation regimes, such as the access charge regime.[46]

2. FCC Orders

54 The FCC has consistently retained the distinction between local and interexchange calling. And, while there are no FCC orders that directly address VNXX, the only conclusion that retains any reasoned distinction between local calling and interexchange calling is one which brands VNXX for what it is – sham "local" calling intended to unlawfully bypass toll and access charges.

55 The genesis of the VNXX issue goes back to issues that arose in the late 1990s relating to section 251(b)(5), the reciprocal compensation provision of the Act. The question quickly arose as to whether traffic to ISPs is properly subject to reciprocal compensation. At that time, the issue had not developed yet into the VNXX issue, but instead focused on whether *local ISP traffic* was subject to section 251(b)(5) was and thus entitled to reciprocal compensation when the ISP's modems were in the same LCA as the calling party. The issue became an urgent one because ILECs had become alarmed about two unique aspects of ISP traffic: (1) the one-way nature of ISP traffic and (2) the long holding times for ISP calls – the combination of those two factors resulted in billions of minutes of traffic from dial-up ISP calls for which CLECs were claiming reciprocal compensation from the ILECs. In the late 1990s, many state commissions addressed this issue under the ICAs in place at the time. While the results varied, most state commissions held that, unless there was something in the ICA that excluded ISP traffic from reciprocal compensation, local ISP traffic qualified for reciprocal compensation.

[46] *ISP Remand Order* at ¶¶ 34, 37-41: *Global NAPs v. Verizon New England,* 444 F.3d 59, 63 (1st Cir. 2006) ("*Global NAPS I*"); *Qwest*, 2007 WL 1071956 at p. *1.

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56 This issue ultimately came to the attention of the FCC, which opened Docket No. 99-68 to address intercarrier compensation for ISP traffic – that docket was incorporated into Docket No. 96-98, the FCC's primary docket relating to implementation of the 1996 Act.. In 1999, the FCC issued its first ISP order.[47] The FCC ruled, among other things, (1) that, based on and end-to-end analysis, ISP traffic is not "local" but is jurisdictionally interstate, (2) that ISP traffic is properly characterized as "exchange access," and (3) that section 251(b)(5) does not impose a reciprocal compensation requirement for ISP traffic. On appeal, the D. C. Circuit found several flaws in the FCC's analysis and *vacated and remanded* it back to the FCC.[48]

a) *ISP Remand Order*

57 The most important order on ISP traffic (the most prevalent form of VNXX traffic), the *ISP Remand Order*, and several definitive decisions from four federal circuits make it clear that the local/interexchange distinction is alive and well under the Act and that VNXX constitutes an unlawful effort by certain CLECs to bypass the intercarrier compensation regimes that apply to interexchange traffic. Further, VNXX is an effort to ignore cost causation and thus create a situation where cost responsibility is divorced from cost causation[49] Indeed, it is an effort to completely reverse the proper flow of cost causation and cost recovery.

58 After receiving extensive comment, the FCC entered the *ISP Remand Order* in April 2001. The FCC simultaneously issued a Notice of Proposed Rulemaking on intercarrier compensation issues ("*Intercarrier NPRM*").[50]

59 In the *ISP Remand Order*, the FCC made several key decisions. For purposes of this docket, the most significant of these actions were:

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[47] Declaratory Ruling, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999) ("ISP Declaratory Order").

[48] *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[49] Direct and Rebuttal Testimonies of Dr. William Fitzsimmons, Exhibits 101T (pp. 9-10) and 103T (pp. 2-4).

[50] Notice of Proposed Rulemaking, In the Matter of Developing a Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610 (2001) ("Intercarrier NPRM").

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- The FCC held that, through section 251(g), Congress limited the reach of section 251(b)(5) to exclude ISP-bound traffic and affirmed its earlier ruling that ISP-bound traffic is not subject to reciprocal compensation under section 251(b)(5).[51]

- The FCC concluded that ultimately a bill-and-keep compensation regime would be the most "efficient recovery mechanism" for ISP traffic because of concerns over regulatory arbitrage and the economic distortions that result from them.[52] These concerns are "particularly acute in the case of carrier delivering traffic to ISPs because these customers generate extremely high traffic volumes that are entirely one-directional."[53]

- The FCC adopted a separate compensation regime for local ISP traffic that stepped the terminating rate down over a three year period to $.0007 per MOU.[54] The FCC's "goal . . . is decreased reliance by carriers on carrier-to-carrier payments and increased reliance upon recovery of costs from end-users . . . ."[55]

- In addition to the rate step-down, the FCC adopted what are known as "growth caps," whereby a CLEC would be able to collect terminating compensation based only on the MOU in 2001, subject to a 10 percent growth factor each year thereafter through 2003.[56] The FCC also ruled that CLECs would not be able to receive terminating compensation for new markets (the "new market rule").[57]

60 Contrary to CLEC advocacy in Washington and elsewhere, the scope of the *ISP Remand Order* is limited only to *local ISP traffic*, traffic where the calling party and the ISP are located in the same LCA. Interexchange ISP traffic is not subject to the compensation regime of the *ISP Remand Order*, but instead to other pre-existing compensation regimes.

61 The *ISP Remand Order* was appealed to the D. C. Circuit.[58] In its *WorldCom* decision, the D.C. Circuit disagreed with some of the FCC's reasoning used to justify its decision – however, unlike the earlier FCC order, the Court, while remanding the matter to the FCC, expressly decided not to vacate the *ISP Remand Order*: "[W]e do not vacate the order. Many of the

[51] *ISP Remand Order* ¶¶ 3, 30-41.

[52] Id. ¶ 4.

[53] Id. ¶ 5.

[54] Id. ¶ 8.

[55] Id. ¶ 7.

[56] Id. ¶ 8.

[57] Id. ¶ 81.

[58] *WorldCom v. FCC* 288 F.3d 429, 434 (D.C. Cir. 2002) ("*WorldCom*").

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petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the [FCC] has authority to elect such a system."[59] Thus, because the FCC has yet to act on the remand nor has issued a decision in the intercarrier compensation docket, the *ISP Remand Order*, the FCC's rules adopted pursuant to the order, and the federal court decisions that have construed and explained the order, all remain fully in effect and are the governing authorities on intercarrier compensation for ISP traffic.

62 The VNXX issue began to arise in state commissions in about 2000. As Mr. Brotherson noted, this issue became more prevalent because of the adoption by ILECs of policies allowing CLECs to exchange traffic as a single point of interconnection in each LATA – the term for this in Qwest's ICAs is Single Point of Presence or "SPOP."[60] SPOP allows a CLEC, for example, to provide local exchange service to end users located in Olympia even though its switch is located in the Seattle LCA.[61] Unfortunately, SPOP also enables CLECs to use VNXX. Because the CLEC no longer had an obligation to maintain a switch in every LCA, and because it had the right to obtain telephone numbers from NANPA, a CLEC was able to assign Olympia telephone numbers to customers (usually ISPs) that were located in Seattle or even in another state. Because Qwest has the obligation to deliver the traffic to the CLEC in Seattle, Qwest had to trust that the CLEC would deliver that traffic back to one of the CLEC's local customers in Olympia in order to qualify for terminating compensation. As the facts demonstrate in this case, many of the CLEC respondents assigned telephone numbers to ISPs that had no local connection whatsoever (physical or otherwise) with the calling party's LCA, thus resulting in VNXX traffic.

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[59] *Id.* at 434.

[60] Exhibit 24 T, at p. 6.

[61] Under this arrangement, if a Qwest Olympia customer makes a *voice call* to an ELI Olympia customer, Qwest would transport the call to point of interconnection ("POI"), most likely in the Seattle area, where the traffic would be handed off to a CLEC. The CLEC would switch the traffic in the Seattle area with its Seattle switch, transport the traffic back to Olympia, where it would deliver the traffic to its end user. Qwest would bear the cost of delivering this local traffic to the CLEC and the CLEC would have the responsibility of delivering the traffic to its customer and would be entitled to reciprocal compensation. If the ELI end user later made a voice call to the Qwest end user, the reverse would apply. Exhibit 24T at pp. 6-7.

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b) ***Core Forbearance Order***

63 In the Core Communications forbearance docket, the petitioner asked the FCC to forbear from enforcing all four major elements of the *ISP Remand* Order: rate caps, growth caps, mirroring rule, and the new market rule. In response to the petition and comments by the industry, the FCC issued its *Core Forbearance Order*[62] in 2004.

64 The FCC first rejected the argument that *WorldCom* "somehow compels us to grant the requested forbearance" because the matter was remanded to the FCC.[63] The FCC also rejected the petitioner's "unsupported allegations" that the rules were anticompetitive, had deterred investment, had limited service options, and had damaged the industry, noting instead that the rate caps were implemented because of "'opportunities for regulatory arbitrage and distorted economic incentives . . . .'"[64] and that the "rate caps help[ed] avoid arbitrage and market distortions."[65] After considering the policy rationale for each element of the *ISP Remand Order*, the FCC changed only the new market rule and the growth cap.[66] The FCC declined to change the rate caps or alter the mirroring rule; the FCC specifically reaffirmed that the policy justifications for these two elements continue to exist.[67]

65 Some CLECs have erroneously argued that the *Core Forbearance Order* represents a wholesale change of policy by the FCC with regard to ISP traffic. But a simple reading of the order demonstrates that the order reaffirms the basic principles of the *ISP Remand Order*, while modifying only two elements of the order. There is nothing whatsoever to suggest that the FCC abandoned the basic principles that underlie the *ISP Remand Order*.[68]

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[62] Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 12 FCC Rcd 20179 (2004) ("Core Forbearance Order").

[63] *Id.* ¶ 17

[64] Id. ¶ 18.

[65] *Id*.

[66] Id. ¶ 22.

[67] *Id.* ¶ 23.

[68] *See Qwest*, 2007 WL 1071956 at p. *14.

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c) Other FCC Orders

66 The only other significant FCC order on VNXX is the original *Intercarrier NPRM* issued the same day as the *ISP Remand Order* in April 2001. The *Intercarrier NPRM* does not purport to resolve the VNXX issue, but does recognize VNXX as a serious issue related to both compensation and the proper use of numbering resources.

