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 REPLY BRIEF

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I. INTRODUCTION

1. Regulators and carriers cannot simply pick and choose the regulatory rules they will follow. Yet that is precisely what most of the Respondents wish to do. They wish to ignore the call rating rules that have governed the industry for decades, and they seek exemption from the intercarrier compensation rules that govern interexchange calls. Instead, through the use of a variety of semantic gymnastics (*e.g.,* euphemisms like "locally dialed" and "FX-like") they seek to disguise interexchange calls as local calls. If approved, the consequences of treating interexchange calls as local calls will be significant. Changes of this significance should be made only as part of comprehensive intercarrier compensation reform, where the impact on *all* carriers considered. Instead of that, Respondents seek exceptions that apply only to them.

2. VNXX traffic—because it originates in one local calling area ("LCA") and is delivered to a CLEC's customer located in another LCA—is interexchange traffic. Respondents' contrary arguments require them to ignore both Washington law and simple common sense. For example, it defies common sense to suggest that calls originating in one LCA that are delivered to a CLEC customer in another LCA are local calls. Respondents' analysis of Washington statutes, rules, prior orders, and Qwest tariffs (which govern call rating under current ICAs) is revisionism at its worst. These authorities are indisputably clear that Washington law bases call rating on the geographical location of parties to the call and not on their telephone numbers.

3. Respondents' position in this case consists of four propositions. First, they claim the right to use VNXX routing on an unlimited basis. Second, they deny any responsibility for the transport of VNXX over Local Interconnection Service ("LIS") trunks and demand that Qwest provide it to them for free. Third, they deny any financial responsibility for the use of Qwest's local

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exchange network for call origination, even though its existence is indispensable for VNXX calls. Finally, they demand that Qwest should pay them terminating compensation on all VNXX traffic. Each of these propositions is contrary to law, would encourage arbitrage and produce economic distortions, and would stand the concepts of cost causation and proper cost recovery on their head. As a practical matter, acceptance of Respondents' proposals will spell the end of the local/interexchange distinction in Washington, and thus serve as the death knell for intraLATA toll (and the access charges collected on such traffic). The implications for Qwest, independent LECs, interexchange carriers ("IXCs"), and others is therefore significant. Consequently, common sense dictates that the adoption the Respondents' proposals will, over time, place upward pressure on local exchange rates.

4. The CLEC cost argument—that it costs no more for Qwest to deliver a VNXX call to a CLEC point of interconnection ("POI") than to deliver a local call to a CLEC POI—is a red herring that distracts attention from the real issue. The CLECs fail to mention that it does not cost Qwest any more to deliver an IXC call to an IXC point of presence ("POP") than to deliver a local voice call to a CLEC POI. But different compensation plans apply to each type of traffic. Thus, cost is not the issue, but the application of the proper intercarrier compensation plan to the type of traffic being exchanged. Interexchange traffic (whether voice or ISP traffic) is subject to access charges; local voice traffic is subject to compensation under Section 251(b)(5); and local ISP traffic is subject to the rate caps set forth in the *ISP Remand Order*.[1]

5. The most remarkable aspect of the Respondents' opening briefs is their astounding lack of candor on the governing case authority. For example, in Level 3's 59-page brief, there is not a

[1] 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*").

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single reference to the *Qwest* decision.[2] Level 3 mentions *Global NAPs I*[3] and *Global NAPs II*[4] once each, and then in a single footnote on an undisputed issue.[5] ELI, TCG, and the Joint CLECs never once mention them. The Ninth Circuit's *Peevey* decision[6] is given nodding reference, but for the most part the CLECs seriously mischaracterize its rulings. Yet these four decisions represent "current federal law" on the central issues in this case, issues such as the nature and definition of VNXX, the scope of the *ISP Remand Order*, whether the local/interexchange distinction remains a viable concept, the nature of state commission authority over LCAs and call rating, and the differences between FX and VNXX. The CLECs have attempted to wish them away by ignoring them.

6. The record and governing authorities are clear that FX and VNXX, properly defined, are not the same and that the CLEC's so-called FX services bear little resemblance to Qwest's FX service. The CLEC claim that Qwest's proposal would mandate that they replicate Qwest's network is nonsense. CLECs may maintain their networks as they are. However, having chosen to build their networks *with no* local exchange network and *with* centralized switching, they cannot pretend that they really built a decentralized, ubiquitous network, in order to force-fit their network configurations into an intercarrier compensation scheme. It is the lack of ubiquity of

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[2] *Qwest Corporation v. Washington State Utilities and Transp. Comm'n*, 484 F.Supp.2d 1160 (W.D. Wa. 2007) ("*Qwest*") .