67 In the *Intercarrier NPRM*, the FCC makes one reference to VNXX, but only to seek comments "on the use of virtual central office codes (NXXs) and their effect on the reciprocal compensation and transport obligations of interconnected LECs."[69] The FCC defined VNXX in terms of geographical customer locations, defining "Virtual NXX codes" as "central office codes that correspond with a particular *geographic area* that are assigned to a *customer located in a different geographic area*."[70] The FCC did not resolve the VNXX issue. Thus, other than raising the VNXX issue for comment and using a VNXX definition that, consistent with Washington law, focuses on a geographical test for call classification, the *Intercarrier NPRM* does not disturb the *ISP Remand Order*.

3. Federal Court Decisions

68 The *Qwest* decision ruled unequivocally that, under prevailing federal law and policy, the *ISP Remand Order* applies only to local ISP traffic.[71] Indeed, the *ISP Remand Order* was absolutely clear on the subject: "[T]he question arose whether reciprocal compensation obligations apply to the delivery of calls *from one LEC's end-user customer to an ISP in the same local calling area that is served by the competing LEC*."[72] The *Qwest* decision cited the same provision in support of its conclusion, characterizing paragraph 13 of the *ISP Remand Order* as demonstrating that the "question presented to the FCC was decidedly narrow," then

[69] *Intercarrier NPRM* ¶ 115.

[70] *Id.* ¶ 115, n. 188 (emphasis added).

[71] *Qwest,* 2007 WL 1071956 at p. *1 (concluding that the Commission violated federal law in "interpreting the *ISP Remand Order* to include ISP-bound VNXX calls terminating outside a local calling area").

[72] *ISP Remand Order* ¶ 13 (emphasis added).

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quoting the language from paragraph 13, quoted above.[73] The *Qwest* court went on to state: "It comes as no surprise, then, that every federal court of appeals that has recently analyzed the scope of *ISP Remand Order* in this regard has concluded similarly, i.e., that the changes ushered by that order apply only to ISP-bound traffic within a single local calling area."[74]

69 A brief review of the cases to which the *Qwest* decision was referring is instructive. Although the *WorldCom* criticized several aspects of the *ISP Remand Order*, the scope of the order was not the subject of dispute. *WorldCom* stated: "[i]n the order before us the [FCC] *held* that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5*)* calls made to internet service providers ("ISPs") *located within the caller's local calling area*."[75]

70 Four 2006 federal circuit court decisions—three of them cited in the *Qwest* decision – confirm this conclusion. Along with *WorldCom*, they establish the controlling rule of federal law on the scope of the *ISP Remand Order*. In the first, *Global NAPS I,* the First Circuit held that "the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*."[76] Three months later, in *Global NAPs II*, the Second Circuit concluded that "[t]he ultimate conclusion of the [*ISP Remand Order*] was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation."[77] Shortly thereafter, the D. C. Circuit noted that, in *WorldCom*, the D.C. Circuit ruled that in the *ISP Remand Order* the FCC "found that calls made to ISPs located *within the caller's local calling area* fall within those enumerated categories—specifically, that they involve 'information access.'"[78] Finally, the Ninth Circuit, in *Peevey*, stated that the rate caps in the *ISP Remand Order* "are intended to substitute for the reciprocal compensation that would otherwise be due to CLECs *for*

[73] *Qwest,* 2007 WL 1071956 at *10.

[74] *Id.* at *11.

[75] *WorldCom*, 288 F.3d at 430 (emphasis added).

[76] *Global NAPs I,* 444 F.3d at 62 (emphasis added).

[77] *Global NAPS II*, 454 F.3d at 99 (emphasis added).

[78] *In re Core Communications,* 455 F.3d 267, 271 (D.C. Cir. 2006) (emphasis added).

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terminating local ISP-bound traffic. They do not affect the collection of charges by ILECs for *originating interexchange ISP-bound traffic*."[79] Thus, the *Qwest* court's ruling that the *ISP Remand Order* applies only to local ISP traffic is settled law in the Ninth and three other federal circuits. There is no contrary authority at the circuit court level.[80]

71 *Qwest* is completely consistent with these cases. The issue before the court was the scope of the *ISP Remand Order*. The *Qwest* court noted the FCC's own description of the issue in the *ISP Remand Order*: "the question presented to the FCC was decidedly narrow: 'whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area*, that is served by a competing LEC.'"[81] Given that, the court noted the well-established principle the conclusions of the *ISP Remand Order* "must therefore be confined to the context of that question."[82] Then, referring directly to the lines of cases described above, the Court noted that "every federal court of appeals that has recently analyzed the scope of the *ISP Remand Order* in this regard has concluded similarly."[83] Thus, the court held that the Commission's conclusion that the *ISP Remand Order* governs *all* ISP traffic "violated federal law."[84] With the addition of *Qwest*, federal case law is unanimous that the *ISP Remand Order* applies only to local ISP traffic.

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[79] *Peevey*, 462 F.3d at 1159 (emphasis added).

[80] In 2005, a federal district court in Connecticut decided that the *ISP Remand Order* applies to *all* ISP traffic. *Southern New England Telephone v. MCI WorldCom* ("*SNET*"), 359 F.Supp.2d 229 (D. Conn. 2005). This ruling is neither binding nor persuasive in the 9th circuit. Indeed, it has not gained support even in its own circuit. In *Global NAPs I* the First Circuit tersely noted that "[w]e simply disagree with the *SNET* court's analysis." 444. F.3d at 75, n. 17. Connecticut is in the Second Circuit. In *Global NAPs II*, the Second Circuit agreed with the First Circuit and never even mentioned the *SNET* case. The *SNET* case is therefore not good law in the Second Circuit or anywhere else.

[81] *Qwest,* 2007 WL 1071956 at *10 (emphasis in original).

[82] This principle – that a decision applies no more broadly than the issue being decided – is so fundamental that the *Qwest* court cited an 1821 decision authored by Justice John Marshall. 2007 WL 1071956 at *10, *quoting Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[83] The court noted that the FCC itself took that same position in an FCC amicus brief filed with the First Circuit in *Global NAPs I. Qwest,* 2007 WL 1071956 at *12. The *Qwest* court noted that the FCC itself takes the position that while the FCC has actively considered the question of whether 'Internet telecommunications traffic is subject to reciprocal compensation[,] [the FCC] has never directly addressed the issue of ISP-bound calls that cross local-exchange areas.'" *Id.* at *13 *quoting Global NAPs II*, 454 F.3d at 95.

[84] *Qwest,* 2007 WL 1071956 at *13.

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4. VoIP Preemption/ESP Exemption

a) The ESP Exemption

72 Neither the ESP exemption nor federal preemption of VoIP traffic in any way change the conclusion that VNXX traffic is interexchange traffic. The ESP exemption applies to customers who are purchasing services as end users, and not as carriers (which is how the Respondents purchase service). And VoIP preemption clearly does not impact this Commission's authority to determine proper call rating under state law.

73 The issues related to the use of VNXX for VoIP traffic turns, in particular, on a proper understanding and application of the FCC's Enhanced Services Provider ("ESP") exemption. The ESP exemption was originally established in 1984. At the same time the FCC established the access charge regime in use today for all IXCs, the FCC permitted ESPs to connect their point of presence ("POP") to the local network as an end user via local exchange service as opposed to access services (*e.g.*, Feature Group D) that IXCs were (and still are) required to purchase.

74 The most critical aspects of the exemption are (1) that an ESP is treated as an end user and not a carrier, and (2) that the ESP's location for call rating purposes is its POP. These principles are clearly articulated in two different portions of theCC's 1988 *ESP Exemption Order*[85]:

> Under our present rules, *enhanced service providers are treated as end users for purposes of applying access charges*. . . . Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. *ESP Exemption Order*.[86]
>
> Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, *enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges.* To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those

[85]Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*").

[86] *Id.* ¶ 2, n. 8 (emphasis added).

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applicable to end users.[87]

75 The D. C. Circuit made it clear that when the FCC says that an ESP is treated as an end user, it means it literally: "The Commission's primary policy justification for the intrastate classification matches the language it has used for the ESP exemption. Rather than directly exempting ESPs from interstate access charges, the Commission defined them as "end users"- *no different from a local pizzeria or barber shop*."[88]

76 An end user is not exempt from toll charges for interexchange calls. Similarly, ESP status does not give an ESP a *carte blanche* exemption from access charges throughout a LATA in which it has purchased local service in only one or a few LCAs. In the current round of Level 3 arbitrations, Level 3 has been quite candid about its position that if, for example, a VoIP call is delivered to Qwest in Seattle, Qwest would have the obligation to transport the call from Seattle to Olympia, but under no circumstance would Qwest be able to charge access for this service.[89] Yet, under identical circumstances, an IXC would pay terminating access charges and, if Qwest provided the transport, would pay for transport from the access tariff (and not TELRIC-rated transport). The effect of this method of operation by CLECs with regard to VoIP traffic is simply another variation of VNXX traffic.[90]

77 Level 3 (and perhaps other CLECs) claim that, instead of having its VoIP Provider customer stand in the place of an end user (whose local service gives it the right to originate and terminate calls within the LCA in which it is located without incurring additional charges), they are completely exempt from access charges. Yet it defies common sense that an ESP, which stands in the place of an end user customer, would receive privileges beyond those granted to end user

[87] *Id.* ¶ 20, n. 53 (emphasis added).

[88] *ACS of Anchorage v. FCC,* 290 F.3d 403, 409 (D. C. Cir. 2002) (emphasis added).

[89] Order on Reconsideration, *Level 3 Communications LLC v. Qwest Corporation*, 2006 WL 2067855 at *3 (Iowa Util. Bd., July 19, 2006) ("*Iowa Level 3 Order*") ("Level 3 claims that all VoIP traffic is exempt from [access] charges").

[90] Cross examination of Larry Brotherson, Tr. 418-19.

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customers. It likewise defies common sense for a CLEC to suggest that, at the same time a typical end user customer's physical location is critical to whether calls or local or long distance, that the location of the POP of the VoIP provider should not be the relevant measuring point for VoIP calls. A non-ESP end user customer located in Seattle who calls a customer in Olympia would incur long distance charges and its long distance carrier (IXC) would pay access charges. CLECs do not have greater rights in this regard than end users.

78 As discussed above, under Washington law, a call (whether voice, ISP, or VoIP traffic) between separate LCAs is an interexchange call and must be treated as such. Thus, when a call is handed off to Qwest within a LCA where the VoIP provider POP is located, but the call is being sent for termination to another LCA, the provider is not entitled to free transport and call termination under the ESP exemption or on any other basis. Nor is the VoIP provider allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a POP in that LCA. Calls of this sort are properly classified as long distance calls and must be handed off to an IXC, which must connect to Qwest via a Feature Group connection.

b) VoIP Preemption

79 In its *Vonage* order, the FCC generally preempted the states on VoIP issues.[91] That, however, does not mean that state commissions lack the jurisdiction to determine call classification and VNXX issues related to VoIP traffic, just as the FCC's general preemption of compensation for ISP traffic does not preempt the state commissions from defining LCAs.[92]

80 Some state commissions (particularly given the current level of uncertainty as to how the FCC will ultimately resolve VoIP issues) have declined to decide VoIP issues. Yet CLECs are currently delivering VoIP traffic to Qwest for termination and the level of such traffic will

[91] Memorandum Opinion and Order, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd 22404 ¶ 1, 46 (2004) ("Vonage").

[92] *Global NAPs II*, 454 F.3d at 97-101.

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undoubtedly increase over time. Thus, VoIP VNXX issues are not theoretical future issues, but are current issues that should be resolved by state commissions. It would be a mistake to assume the FCC will quickly resolve these issues. After all, we have now passed the sixth anniversary of the *Intercarrier NPRM* and resolution of that docket appears to be anything but imminent. Despite the FCC's assertion of jurisdiction over VoIP issues, the delegation of authority to the Commission to decide disputed issues covers VoIP issues, just as it covers ISP traffic issues. And, perhaps most importantly, the FCC has already provided general philosophical guidance to state commissions on the proper treatment of VoIP traffic in its *IP-Enabled Services NPRM*[93]: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, *on an IP network*, or on a cable network. *We maintain that the costs of the PSTN should be borne equitably among those that use it in similar ways*."[94] In light of this guidance, there is no reason that a state commission should not address VoIP VNXX issues.

5. Other State Commission Decisions

81 Most state commissions define VNXX traffic using a geographic test, and most do not require the payment of terminating compensation on such traffic. Some commissions, such as Massachusetts and Ohio, require the payment of access charges on such traffic.[95] The decisions from the current round of Qwest/Level 3 arbitrations are instructive on the current state

[93] Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services,* WC Docket No. 04-36, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*").

[94] *Id.*¶ 61 (emphasis added).

[95] *Global NAPs I*, 444 F.3d at 60 (Upholding a decision by the Massachusetts commission to impose access charges on VNXX traffic, stated: "We . . . hold that the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls as are involved here, leaving the DTE free to impose access charges for such calls under state law"); Arbitration Award, *In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration of an Interconnection Agreement with United Telephone Company of Ohio dba Embarq Under Section 252(b) of the Telecommunications Act of 1996*, 2007 Ohio PUC LEXIS 301 at *14-*15 (Ohio PUC, April 18, 2007) ("Given that an ILEC must perform the exact same functions when originating a voice VNXX call and an ISP-bound VNXX call, the Commission sees no reason to treat these two types of calls differently . . . . Therefore, the Commission finds that, for ISP-bound VNXX calls that originate or terminate outside the ILEC's local calling area, the call is considered toll or interexchange. Compensation is based upon the originating or terminating party's access charges.").

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commission view of this issue.

82 The Iowa Board reaffirmed its bill-and-keep approach to terminating compensation, adopted Qwest's VNXX definition, and adopted language that requires Level 3 to pay for the transport of ISP traffic.[96] In Colorado, the commission reached the same conclusion as Iowa, approving Qwest's geographic VNXX definition, reaffirming its bill-and-keep policy for ISP traffic, and requiring Level 3 to pay for the transport of ISP traffic.[97] The Colorado commission stated: "[b]y eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the local market. Thus, the outcome is pro-competitive and anti-subsidy. ISP users pay for what they use; competitors can serve them accordingly; and non-ISP-users do not have to pay for services they do not use."[98]

83 In Oregon, the commission adopted Qwest's VNXX language, imposed a zero rate on VNXX ISP traffic, but also required Level 3 to pay for the transport of VNXX ISP traffic at private line rates instead of TELRIC-rated transport.[99] The commission also ruled that "calls in Oregon have been rated as 'local' or 'interexchange' based on the physical [or geographical] location of the parties to the call" and further, that "[t]he First, Second, and Ninth Circuit Courts all concur with the Commission's determination that VNXX-routed ISP traffic is 'interexchange' in nature."[100] Just a month ago, the Wyoming commission entered its order adopting Qwest's

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[96] *Iowa Level 3 Order*, 2006 WL 2067855 at *10, *17-*19. The Iowa Board stated that its "concern with VNXX has always been that a CLEC like Level 3 would be using Qwest's network to carry interexchange calls for free; any logical response to that concern would require some payment from Level 3 to Qwest." *Id.* at *19.

[97] Initial Commission Decision, In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation (Docket No. 05B-210T, ¶¶ 22, 49-51 (Colo. PUC, March 6, 2007). No Westlaw cite is yet available for this order. However, the decision can be accessed at the following location: http://www.dora.state.co.us/PUC/DocketsDecisions/decisions/2007/C07-0184_05B-210T.doc. On April 23, 2007, the Colorado commission denied Level 3's petition for rehearing.

[98] *Id.* ¶¶ 50-51. In a 2003 case, the Colorado commission stated: "The calling party and called party must both be physically located in the same local calling area for the call to be a local call for reciprocal compensation purposes." *In the Matter of Petition of Qwest Corp. for Arbitration of an Interconnection Agreement with AT&T of the Mountain States, Inc. and TCG-Colorado,* 2003 WL 22399647, at *8, ¶ 52 (Colo. PUC, Oct. 14, 2003).

[99] In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act, 2007 WL 978413, at pp. *2, *4-*5,, *20, *26, *28 (Ore. PUC, March 14, 2007)("Oregon Level 3 Order").

[100] *Id.* at pp. *19, *20 (citations omitted).

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VNXX definition and requiring Level 3 to pay for the transport of ISP traffic.[101] While the cases are not unanimous,[102] most state commissions have rendered rulings that are consistent with the recent cases in the Qwest/Level 3 arbitrations.[103]

III. VNXX RELATIONSHIP TO OTHER SERVICES

84 The parties presented evidence comparing VNXX to a variety of other services. Yet none of the CLECs offers a real FX service. VNXX is most like an inbound 800 service in terms of functionality, and 800-type service is the appropriate model for determining the nature of and compensation for VNXX calls.

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[101] Memorandum Opinion, In the Matter of the Petition of Level 3 Communications LL, for Arbitration of an Interconnection Agreement with Qwest Corporation, Docket Nos. 70043-TK-05-10 and 70000-TK-05-1132, at 11, 19-22 (Wyo. PSC, April 30, 2007).

[102] Qwest's research has disclosed only a few cases that have used something other than a geographic test for call classification. In California, which Qwest discussed in Section II.B.4.a, *supra*, the commission reached a different conclusion based on LEC tariffs in California. In another case, *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, 18 FCC Rcd 23,625 (2003) ("*Starpower*"), the FCC was sitting in place of the Virginia Corporation Commission, which refused to act as arbitrator. In that case, the FCC required the payment of compensation on VNXX traffic, noting that "the [Verizon] Tariff does not expressly address whether the 'location' of a customer station turns on physical presence or number assignment . . ." *Id.* ¶ 15. *See also* Memorandum Opinion and Order, *In the Matter of the Petition of WorldCom . . .; In the Matter of the Petition of Cox Virginia . . .; In the Matter of the Petition of AT&T Communications of Virginina . . .,* 17 FCC Rcd 27039 (FCC Wireline Competition Bureau, July 17, 2002) ("*Virginia Arbitration Order*") (Wireline Compensation Bureau sitting in place of the Virginia Corporation Commission). The Vermont board ruled that the *Starpower* decision is not binding upon it, because the FCC was applying Virginia law and "acting in the place of the Virginia State Corporation Commission." *Re Adelphia Business Solutions of Vermont, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *61 (Vt PSB July 16, 2003).

[103] E.g., Arbitration Award, In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration of an Interconnection Agreement with United Telephone Company of Ohio dba Embarq Under Section 252(b) of the Telecommunications Act of 1996, 2007 Ohio PUC LEXIS 301 at *14-*15 (Ohio PUC, April 18, 2007); Order, Re New England Fiber Communications, LLC, Nos. DT 99-081 & DT 99-085, 2003 N.H. PUC LEXIS 128, at *32-*33 (NH PUC, Nov. 12, 2003) ("[R]eciprocal compensation applies only to local traffic, which is defined in the tariff as calls originating and terminating within a specified geographic area"); Arbitrator's Recommended Decision, In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha, Docket No. C-3095, at 18-19 (Neb PSC May 4, 2004); Order, Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (Vt. PSB, Dec. 26, 2002) (pinpoint citation not available) ("[W]e make clear that the determination of whether traffic is local or toll is based upon the physical termination points, not the rate center assigned to the VNXX number."); Order, Petition of Global NAPS, Inc. . . . for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 02-45, 2002 Mass PUC LEXIS 65 at *51 (Mass Dep't of Tel & Energy, Dec. 12, 2002) ("VNXX calls will be rated as local or toll based on the geographic end points of the call"); Opinion and Order, Petition of Global NAPs South, Inc. for Arbitration . . . with Verizon Pennsylvania Inc., Docket No. A-310771F7000 at 45 (Pa. PUC, Apr. 21, 2003) ("[C]alls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation.").