[3] *Global NAPs v. Verizon New England,* 444 F.3d 59, 63 (1st Cir. 2006) ("*Global NAPs I*")

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

[5] Level 3 Br. ¶ 55, n. 121. Level 3 cites the *Global NAPs* decisions and *Peevey* for the general proposition that state commissions determine call rating. That proposition is true, subject to the qualification that state commissions are not given *carte blanche*, and must comply with federal law. But in making that point, Level 3 implies that these cases have adopted Level 3's "FX-like" euphemism. In reality, neither *Global NAPs I* nor *Peevey* make reference to FX, let alone to the term "FX-like." In *Global NAPs II*, the court made numerous references to FX, all in the context of explaining that FX and VNXX *are not* the same. 453 F.3d at 96, 103.

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

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their networks that makes CLECs so reliant on Qwest's network to originate and terminate traffic throughout the LATA

7. There is no consistent Respondents position on the Verizon settlement issue. ELI and TCG do not oppose it. The Joint CLECs complain only about the 14-state application of the agreement. Level 3 and WITA oppose the entire agreement, but for completely different reasons (neither of them valid). The evidence, however, is clear that the agreement is in the public interest, that it meets all applicable requirements of Section 252, and that it should therefore be approved.

II. VNXX LEGAL ISSUES

A. COCAG and Other Industry Guidelines

8. Qwest's position on the Central Office Code (NXX) Assignment Guidelines ("COCAG") is simple and straightforward and is set out in detail in Qwest's opening brief.[7] To briefly summarize, the FCC created the North American Number Plan Administrator ("NANPA"). NANPA must administer telephone numbers in accordance with the guidelines of the North American Industry Numbering Committee ("INC"), which created the guidelines known as the COCAG. The FCC made the COCAG binding on the industry. The COCAG is replete with references to the connection between telephone numbers and rate areas and rate centers. Among these references is the concept of a "Geographic NPA." The only specific exception to a Geographical NPA is the reference in section 2.14 of COCAG to a "tariffed service such as foreign exchange service."

[7] Qwest Br. ¶¶ 11-20.

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9. The Respondents' argument, that the COCAG represents only "guidelines" that are not binding on state commissions, is wrong for the reasons already discussed in Qwest's opening brief.[8] The FCC established NANPA to "administer numbering resources."[9] Among NANPA's duties are "[c]omplying with guidelines of the . . . INC,"[10] the entity that created the COCAG. Thus, while the COCAG is characterized as a set of guidelines, NANPA (and thus the rest of the industry) has a duty to "comply[] with those guidelines" because the FCC has made them mandatory.

10. ELI's claim that geography is not an *absolute* limiting factor on number assignment[11] is true but irrelevant. As noted, section 2.14 is the only exception in the COCAG's Geographical NPA; it excepts "tariffed service such as foreign exchange service." FX lines represent a tiny fraction (only 0.22 percent) of Qwest's access lines in Washington,[12] while, for many of the CLECs in this case, VNXX is their core business plan. In other words, if the CLEC position is adopted and VNXX is treated as an exception to Geographical NPAs, the exception will consume the rule.[13]

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[8] Qwest Br. ¶ 13.

[9] 47 C.F.R. § 52.13(a).

[10] *Id*. § 52.13(b)(3).

[11] ELI Br., at p. 3, lines 24-29.

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

[13] Level 3's argument that the COCAG's requirements are assumptions rather than requirements (Level 3 Br. ¶ 8) is hopelessly vague and is inconsistent with the fact that the COCAG has been made mandatory by the FCC. Level 3's claim that the "Guidelines for Administration of Telephone Numbers" ("Guidelines") apply here instead of the COCAG (Level 3 Br. ¶ 13) is unsupported by any legal authority, and completely ignores the fact that section 2.14 of the COCAG directly addresses number assignment to end user customers. Even a cursory review of the Guidelines demonstrates that they are completely irrelevant to the issues of this case. The three main substantive sections of the Guidelines are "Aging Numbers," "Reserved Numbers," and "Sequential Number Assignment," none of which have anything to do with the issues in this docket.

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11. VNXX does not fall within an exception to the COCAG.[14] This argument is simply another way for the CLECs to argue that VNXX and FX are the same. As set forth in Qwest's opening brief,[15] and *infra*, this argument has no factual basis and should be rejected.