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A. Foreign Exchange ("FX") Service

85 Several of the Respondents claimed that there are no differences between their "FX" services and Qwest's foreign exchange service. They also claimed that their versions of FX are not VNXX. Finally, they claimed that QCC's Wholesale Dial service is no different than their "FX services." None of these claims has merit.

1. Qwest's FX Service

86 Mr. Brotherson and Mr. Linse addressed these issues at length.[104] To understand this issue it is critical to understand Qwest's FX service, as illustrated by the following example. Assume that a Seattle business wishes to do business with customers in Olympia and to facilitate that business wishes to have a local number that Olympia customers can dial toll-free. Qwest's FX service is a combination of two services. First, the FX customer is required to buy local exchange service *in Olympia at the Olympia local exchange rate.* This service provides the FX customer with the Olympia telephone number.[105] The second service the FX customer must buy is a private line service from Olympia to its location in Seattle. This is purchased out of the Qwest private line tariff or catalog at the same retail private line rates that other customers pay (and has both flat-rate and mileage components).[106] Through the payment of local exchange rates in Olympia, the FX customer pays its fair share of the costs that Qwest has incurred to build-out an extensive local exchange network in Olympia and to provide a switch in that LCA.

87 Through this service, the FX customer is treated the same as any other Olympia customer and pays the same rate as other Olympia customers. Through the payment of retail private line rates, the customer fully compensates Qwest for transporting the call from Olympia to Seattle – thus cost causation and cost recovery are aligned.[107] Also, the FX customer buys service as an end

[104] Brotherson Rebuttal, Ex. 24T at pp. 3-26; Linse Direct, Ex. 171T, at pp. 7-11; Linse Rebuttal, Ex. 172T, at pp. 2-9.

[105] Brotherson Rebuttal, Ex. 24 T, at pp. 4-5.

[106] *Id.* at p. 5.

[107] *Id.* at pp. 4-5.

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user, and not as a carrier, and thus has no basis to demand terminating compensation for FX traffic. In every LCA in which Qwest offers FX service, it has a switch and an extensive (in most cases, ubiquitous) local exchange network. Without either a switch or a local network, it would obviously be impossible for the FX service to work.

2. QCC's Wholesale Dial Service

88 QCC's Wholesale Dial Service is based on the purchase of a variation of FX service and is not VNXX. QCC buys the service as an ESP (and thus as an end user). PRI is a local exchange service that QCC buys from Qwest's local exchange tariff. QCC also buys retail private line service from Qwest to transport the calls to QCC's Network Access Server. The only significant difference is one of scale. QCC's PRI service gives it greater capacity in the local exchange and it will buy a much larger capacity transport service than a single private line circuit. Typically, QCC will buy a DS1 or DS3 private line service (at the appropriate retail rates). Thus, QCC pays for service in the originating local exchange (thus compensating Qwest for the use of loop plant, distribution facilities, carrier systems, and the local Qwest switch), it pays to transport the traffic, and because QCC is an end user it can make no claim against Qwest for terminating compensation. Once again, cost causation and cost recovery are aligned.[108]

3. CLEC FX Service

89 Given page constraints, Qwest will not discuss each CLEC individually. However, for illustrative purposes, Qwest will concentrate on Pac-West and Level 3. Pac-West does purport to provide an FX service which it has branded as "Intelligent FX" service.[109] Level 3's price list makes no reference to an FX service – the only local services that it claims to provide under the price list are a DID and DOD service.[110] The primary line of business for both Pac-West and

[108] *Id.* at pp. 37-42.

[109] Exhibit 516 (last two pages) (PacWest website material); Exhibit. 517, at pp. 131-44 (PacWest Price List excerpt).

[110] Exhibit 474, at pp. 46-50 (Level 3 Price List excerpt); Cross Examination of Mack Greene, Tr. 600-01. Mr. Greene stated that Level 3 provides a non-tariffed "FX-like service" as part of its Managed Modem service. *Id.* at p. 601.

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Level 3 is providing service to ISPs: both companies refer to this service as "Managed Modem" service.[111] Both services essentially outsource to ISPs the basic network functionality needed to be a dial-up ISP (access to telephone numbers, network routing, IP-TDM conversion, authentication, etc.) – in essence, while the ISPs do some things such as marketing, email, billing, and customer service, Pac-West and Level 3 perform the fundamental network functionalities necessary for the ISPs to provide Internet access service to end users.[112]

90 While both companies have IP networks, they do not have anything like the network that Qwest has built in Washington, nor does Qwest demand that they replicate Qwest's network. However, there are consequences of not having a network, one of which is that, while these companies may call something FX service, the service they actually provide bears no resemblance to a true FX service. For example, neither Pac-West nor Level 3 provides local exchange service to end users in Washington. This is graphically demonstrated by the relative traffic flows between each of them and Qwest. For 2005 and 2006, 99.6 percent of the traffic exchanged between Qwest and Pac-West originated with dial-up ISP customers on Qwest's network, while only 0.4 percent originated with customers on Pac-West's network.[113] The numbers for Level 3 are even less balanced. For 2005 and 2006, 99.93 percent of the traffic exchanged between Qwest and Level 3 originated with dial-up ISP customers on Qwest's network, while only 0.07 percent originated with customers on Level 3's network.[114] Given these numbers, it is clear that Pac-West and Level 3 have not built out local exchange networks. If they had, they would have customers and the traffic flows would be more balanced. Each company has only a single switch located in the Seattle LCA (though Level 3 acquired a second Seattle area switch in its Broadwing acquisition). They have no switches in any other LCA in Washington.

[111] Exhibit 475 (Level 3 website material); Exhibit 516 (last two pages) (PacWest website material).

[112] Exhibit 475; Cross examination of Mack Greene, Transcript at pp. 591-94; Exhibit 516.

[113] Exhibit 25.

[114] Exhibit 26.

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91 So, when these CLECs purport to provide FX service, it is the exaltation of form over substance. Using Olympia as the example, Qwest has both a switch and a ubiquitous local exchange network in Olympia. Qwest also has an interoffice network between Olympia and Seattle. Therefore, when it provides FX service, it provides the local exchange network (without which FX traffic cannot be collected), a switch (which is likewise necessary) and interoffice trunking to Seattle. When Level 3 and Pac-West purport to provide FX service in Olympia, they can do so only through the use of Qwest's local exchange network and switch (*i.e.*, which constitutes originating costs), but they do not believe they have any obligation to pay Qwest anything for these facilities (even though IXCs in identical circumstances pay for these facilities through originating access charges). Level 3 and Pac-West may have some interoffice facilities between Olympia and Seattle, but it is also just as likely that they subscribe to Qwest's TELRIC-rated DTT transport (and in Washington they claim that Qwest must bear financial responsibility for such transport, even for ISP traffic). Finally, both claim that that Qwest should pay terminating compensation on all minutes delivered to them, even minutes that originate in one LCA and are delivered to an ISP in a different LCA. As Dr. Fitzsimmons pointed out, this completely reverses the linkage between cost causation and cost recovery.[115]

4. Summary of FX Issues

92 There are three key points that flow from these facts. First, there is a dramatic difference between FX service, as provided by Qwest, and the sham FX service that CLECs like Pac-West and Level 3 purport to provide. They should not be treated the same.

93 Second, there should be intercarrier compensation consequences from these facts. Qwest should be compensated for its local exchange network and switch in these circumstances (e.g., originating access or some other reasonable origination charge); but if Qwest is not allowed such compensation, it would be egregiously unfair to require Qwest to pay terminating

[115] Rebuttal Testimony of Dr. William Fitzsimmons, Exhibit 103T, at pp. 1-8.

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compensation to the CLEC that benefits from this arrangement (thus, a zero terminating rate for all ISP traffic should, at the very least, be required). In addition, CLECs should be required to bear the financial responsibility for transporting VNXX traffic; and, CLECs should pay private line rates for such traffic instead of the deeply-discounted TELRIC transport rates.[116]

94 Third, these facts demonstrate that there is nothing inappropriate about QCC's Wholesale Dial Service. QCC buys services at retail rates as an end user and thus compensates Qwest for costs incurred by Qwest to provide the service. And, just as importantly, QCC cannot claim a right to terminating compensation. This arrangement is entirely consistent with the ESP exemption.

B. 800 Service

95 VNXX and 1-800 services are virtually identical.[117] The clearest evidence on this point is Exhibit 173, the illustrative comparison of the two services. The only real difference between a 1-800 call flow and a VNXX call flow is the database query made when the calls reach the Qwest originating end office. For a 1-800 service, an external 800 database is queried for routing and billing purposes. Because VNXX appears to be a local call, the query goes instead to a switch routing table in the end office. In every other respect, the calls are identical. Yet the intercarrier compensation proposed by the CLECs could not be more different. For a 1-800 call Qwest would receive originating access charges and would have no obligation to pay terminating charges. For a VNXX call, Respondents demand free use of Qwest's local network and also expect Qwest to pay terminating compensation.

96 The comparison of VNXX to 1-800 service has been recognized by state commissions. For

[116] In the Qwest/Level 3 arbitration docket in Oregon, the Oregon commission created a limited VNXX exception for ISP traffic, but, in addition to not allowing terminating compensation on VNXX ISP traffic, the commission required that Level 3 pay private line rates for VNXX transport. *Oregon Level 3 Order,* 2007 WL 978413, at p.*4 ("[W]e do not agree with Level 3 that TELRIC rates should apply to the transport of the interexchange/interstate VNXX traffic . . . . [H]ad we not already prohibited VNXX, that traffic would properly be subject to access charges. Accordingly, we agree with the Arbitrator that Level 3 should pay the applicable tariff rate for interexchange/interstate trunks used to transport VNXX-routed ISP-bound traffic . . .").

[117] Fitzsimmons Direct, Exhibit 101 T at pp. 5-8; Linse Rebuttal, Exhibit172T, at pp. 9-13; Exhibit 173.