12. Level 3's reliance on the *Virginia Arbitration Order*[16] for its claim that call rating must be performed based on telephone number (and, inferentially, that the COCAG is irrelevant to VNXX) is wrong. The *Virginia Arbitration Order* applied Virginia law. Moreover, for that order to possess the precedential value that Level 3 ascribes to it, one would have to accept the far-fetched claim that the FCC intended to invest a sub-agency with authority to establish preemptive nationwide authority on behalf of the FCC, and then have that agency do it in an arbitration proceeding where the sub-agency was sitting in place of the state commission.[17] Neither in the paragraph cited by Level 3 nor anywhere else in the *Virginia Arbitration Order* is there a single reference to the COCAG.[18] Thus, that order is completely irrelevant on issues relating to the COCAG. Level 3's argument, which is simply a backdoor effort to promote the NXX theory (*i.e.*, that call rating must be based on the NXXs of the parties to the call), fails to recognize an important principle that is entirely consistent with the COCAG's rules related to Geographical NPAs. In *Global NAPs I,* the First Circuit explained how NXXs have been used as geographic designators and why the NXX theory makes no sense:

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[14] Jt. CLEC Br. ¶¶ 11-12; Level 3 Br.¶¶ 14-19.

[15] Qwest Br. ¶¶ 85-94.

[16] 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 Virginia . . .,* 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).

[17] *See* Qwest Br. ¶ 83, n. 102.

[18] *Virginia Arbitration Order* ¶ 301; see also *id.* ¶¶ 286-303. In fact, there is not a single reference to the COCAG in the entire *Virginia Arbitration Order*. There is one reference to NANPA in a footnote unrelated to any issues in this docket. *Id.,* fn. 810.

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> The "NXX" has generally been associated with a particular "switch" (that is, the equipment that routes phone calls to their destination) physically located within a local calling area; *NXXs have thus served as proxies for geographic location*. This means that if the NXX numbers of the caller and the recipient were within the same local calling area, one could assume that the caller and recipient were actually physically within the same calling area and bill the call as a local call.[19]

13. Ironically, while Level 3 now takes the position that NXXs have no geographical significance, this is not the position that Level 3 took in an intercarrier compensation docket in Florida:

> We disagree . . .that the jurisdiction of traffic should be determined based upon the NPA/NXXs assigned to the calling and called parties. Although presently in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, we believe this practice was established based upon the understanding that NPA/NXXs were assigned to customers within the exchanges to which the NPA/NXXs are homed. *Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of the call*.[20]

14. ELI also argues that if Qwest is unable to demonstrate that VNXX is banned by the COCAG then Qwest cannot prevail based on its claims that VNXX violates state statutes, rules, orders, and Qwest tariffs. ELI cites no authority for this extraordinary claim, which cannot be reconciled with *Global NAPs II*, where the Second Circuit affirmed the Vermont Board's ban of VNXX dialing arrangements in Vermont.[21]

15. Level 3 relies on a New York commission rehearing order in a docket that primarily addressed the exchange of traffic between CLECs and Independent LECs (referred to as "Small Companies"). Level 3 cited it for the proposition that its undefined "FX-like services" should

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[19] 444 F.3d at 64, emphasis added.

[20] Order on Reciprocal Compensation, *In re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996,* 2002 WL 31060525 (Fla. PSC, September 10, 2002) (emphasis added).

[21] ELI's argument that the COCAG really relates only to 10,000 number blocks (ELI Br, at p. 2, lines 5-9) is inexplicable since in the next breath, ELI acknowledges that section 2.14 does address individual numbers.

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not be banned.[22] It is true that in its original order the New York commission allowed VNXX routing. However, Level 3 omitted two critical details relevant to this case. First, Level 3 failed to mention that the commission also concluded that "*treatment of the call as local for the purpose of reciprocal compensation does not appear warranted*."[23] The New York commission, therefore, ordered that VNXX traffic be exchanged on a bill-and-keep basis.[24] Furthermore, the commission ruled that a Small Companies' transport responsibility was solely to deliver "traffic to their own service boundaries."[25] On rehearing, the commission reaffirmed its bill-and-keep ruling. The New York commission was even more explicit concerning the CLECs' transport obligations, ruling that "*CLECs must assume the obligation* of delivery beyond the Independent service area border."[26] Thus, while allowing VNXX routing, the New York decisions stand for the propositions (1) that a CLEC is not entitled to terminating compensation on VNXX traffic because it *should not be treated as local for compensation purposes* and (2) that CLECs bear significant financial responsibility for transporting VNXX traffic.[27]

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[22] Level 3 Br. ¶ 18, relying on Order Denying Petitions for Rehearing, *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies,* 2001 WL 34082126 (NY PSC, June 21, 2001) ("*New York Rehearing Order*").

[23] Order Establishing Requirements for the Exchange of Local Traffic, *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies,* 2000 WL 33939242, (NY PSC, December 22, 2000) ("*New York Order*") (star cites not available—quoted material is in "Inter-Carrier Compensation" section) (emphasis added).

[24] *Id.*

[25] *Id.* (star cites unavailable—quoted material is in ordering provision no. 1).

[26] *New York Rehearing Order* (star cites unavailable—quoted material located in Section B) (emphasis added).

[27] ATI cites cases for the proposition that states retain the authority to determine call rating and that some states have allowed VNXX. ATI Br., at pp. 4-7. Qwest does not dispute that some states allow VNXX. Nor does Qwest dispute that the Commission has call rating authority—indeed, that is precisely what the *Qwest* decision decided. But Washington law requires that call rating be based on customer locations and not on telephone numbers.

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B. Washington State Statutes, Rules, Orders, and Tariffs

16. ELI's arguments regarding Washington statutes was the most extensive.[28] Level 3 and TCG largely ignore state statutes and Qwest tariffs, focusing instead on Commission rules and Commission orders.[29] The Joint CLECs make only a general argument on these issues, with no specific citations to statutes, rules, Commission orders, or Qwest tariffs.[30] No party presented a meaningful argument regarding the legal impact of Qwest's tariffs. Because the CLECs' arguments often overlap, Qwest will attempt to address each CLEC argument only once.

1. Washington State Statutes

17. Only ELI discussed the specific state statutes (RCW §§ 80.36.080. 80.36.140, 80.36.160, and 80.36.170) that Qwest referenced in its Complaint.[31] Its arguments are without merit. The most common argument advanced by ELI and others is the claim that "no state law prohibits VNXX service."[32] This argument is based on the odd premise that the Commission may only find VNXX to violate state law if there is a statute that explicitly says that "VNXX" is "unlawful" or "illegal." But that is not the test. The proper analysis of this issues relies on the entire body of state statutes, state rules, tariffs filed in the light of those rules and statutes, and Commission orders. As discussed in Qwest's opening brief[33] and hereafter, a comprehensive analysis of those authorities demonstrates that VNXX is not consistent with state law.

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[28] ELI Br. at pp. 5-9.

[29] Level 3 Br. ¶¶ 22-34; TCG Br. ¶¶ 12-17.

[30] Joint CLEC Br. ¶¶ 13-15.

[31] ELI Br., at pp. 5-9. Qwest reaffirms the arguments of it opening brief on these statutes. Qwest Br. ¶¶ 22-26.

[32] Level 3 Br. ¶ 21; *see also* Joint CLEC Br. ¶ 13, ATI Br. at p. 9.

[33] Qwest Br. ¶¶ 21-46.

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18. ELI claims that Qwest alleged that VNXX violates RCW 80.36.230.[34] In reality, Qwest pointed out that this section—along with the Commission's definitions rule, WAC 480-120-021, which defines an exchange as a "geographic area"—gives the Commission the authority to prescribe exchange areas or exchange boundaries and, therefore, that they support the concept of geographic LCAs. The current ELI/Qwest interconnection agreement ("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*."[35] So, to the extent that ELI provides a service that treats interexchange calls as local calls, it violates the LCA boundaries it is contractually bound to follow in the ICA. Qwest does not dispute that ELI filed a price list to offer services to end users that ELI refers to as "FX service," but that price list does not govern the Qwest/ELI compensation relationship, does not mandate the payment of terminating compensation on interexchange calls, does not convert interexchange traffic to local traffic, and does not legalize unlawful activity. Furthermore, ELI agrees to be bound by the same LCAs as Qwest.[36]

19. In conjunction with a discussion of RCW 80.36.140 (which makes "unjust and unreasonable practices" unlawful), ELI states that "Qwest is compensated for any portion of the Qwest network ELI uses."[37] That is not true. When a Qwest end user initiates an interexchange VNXX call, Qwest's local exchange network is used to transport that call to the local end office and

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[34] ELI Br., at p. 6, lines 1-16.

[35] Exhibit 434 (emphasis added).

[36] Apparently in the belief that it helps its case, ELI argues that it charges its customers a "premium" price for VNXX service. ELI Br., at p. 6, line 23. This admission merely underlines the gross inequity that results from VNXX. In addition to charging its customer a premium for VNXX, ELI (and most of the other CLECs) demand free use of Qwest's local exchange network to originate VNXX traffic, demand free transport for VNXX traffic, and demand to receive terminating compensation on such traffic. In other words, VNXX is all "win" for the CLECs, and all "lose" for Qwest.