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example, the Vermont commission stated: "In effect, a CLEC using VNXX offers the equivalent of incoming 1-800 service, without having to pay any of the costs associated with deploying that service and instead relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says the call is 'local.'"[118] The South Carolina Commission, in a more recent order, reached the same conclusion: "The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for Virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls."[119]

97 Level 3's witness, Dr. Blackmon, confirmed the similarity of VNXX with toll or 1-800 calls.[120] Indeed, he also confirmed that one reason for setting up a 1-800 number is to enable others to more easily have access to the holder of the number.[121] And of course, in such a case, the holder of the number is responsible for the toll charges. The analogy to VNXX is nearly perfect, marred only by the fact that with VNXX, the CLEC attempts to disguise the interexchange nature of the traffic.

C. Market Expansion Line/Remote Call Forwarding Services

98 The claim that Qwest's Market Expansion Line ("MEL") or other Remote Call Forwarding features are like VNXX has no basis in fact. Indeed, MEL supports Qwest's position. No party rebutted Mr. Brotherson's testimony that MEL is simply a remote call forwarding feature that allows a business to forward its line to a different location.[122] If the number to which the MEL

[118] Petition of Global NAPs, Inc. for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at *41-*42 (Vt. PSB 2002).

[119] Order Ruling on Arbitration, In re Petition of MCI Metro Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, 2006 S.C. PUC LEXIS 2, at *35 (S.C. PUC, January 11, 2006).

[120] Cross Examination of Glenn Blackmon, Tr.743:6-745:15.

[121] Tr. 745:6-15.

[122] Brotherson, Rebuttal, Exhibit 24T, at p. 46.

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customer forwards its line is outside the LCA of the end office serving the MEL customer then the MEL customer is responsible for retail toll charges and the MEL customer's IXC is responsible for access charges on the call. In other words, MEL fully honors LCA boundaries and, when calls cross those boundaries, toll (and access) charges are assessed. In a sense, if a MEL customer forwards its line to a different LCA, the service works like a 1-800 service where the called party pays the toll charges. This is nothing like VNXX, which seeks to disguise an interexchange call as a local call in order to avoid access charges.

D. One Flex Service

99 Some parties suggested that QCC's VoIP Service, OneFlex, is a VNXX service. Mr. Brotherson explained this service and provided a diagram to show how it works, and how it honors LCA boundaries.[123] QCC offers OneFlex as an ESP who is able to purchase services in a LCA as an end user and not as a carrier.[124] QCC receives its telephone numbers from Qwest, which it uses to route calls to its VoIP customers, and QCC also "purchases tariffed or cataloged services from Qwest (the ILEC), typically catalog Primary Rate ISDN or equivalent services, *in each of the LCAs where these virtual numbers are assigned.*"[125] Thus the calls are handed off "within the LCA where QCC has purchased local PSTN service."[126] Mr. Brotherson noted that QCC does not purchase local service in all Washington LCAs.[127] But instead of avoiding access charges via a VNXX scheme, "when [QCC] terminates calls in LCAs where it has not purchased local service *it hands the traffic off to an IXC for termination.*"[128] Mr. Williamson agreed with Mr. Brotherson's characterization of OneFlex.[129]

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[123] Exhibit 24T at pp. 42-45; Exhibit 29.

[124] Exhibit 24 T at pp. 42.

[125] *Id.* at p. 43 (emphasis added).

[126] Id.

[127] *Id.* at p. 44.

[128] *Id.*, emphasis added.

[129] Cross Examination of Robert Williamson, Tr 397:12-22 ("QC, the telephone company, will only assign telephone numbers associated with where you buy your local service. . . . QCC can translate those into IP addresses if they're sending – if they're routing traffic on the Internet or if Internet traffic is coming back to them to their equipment. But the only place they can connect to the public network, the only place those – the way calls can

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100 The result is that OneFlex honors LCA boundaries and QCC pays access charges when OneFlex traffic is delivered to an LCA where QCC has not purchased local service. OneFlex is not a VNXX service and it complies with the ESP exemption.

IV. VNXX POLICY CONSIDERATIONS

101 Public policy considerations weigh in favor of declaring VNXX to be unlawful. VNXX subverts the historic system of access charges, it does not reflect a legitimate form of competition, it forces Qwest to incur costs to transport non-local calls without appropriate compensation, and has not been shown to be necessary for access to the internet or any other lawful purpose.

A. Cost Issues

102 When a customer places a VNXX ISP call, three types of costs are incurred – origination, transport costs, and termination costs.[130] The question is who should bear those costs – the ISPs and their dial-up ISP customer, or ratepayers generally.[131] A comparison of the "local call model" and the "long distance model" in light of cost causation principles provides a clear answer to that question.

103 The theory behind compensating the terminating carrier for terminating local traffic is that it has performed a service (delivering, or terminating, the call *to the called party*) for which the originating carrier has received compensation (specifically through flat-rated local service charges). But that theory does not apply to interexchange calls because the flat monthly rate paid by a customer to place an unlimited number of local calls does not include calls placed outside of the customer's LCA.[132]

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enter the public network is where they purchase their local service.")

[130] Brotherson Rebuttal, Exhibit 24 T, at p. 41; Exhibit 173.

[131] This analysis applies equally to non-ISP VNXX calls. Because ISP calls constitute the vast bulk of VNXX traffic, it is used as the example in this section.

[132] Fitzsimmons Rebuttal, Exhibit 103T at p. 6.

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104 Interexchange calls are governed by a different intercarrier compensation scheme. Under the long distance intercarrier compensation model, the IXC charges the customer placing the call and pays originating access to the originating LEC and terminating access to the terminating LEC. Thus, when a Qwest customer originates a long distance call, Qwest receives rather than pays compensation. In offering VNXX, a CLEC is actually operating under the long distance model and is functioning as an IXC.[133] It offers its ISP customers a service that allows dial-up callers to place interexchange calls for free. Further, a CLEC's use of VNXX (because it disguises long distance calls as local calls) prevents passing these costs on directly to the dial-up callers.[134] The economic principle of cost causation requires the cost-causer – the dial-up customer – to bear the cost of providing dial-up service.[135] The long distance model, which applies here, would have the CLEC (the provider offering the equivalent of 1-800 service[136]) pay compensation to Qwest for the origination costs Qwest incurs and then seek compensation from the ISP in an amount sufficient to cover what the CLEC pays Qwest plus the costs the CLEC incurs to transport and deliver the call to the ISP. Applying proper cost causation principles, the ISP could then pass its costs on to the dial-up customer so that the dial-up customer bears the costs that Qwest, the CLEC, and the ISP incur to make dial-up service possible.[137] The position that the CLECs took in testimony, however, would reverse the compensation flow that should apply to interexchange ISP traffic. That is the very outcome the FCC seeks to avoid. As the FCC stated, "[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."[138]

105 Carriers cannot just unilaterally pick and choose which regulatory rules apply. The applicable rules mandate that the long distance model applies to VNXX traffic. The foregoing analysis

[133] Fitzsimmons Direct, Exhibit 101T at pp. 5-9.

[134] Brotherson Direct, Exhibit 1T at pp. 20-25.

[135] Fitzsimmons Direct, Exhibit 101T at p. 9-10; Fitzsimmons Rebuttal, Exhibit 103T at pp. 2-4.

[136] Fitzsimmons Direct, Exhibit 101T at pp. 6-7.

[137] Fitzsimmons Rebuttal, Exhibit 103T at p. 3.

[138] ISP Remand Order ¶ 87.

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also demonstrates that application of the long distance compensation model is the right answer from an economic perspective.

B. Impact on Access Regime/Impact on Competition

106 As discussion in other sections of this brief demonstrate, VNXX subverts the existing access charge regime, in contravention of 47 U.S.C. §251(g). Furthermore, there has been no showing that there would be any negative impact on competition if the Commission were to determine that VNXX should be prohibited or subject to access charges. There would of course be an even smaller impact on CLECs if the Commission were to instead determine that VNXX should be allowed only on a bill and keep basis, with the CLEC obligated to pay for the transport of that traffic.

C. Consumer Impact

107 Elimination of VNXX would produce no demonstrable negative consumer impact. Dial-up internet access was prevalent in the days before VNXX. ISPs simply placed their modems within the LCAs, thereby allowing for true local calls to be made to access the internet on a dial-up basis. There has been no showing that a return to that model (in other words, disallowing VNXX completely) would demonstrably affect the availability of dial-up services. And there would be even less of an impact if the Commission were to adopt the Staff position or the Qwest/Verizon Access settlement, allowing VNXX under certain conditions.

108 Level 3 complained in its testimony that imposition of access charges on VNXX would raise costs for ISPs and would harm consumers. But under the Staff proposal or the Qwest/Verizon settlement, no such cost increases would be imposed on ISPs, because access charges would not apply. And the elimination of terminating compensation for those calls would likely not deter CLECs such as Level 3 from offering services to ISPs in Washington.[139] For example, Level 3 has more traffic in Colorado than any other Qwest state, and in Colorado all ISP-bound traffic is

[139] Cross Examination of Glenn Blackmon, Tr. 741:18-742:1.

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exchanged at a zero rate and has been for several years. In Washington, local ISP-bound traffic would still be compensated under the various ICAs that provide for compensation for ISP-bound traffic, as this proceeding would not change anything in connection with truly local calls.[140]

D. Impact on Independent ILECs

109 Qwest understands that the Washington Independent Telephone Association ("WITA") will be most directly addressing this issue. No doubt WITA has many of the same concerns with regard to access charge avoidance that initially led Qwest to file this complaint.

E. Other Public Policy Considerations

110 Qwest will address other policy consideration raised by other parties in its reply brief.

V. STAFF PROPOSAL

111 Staff proposes that the Commission allow VNXX traffic for ISP-bound traffic at a zero rate, or on a bill and keep basis. Staff would prohibit VNXX dialing and traffic for voice calls. While Qwest understands the public policy considerations that drive this recommendation, as explained by Staff witness Robert Williamson, Qwest supports an outcome in this case that is consistent with its complaint, and/or with its settlement with Verizon Access, discussed below.

112 In particular, Staff's proposal does not explicitly require the CLEC to assume responsibility for transport for the VNXX traffic. This is an important component of the agreement that Qwest has with Verizon, and should be a component of any Commission decision that allows VNXX routing.

VI. QWEST/VERIZON ACCESS SETTLEMENT

113 Qwest has alleged that the use of VNXX arrangements by other carriers, without payment of access charges or other appropriate arrangements, is unlawful. Verizon Access disputed that allegation, and took the position that carriers should negotiate appropriate arrangements for

[140] *Id.*, Tr. 742:2-743:4.

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compensation for those types of calls.

114 Qwest and Verizon Access agreed to settle this dispute as between themselves, as well as other disputes between them, by entering into a Confidential Settlement Agreement. The Settlement Agreement resolved historical disputes, and contains an agreement to enter into an amendment to the parties' ICA. That amendment was filed with the Commission for approval in Docket No. UT-063055, and that docket has been consolidated with this one for purposes of the review of that amendment.

115 The Agreement is in the public interest and should be approved. The Agreement and the amendment to the ICA resolve the dispute between the parties regarding whether a carrier should be permitted to use VNXX dialing patterns, and if so, what compensation arrangements should apply. Under both Washington and federal law, carriers are permitted to enter into agreements of this type.[141] This Agreement addresses Qwest's concerns with being charged (inappropriately, in Qwest's view) reciprocal compensation or ISP-bound compensation for what Qwest believes to be non-local calls, and creates an agreed-upon arrangement for the exchange of VNXX traffic. The Agreement is consistent with the position taken by Verizon Access in this docket that carriers should negotiate intercarrier compensation agreements to govern the exchange of VNXX traffic pending completion of the intercarrier compensation docket at the FCC.[142] The Agreement expressly does not resolve Qwest's complaint against respondents other than Verizon Access in this docket.

116 In Qwest's view, VNXX traffic is and remains unlawful when both carriers who participate in

[141] RCW 80.36.150 expressly contemplates that carriers may enter into contracts for telecommunications services or the use of facilities. There is no Commission rule or regulation that such contracts be filed with the Commission, except for those contracts entered into under 47 U.S.C § 252. Under 47 U.S.C § 252, parties may negotiate agreements to implement the requirements of Section 251, and may do so without regard to the standards set forth in Section 251(b) and (c). A state commission may reject such an agreement only if it is discriminatory against a carrier who is not a party, or if implementation of the agreement is not consistent with the public interest. 47 U.S.C. § 252 (e)(2)(A).

[142] See *Intercarrier NPRM* (2001) and Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685 (March 3, 2005).

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the origination and termination of the VNXX call have not agreed to the terms and conditions for the exchange of that traffic. Qwest and Verizon Access have attempted to reconcile at least some of the problems created by VNXX traffic by agreeing to a methodology for the exchange of VNXX traffic. Qwest and Verizon Access have filed a joint motion requesting Commission approval of the confidential Settlement Agreement, and dismissal of Verizon Access as a respondent in this case.

A. Standards for Approval of Negotiated ICA

117 Under Section 252, parties may negotiate agreements to implement the requirements of Section 251, and may do so without regard to the standards set forth in Section 251(b) and (c). A state commission may reject such an agreement only if it is discriminatory against a carrier who is not a party, or if implementation of the agreement is not consistent with the public interest.[143] Those standards are met in this case. While Qwest is aware that Level 3 has claimed, in other states, that the agreement is discriminatory, Qwest is unaware of any such claim in Washington. Nor would there be any basis to make such a claim. The agreement is not discriminatory because Qwest will make the agreement available to other carriers, under the terms and conditions set forth below, consistent with those offered to Verizon Access.

118 The agreement is consistent with the public interest because it resolves, without litigation, a disputed issue between the parties, consistent with the Act's policy favoring negotiated agreements. It also allows for the continued use of VNXX dialing, to the extent that such use enables internet access and is thereby considered to be in the public interest.

B. Terms and Conditions

119 The agreement allows for the exchange of VNXX traffic. It is a 14-state agreement, and is not available on a state-by-state basis for two important reasons. First, Qwest entered into it with Verizon Access only because it addressed all states in Qwest's ILEC territory. Second, the

[143] See 47 U.S.C. § 252 (e)(2)(A).

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calculation of the applicable unitary rate (see below) is based on inclusion and weighting of the rates in all 14 of those states. Thus, anything less than a 14-state agreement would allow a carrier to enter into a state-specific agreement in those states where rulings favored the CLEC, but adopt the agreement in other states. Such a result would be inconsistent with the agreement that Qwest and Verizon Access have entered into, and would arguably be discriminatory to Qwest and Verizon Access.

120 There are two key elements associated with the amendment in terms of the compensation that will be paid on traffic exchanged between the parties. First is the Unitary Rate which applies to traffic that is payable for the exchange of local traffic. The initial Unitary Rate applicable in Washington (and the same unitary rate that is employed in all Qwest states, except Iowa and Colorado) is $0.00078651. This rate was calculated based on historic company-specific usage data from the twelve states where the rate will be applicable and also accounts for the current approved voice rates in each state and the FCC's mandated rate for local ISP traffic. The traffic that will be compensated at this rate is local voice and local ISP traffic.

121 The second key element is the "Percent Compensable Minute Factor" ("PCMF") which is used to determine "which traffic exchanged by the Parties pursuant to the Agreement is subject to compensation at the Unitary Rate." The PCMF is the ratio of "a) the quantity of Local Voice Traffic ***plus*** Local ISP-bound traffic to b) the quantity of Virtual VNXX traffic ***plus*** Local Voice Traffic and Local ISP-bound traffic." A PCMF is calculated for each company's originated traffic, based on historic traffic usage, specific to the two companies. In other words terminating compensation will not be paid by Qwest on VNXX minutes. The same methodology is used to calculate a PCMF for Verizon Access-originated traffic that Qwest will employ when billing Verizon Access for its traffic. Under the agreement, Verizon Access will be allowed to use VNXX routing, but all VNXX minutes are effectively subject to a bill and keep compensation regime.

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122 Other CLECs would be able to opt in to the same agreement (the whole agreement), though of course the specific Unitary Rate and the PCMF provisions would produce different rates and ratios for each party based on their unique mixes of traffic historically exchanged with Qwest. Both the Initial Unitary Rate and the PCMF will be in effect for one year and can be revisited after that initial period at the election of either party. The Revised Unitary Rate will be recalculated to reflect any changes in the mix of local voice and ISP traffic, or changes in a state voice rate or FCC ISP rate. The Revised PCMF will be recalculated to reflect any changes in the mix of local voice and ISP traffic, on the one hand, and VNXX traffic on the other.

123 The Parties also agreed to a relative use factor ("RUF") that allocates cost responsibility for LIS transport. Under the amendments to the interconnection agreement, Verizon Access will effectively bear the responsibility under the RUF formula for all VNXX traffic.

VII. CARRIER SPECIFIC ISSUES

A. Level 3 Broadwing Counterclaim

124 Broadwing filed a counterclaim in the amount of $1,235,368.54 based on Broadwing bills through October 28, 2006 for traffic exchanged in Washington between Qwest and Broadwing.[144] As the complainant, Broadwing has the burden of proof to establish that it has lawfully and correctly billed Qwest in connection with the disputed traffic. Broadwing has not done so, and cannot do so, because virtually all of the claimed amounts include billing for non-local VNXX traffic. This traffic is not compensable under the parties' ICA, which provides for compensation only for local traffic (whether voice or ISP-bound traffic). Because VNXX is not local, and because nearly all of the claimed amounts contain some degree of VNXX traffic, Broadwing has failed to establish that it is entitled to be paid the disputed amounts.

125 Qwest attempted to separate the claim into three main categories[145] and concluded that rather

[144] Direct Testimony of Rhonda McNeil, Exhibit 301T, p. 8, lines 12-13).

[145] 1) Local/Reciprocal Compensation disputes: $817,654.80; 2) Intrastate Access Charge dispute: $216,384.70; and, 3) Interest on the unpaid and disputed charges: $122,507.79.

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than the $1.235 million claimed by Broadwing, a more correct number for the amount really in dispute is about $1.157 million. Broadwing, on the other hand, claims $986,724.62 in compensation for local traffic, $225,304.60 for access, and $23,028.08 in late payment charges.[146] It has been difficult for Qwest to do a meaningful analysis of the total amount claimed for Qwest to determine all of the components of Broadwing's $1,235,368.54 claim. Broadwing's numbers have not been explained in any detail and the dollar amounts do not match Qwest records. However, regardless of whether Qwest's numbers are used or Broadwing's, the dispute is essentially one about compensation for VNXX traffic and for traffic that did not originate on Qwest's network – and in both cases, Qwest does not owe compensation to Broadwing.

126 There are several subparts to the local compensation dispute: 1) Local Minute of Use ("MOU") volume dispute: $ 60,773.04; 2) Universal Service Fund ("USF") dispute; 3) Charges for local MOUs that were exchanged prior to the date of the *Core Forbearance Order*: $317,630.97 ("Pre-*Core* Claims"); 4) Charges for MOUs from the date of the *Core Forbearance Order* to October 28, 2006: $48,789.45; and, 5) Disputed charges related to MOUs that Qwest claims are not subject to terminating compensation (*i.e.,* VNXX minutes): $390,461.34.

127 Broadwing provided no supporting detail on how it calculated its interest charges on the unpaid and disputed charges. Broadwing claims $122,507.79 in interest, yet provides no detail on whether these charges were associated with the dispute regarding local traffic, access service, or VNXX – if interest has been charged on all elements of Broadwing's claim, Broadwing provides no information as to how it has pro-rated its interest claim. Given that Broadwing has provided no information as to interest rates and the application of those interest rates to principal amounts it claims is owed, or any other specific information on the calculation of interest charges, it is impossible to determine how much of this interest applies to each disputed area.

[146] Exhibit 306C.

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Thus, Broadwing has failed to meet the most basic burden of proof requirements.

1. Disputed Volumes of "Local" Calls

128 As noted above, most of the minutes of use at issue in this portion of the dispute are tainted by virtue of VNXX number assignment and dialing patterns. VNXX traffic is not local and is not compensable as local traffic, either voice or ISP-bound. Thus, Broadwing has not met its burden of proof to establish that it is entitled to compensation for these minutes.

a) Local Minutes of Use Volume Dispute

129 This is one aspect of the dispute that does not concern VNXX traffic. Rather, this dispute concerns traffic that Broadwing claims its customers have terminated to Qwest. The way this traffic becomes relevant to this dispute is because traffic is highly out of balance between Qwest and Broadwing, and the *ISP Remand Order* developed a rule for determining how many of the minutes exchanged between two carriers may be presumed to be ISP minutes, as opposed to more traditional voice traffic. It is called the "3:1 rule." Instead of performing an actual measure if ISP traffic, the rule creates a rebuttable presumption that the traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP traffic and subject to the compensation regime of the *ISP Remand Order*. Under the 3:1 rule, Broadwing can bill a portion of the total minutes that terminate on its network at the voice rate and the balance at the ISP rate of $.0007. To determine the amount of minutes billed at the voice rate, Broadwing calculates the total local minutes Broadwing customers terminated to Qwest and multiplies that number by three. For example, if in a given month 100 minutes of traffic was terminated from Broadwing to Qwest, that amount would be trebled to produce 300 minutes. If that same month, 500 local minutes were terminated to Broadwing from Qwest, 200 minutes (500 minus 300) would be presumed to be ISP minutes under the 3:1 rule.

130 The application of this rule depends on agreement on the quantity of local minutes terminated on both networks. In this case, the local minutes that Broadwing claims its

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customers terminated with Qwest customers are overstated. The difference in the minutes recorded by Qwest and those recorded by Broadwing, after applying the 3:1 rule, results in Broadwing over billing Qwest by $60,773.04 for the period in question. The effect of the 3:1 rule is that Broadwing's overstated numbers it claims are terminated to Qwest are magnified threefold.

131 In determining the minutes that Broadwing terminates to Qwest, Qwest agrees that Broadwing should include all local traffic that actually terminates to Qwest. In its calculations of MOUs to apply the 3:1 ratio, Broadwing should not include transit traffic (traffic that Broadwing sends to Qwest, but which transits a portion of Qwest's network, and is actually terminated with another carrier) in that calculation. Based on Qwest's analysis of traffic terminated to it from Broadwing, Qwest believes that is most likely what Broadwing has done. Broadwing did not begin purchasing transit records from Qwest – records that enable it to exclude transit traffic – until late 2005.[147] This dispute dates back to 2003, and Qwest's testimony and evidence establishes that it is more likely than not that Broadwing has included transit minutes in its calculation, thereby inflating the number of minutes for which it claims compensation.

132 Mr. Brotherson's testimony explains how Qwest monitors and captures data from the local trunk groups using Call Recording Over Signaling System 7 ("CroSS7") software. Qwest also utilizes the Trunk Usage Measurement Set-Up ("TUMS") database which is populated based on the information provided by the CLEC. CroSS7, has been in use by Qwest for many years to record local minutes of use, and has been attested – in a study focusing on accuracy of recording minutes in the manner necessary to corroborate the actual amount of local terminating traffic – as being highly accurate.[148]

133 Because Broadwing has apparently billed Qwest based on total minutes measured from its

[147] Tr. 723:8-11.

[148] Brotherson Response Testimony, Exhibit 22T. at pp. 6-8, and pp. 9-11.

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switches, as compared to the total minutes that Qwest systems show are related to Qwest customers, Broadwing is identifying and billing Qwest for all MOUs that originate at its switches. These MOUs include calls that, while they are delivered to the Qwest network, are not terminated to a Qwest customer. In other words, this transit traffic merely transits Qwest's network but is actually delivered to another local exchange carrier and is terminated to customers of that other carrier.[149]

134 Ms. McNeil states that Broadwing uses total minutes of use information from Broadwing's switches that is captured on a monthly basis, and then split into three categories: (1) local traffic terminated by Broadwing, (2) toll traffic terminated by Broadwing, and (3) local traffic originated by Broadwing.[150]

135 Qwest believes that Broadwing is billing Qwest not only for the traffic that is terminated to Qwest customers, but is also including all originating traffic that is transiting Qwest's network destined for other local exchange carriers. Broadwing sends to Qwest, as a transit provider, traffic originating from its switches destined for other local exchange carriers (CLECs, ILECs, WSPs) that, for a variety of reasons, do not interconnect directly with Broadwing. If any terminating charges apply for traffic that is transited the Qwest network and not terminated to Qwest end user customers, those charges must be billed to the carrier the calls are terminated to, not to Qwest. And, just as important, these minutes should not be used in the 3:1 calculations to establish how many minutes Qwest must pay Broadwing at the voice rate. Qwest has notified Broadwing that the MOUs billed to Qwest did not match the tracking systems Qwest uses to validate billing and that the differences may be attributable to transit traffic.

b) USF

136 Qwest believes all Universal Service Fund amounts have been paid.[151] Importantly though, it

[149] Id.

[150] McNeil Direct, Exhibit 301T, at p. 4, lines 5-9.

[151] Brotherson Response, Exhibit 22T at pp. 11-12.

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does not appear that Broadwing has remitted these amounts, or any other USF amounts that is has collected.

c) Disputed Billing for MOUs Prior to the Issuance of the Core Forbearance Order

137 A portion of the Broadwing counterclaim involves a dispute over minutes of use prior to the issuance of the *Core Forbearance Order*. These minutes very likely are VNXX minutes, and not compensable in any event, as noted above. The dispute here is substantial – $317,630.97. This invoice appears to represent a back billing to Qwest for the period from January 1, 2004 to October 8, 2004 (the effective date of the *Core Forbearance Order*). Broadwing claims that this billing was rendered in compliance with the June 20, 2002 Amendments to the ICA between the parties dated June 20, 2002, arguing that "Section 4 of the Amendments did not contain a growth ceiling (or cap in minutes of use) for any time period after December 31, 2003. Consequently, all ISP-bound traffic exchanged between the parties after that date was compensable at the rate of $.0007/minute."[152] In other words, Broadwing claims that under the parties' Amendments the growth caps were eliminated on January 1, 2004. But Broadwing does not otherwise explain the justification for billing Qwest as though the growth caps had been removed beginning on January 1, 2004, particularly in light of the fact that the *Core Forbearance Order* did not become effective until October 8, 2004.

138 Broadwing is incorrect in claiming that these minutes are compensable under the ICA, and has not established that these minutes are local and therefore compensable as ISP-bound traffic. Broadwing uses VNXX and bills traffic as "local" based on the NPA-NXX of the calling and called numbers.[153] This is contrary to the definition of local traffic in Qwest's tariff's and the parties' ICA. Thus, Broadwing has not met its burden of proof that these minutes are local and therefore compensable, even if Broadwing were correct that the ICA otherwise allowed them to be billed.

[152] *Id.* at p. 2, lines 3-6.

[153] Cross Examination of Daniel Meldazis, Tr. 725:15-726:14.

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139 Qwest is not responsible for these minutes because they exceeded growth caps established in the *ISP Remand Order*, which remained unaltered until the *Core Forbearance Order*. Broadwing's behavior indicates that it concurs with that interpretation. Until it decided to bill Qwest for these pre-Core minutes in February 2005, over a year after the first of them were exchanged in January 2004, Broadwing had never made a claim that the growth caps ended on January 1, 2004. As evidenced by the fact that it did not attempt to bill for these minutes until 13 months after the growth caps allegedly disappeared, it is obvious that Broadwing did not view them as billable minutes at the time the traffic was exchanged. This suggests that Broadwing's intent under the ICA was consistent with Qwest's – that the growth caps imposed by the *ISP Remand Order* and memorialized by the ICA stayed in place until altered by an amendment to the ICA.

140 As a matter of policy, the FCC recognized that "Internet consumers may stay on the network much longer than the design expectations of a network engineered primarily for voice communications."[154] The FCC also noted that "[t]raditionally, telephone carriers would interconnect with each other to deliver calls to each other's customers" and that it "was generally assumed that traffic back and forth on these interconnected networks would be relatively balanced."[155] In the FCC's view, "Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results."[156] This situation led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.[157]

[154] ISP Remand Order ¶ 19.

[155] *Id.* ¶ 20.

[156] *Id.* ¶ 21.

[157] *Id.*

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141 The FCC thus stated "that intercarrier payments for ISP-bound traffic have created severe market distortions."[158] The FCC stated that its "goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users."[159] It was on the basis of these policy concerns and conclusions that the FCC adopted the compensation regime for ISP-bound traffic regime designed eventually to move to a bill and keep regime.[160]

142 For 2001, the growth cap was based on compensable minutes for the first quarter of 2001, plus a 10 percent growth factor. For 2002, the cap was the 2001 level plus 10 percent. For 2003, the cap remained at the 2002 level.[161] The order is silent on further phases of growth cap reductions after 2003. Section 4 of the parties' amendment precisely tracks the FCC's ruling in the *ISP Remand Order* on growth caps.

143 Broadwing's position is that, because the Amendment did not mention growth caps after December 31, 2003, all growth caps were eliminated effective on January 1, 2004. Thus, Broadwing claims that Qwest is legally responsible to pay $.0007 on all ISP traffic thereafter. Broadwing's position is apparently based on the belief that, because the Amendment is silent on further growth cap reductions after December 31, 2003, all ISP-bound traffic is somehow compensable thereafter. If that were correct, then effective January 1, 2004 the growth caps in the *ISP Remand Order* would clearly have been eliminated. But that is not how the *ISP Remand Order* has been interpreted nor is it consistent with the underlying policy of the order, which was to eliminates subsidies and to "decrease[] reliance by carriers upon carrier-to-carrier payments and . . . increase[] reliance upon recovery of costs from end-users.[162] Instead, the order has generally been interpreted by Qwest and others in the industry as retaining the growth caps

[158] *Id*. ¶ 76.

[159] *Id*.¶ 7.

[160] *Id.* ¶¶ 7-8.

[161] Id.¶ 8.

[162] *Id.* ¶ 7.

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is place at the 2003 levels for 2004.

144 Broadwing's interpretation is also inconsistent with the very existence of the *Core Forbearance Order*. The Forbearance petition was filed on July 14, 2003 (less than six months before the end of 2003). The Petition requested several areas of relief, but one of the specific ones was for the FCC to "forbear from applying the . . . growth caps of the *ISP Remand Order*."[163] Notable by its absence from the list of arguments advanced by the petitioner was any claim that the growth caps would simply end on January 1, 2004.[164] A variety of parties filed comments on the petition, and it does not appear that any of them argued that the growth caps would simply end on January 1, 2004.[165]

145 In holding that the growth caps are no longer in the public interest, the FCC focused on changes in the market, particularly its perception that expansion of dial-up traffic was unlikely, and was in fact declining.[166] Once again, notable by its absence was any suggestion in the *Core Forbearance Order*, which was entered into by the FCC in October 2004 (more than nine months after the growth caps allegedly disappeared as a matter of law under Broadwing's theory), that the growth caps were no longer in effect – to the contrary, the entire premise of the order is that the growth caps remained in effect and that specific action by the FCC was necessary to end them.

146 Broadwing's position is thus based on the belief that the *Core Forbearance Order* is completely superfluous, and that the growth caps ended of their own accord on January 1, 2004. But such a theory is inconsistent with the relief sought in the Core forbearance petition, is inconsistent with the parties' advocacy in that case (where no party asked the FCC to confirm that the growth caps would end on January 1, 2004) and is inconsistent with the FCC's order, which could have,

[163] Core Forbearance Order ¶ 11.

[164] *Id.* ¶ 12.

[165] *Id.* ¶¶ 13-14.

[166] *Id.* ¶ 20.

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but did not, state that it had no need to eliminate the growth cap because it expired on December 31, 2003. Broadwing's theory has no merit and is simply an after-the-fact effort to eliminate caps that continued under the *ISP Remand Order* and under the amended ICA between Broadwing and Qwest.

d) Post-Core Forbearance Dispute

147 Between the date that the *Core Forbearance Order* was issued on October 8, 2004, and January 2005, Broadwing submitted bills to Qwest for MOUs that exceed the cap of MOUs that were established by the *ISP Remand Order*. Broadwing contended that all MOUs including those above the cap were compensable once the Core order was signed. Qwest contends that until the amendment to the agreement is signed adopting the change of law that the cap on new minutes remained in place. The dispute involving Post Core MOUs above the cap for this period involved an additional $99,594.60 in charges has been disputed by Qwest.

148 Again, these minutes are tainted with VNXX traffic that is not compensable at all, and is in fact an unlawful avoidance of access charges by Broadwing. Broadwing, admitting that it employs VNXX, and failing to provide any reasonable method of excluding that traffic, has failed to meet its burden of proof that these "post-Core" minutes are compensable.

149 Following the *Core Forbearance Order*, Qwest began excluding VNXX MOUs. Prior to that decision, VNXX was not an issue because the minutes were excluded because of the *ISP Remand Order* growth cap and by the new markets limitation. Since none of these minutes were compensable because of the growth caps and the new markets rules, it was unnecessary to exclude VNXX traffic (since they were not billed to Qwest). However, commencing February 2005, after CLECs began billing large amounts of ISP minutes as a result of the Core order, it became clear to Qwest that many of these minutes were VNXX minutes and Qwest therefore excluded VNXX MOUs and refused to pay compensation on them. With the exclusion of VNXX minutes the amounts above the growth cap MOUs were subsumed into the VNXX

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exclusion and are reflected in the amount discussed in the next section, which deals with the VNXX dispute. The result of this process is that minutes for November and December of 2004 and January 2005 were excluded because they exceeded the growth cap. The amount of this dispute is $99,594.60. Qwest continues to take the position that the removal of the growth caps ordered by the FCC should not become effective until the amendment is approved by the Commission.

2. VNXX Dispute

150 The *ISP Remand Order* applies only to local ISP traffic (where the calling party and the ISP are physically located in the same local calling area).[167] That being the case, it is Qwest's position that the Amendments to the parties' ICA, which implemented the *ISP Remand Order*, by definition only require Qwest to pay $.0007 for *local* ISP traffic. Furthermore, to the extent that Broadwing is attempting to require the payment of reciprocal compensation on VNXX voice traffic, it is Qwest's position that Broadwing's request for such compensation violates Washington call rating rules and the access charge regime that applies to interexchange traffic.

151 Broadwing uses VNXX in the same way as described generally in this case. Broadwing has obtained an assigned block of local telephone numbers for a LCA, but does not have end-user customers located in that LCA and uses its numbers for its ISP customers, who also have no physical presence in the LCAs associated with those telephone numbers. In order to successfully claim that calls to a Broadwing customer located in an LCA different than the LCA from which the call was originated, Broadwing must establish that VNXX calls are actually local calls and fall within the definitions of the parties existing ICA. That has not occurred.

152 The ICA makes it clear that the only traffic subject to reciprocal compensation is "local traffic." See, § V.D. regarding reciprocal compensation and III PP., which defined "local traffic" in

[167] *Qwest*, 2007 WL 1071956 at p. *1.

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accordance with Qwest's (then US West) tariffs.[168] Qwest is disputing payment in the amount of $390,461.34 for traffic that is VNXX traffic. This traffic is not local and is not subject to either reciprocal compensation or the $.0007 rate for ISP traffic.[169]

3. Access Charge Dispute

153 Broadwing's testimony claims that Qwest owes it $225,304.60 in access charges. Qwest disputes these charges on the same basis that it disputes the local minutes billed, detailed in section 1.a, above. In other words, these minutes are not attributable to Qwest traffic and therefore are not billable to Qwest.

154 There are four main types of traffic between Qwest and Broadwing: 1) Inter and intraLATA toll traffic routed through Feature Group D Service; 2) Qwest traditional intraLATA terminating toll traffic; 3) Wireless traffic to Broadwing landline customers that originated on cell phones within the Metropolitan Trading Area ("MTA") which the FCC has deemed local, or outside of the MTA; 4) Wireline local traffic between Broadwing end user customers within the same local calling area as other local telephone company end users.

155 Qwest provides intraLATA toll service in Washington to customers that are located within Qwest local territories and purchase local service from Qwest. All Qwest intraLATA toll traffic is recorded at the originating end office. These records are then used to bill the end user for their toll calls. The call detail is collected in the Qwest Toll Usage Tracking ("TUT") database system. The end user billing data shows the exchange and the duration of the call. From the data that is created for these calls, the necessary information for other LECs to bill terminating

[168] Exhibit 242, Broadwing ICA.

[169] Qwest is able to tell that some traffic is VNXX traffic as opposed to local traffic. When a CLEC orders LIS trunks the information is tracked by Qwest in the TUMS system. For each trunk the TUMS information shows, among other things, the CLEC that ordered the trunk, the LATA, the trunk type the location name of the site, (Central Office or switch) and the CLLI of the CLEC switch. Qwest tracks MOU in SS7. Qwest uses the SS7 Two Six Code and matches it to the information in TUMS to determine where the CLEC switch is located. Based on the data in TUMS and SS7, Qwest is able to tell whether or not the traffic originated and terminated within the same LCA. Brotherson Direct, Exhibit 1T, at pp. 40-47.

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access is created on a TUT report.

156 When Qwest is the designated IntraLATA Toll provider for traffic from its own end users, Qwest will be responsible for payment of appropriate usage charges. Qwest pays access on intraLATA toll traffic for which Qwest is the retail toll provider, however Qwest should not pay intraLATA toll access charges for terminating traffic that is not Qwest's. Because Broadwing provides no detail regarding its access charges, Qwest is unable to match its records to Broadwing charges. Qwest believes that Broadwing has included access charges in the Qwest bill for traffic that should not be billed to Qwest. Traffic that would not be subject to access charges to Qwest would include wireless traffic, where calls from within the 'local' MTA would not fall under traditional access tariffs, and traffic that transits the Qwest network destined for other local exchange carriers. In its role as a transit provider, Qwest's tandem simply connects switches to other switches. The tandem provider is not the originator of the traffic, and therefore has no end user customers it bills.

157 Qwest is clearly not financially responsible for all traffic that routes through its access tandems. The carriers that originate the traffic (those carriers that hand it to the Qwest tandem for termination to other companies) should be responsible for compensating the terminating company. In billing Qwest for any transit or "unidentified" traffic it receives, Broadwing places liabilities on the tandem provider for the actions of the originator of the traffic. Tandems provide a service to the network; however, the tandem provider is not responsible for access charges applicable to the originating carrier. Qwest's records, which are accurate and reliable, show that Broadwing has over billed Qwest for $216,384.71 in terminating access charges for toll calls that did not originate from Qwest customers.

B. Global Crossing Counterclaim

158 Global Crossing's claim is considerably simpler – Global freely admits that all of the disputed minutes are in connection with VNXX traffic. As such this traffic is not local and is not subject

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to either reciprocal compensation or intercarrier compensation under the *ISP Remand Order*. Global has not affirmatively established, as it is required to, that it has properly billed only for local minutes. Global's counterclaim should be denied.

C. Other Carriers

159 Issues raised in other parties' opening briefs will be addressed on reply.

VIII. CONCLUSION/RECOMMENDATIONS

160 Qwest asks the Commission to enter an order declaring that VNXX traffic is interexchange in nature, not local, and that VNXX routing is unlawful in Washington absent either payment of access charges or an agreement by the participating carriers on such traffic exchange. VNXX routing without the consent of the carriers involved violates state law, Commission rules, prior Commission decisions, and Qwest's tariffs. However, an agreement between the parties can address all of those concerns. Parties to an ICA can negotiate terms and conditions under which VNXX traffic may be exchanged under the contract, as an exception to the access regime.

161 Qwest further asks the Commission to approve the ICA amendment filed in Docket No. UT-063055 between Qwest and Verizon Access as a negotiated agreement under Section 252. The amendment is not discriminatory against any carrier who is not a party to it, and is otherwise not inconsistent with the public interest.

DATED this 1st day of June, 2007.

QWEST

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