[37] ELI Br., at p. 7, lines 6-7.

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Qwest's local switch is then used to direct the call to the CLEC. With VNXX, Qwest is not compensated by the CLEC for either the local network or the switching. The CLECs have relied erroneously on prior Commission rulings concerning local traffic that if the CLEC uses LIS for transport,[38] Qwest continues to bear the entire cost of that facility dedicated to transporting that traffic. In the identical situation where Qwest performs the same functions for an IXC, it is entitled to originating access from the IXC, not to mention transport at the transport rates in the applicable access tariff. ELI and other CLECs who use VNXX disguise interexchange traffic as local in order to avoid access charges.[39]

20. ELI claims that its VNXX service does not subject Qwest to the "undue or unreasonable prejudice or disadvantage" prohibited by RCW 80.36.170 and that Qwest cannot prove that VNXX affects Qwest in a way that is different from other carriers.[40] But that is exactly what Qwest has shown. Only Qwest has the ubiquitous network that allows other carriers to provide VNXX, only Qwest bears the origination costs on disguised interexchange calls (upon which

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[38] ELI's Exhibit 422 shows that ELI uses Qwest LIS facilities extensively in Washington (all routes in red). ELI witness Robins also acknowledged that ELI uses LIS transport in Washington. Tr. 770:7-25.

[39] ELI made three arguments in connection with RCW 80.36.160. First, ELI makes the absurd claim that, because it originates more calls (though not more minutes) than Qwest, Qwest's calculation of the traffic imbalance is somehow suspect. ELI Br., at p. 7, lines 11-23. ELI had ample time and opportunity to challenge Qwest's traffic studies and never did so—instead, ELI waited until the hearing to present this new theory. But because compensation is based on minutes of use, and not on the number of calls, its new information is completely irrelevant. Second, ELI erroneously states that Qwest has built its case on an alleged traffic imbalance. *Id.,* p. 6, lines 16-18. It is true that there is a significant imbalance in Qwest's and ELI's traffic—nearly 92 percent originates with Qwest, while only a little more than 8 percent originates with ELI. (Exhibit 27). In the case of PacWest and Level 3, the imbalances are even more pronounced. (Exhibits 25 and 26). But, while the imbalance demonstrates that these carriers provide little, if any, local exchange service, Qwest's VNXX case is based on the fact that carriers are attempting to disguise interexchange calls as local calls. Whether the traffic is imbalanced or not, such practices result in the application of the wrong intercarrier compensation to the traffic, and are therefore improper. The traffic imbalance is thus not the basis for Qwest's claim, but merely demonstrates the insult that is added to the injury. Third, ELI mischaracterizes Mr. Brotherson's testimony, stating the Mr. Brotherson agreed that "Qwest's study counted legitimate intraexchange traffic as interexchange." ELI Br., at p. 7, lines 20-21, citing Tr. 362:10. But that is not what Mr. Brotherson said. He said that such a scenario was conceivable, but that in fact ISPs are not typically located in the "small towns where the NXX codes are associated." Tr. 364:14-15. He also stated that if a CLEC can point out errors by Qwest, "we're happy to sit down and work through it." (Tr. 364:23-24).

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originating access charges should be paid), and only Qwest has been required to provide transport at TELRIC rates for interexchange VNXX traffic. Only Qwest bears these costs, while the other carriers benefit from them. That is the very essence of "unreasonable disadvantage and prejudice" being imposed on Qwest in violation of the statute.

21. ELI denies that there is a subsidy to its VNXX service and asserts that, if the Commission limits VNXX, it will impact the diversity of supply of telecommunications services.[41] ELI is wrong on both counts. By demanding and receiving intercarrier compensation at the $.0007 ISP rate for calls that should otherwise be rated as interexchange traffic, ELI and other CLECs receive compensation on calls for which they should be paying access charges. That constitutes an improper subsidy to the VNXX service. It is also clear that the provision of dial-up Internet access is not telecommunications service, but is an information service.[42] It is not clear that the Commission is charged with promoting "diversity of supply" of these services, since the policy of the state is actually to promote broadband deployment, not dial-up access. To the extent that subsidized VNXX encourages the uneconomic use of dial-up by not requiring users to pay the full costs of that service, it is inconsistent with the stated policies of the state.

2. Commission Rules

22. None of the Respondents make convincing arguments that the Commission's rules support their pro-VNXX positions. TCG argues that none of the "definitions" in the Commission rules upon which Qwest relies are meaningful on the VNXX issue. TCG claims that all they merely define

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[40] ELI Br., at p. 8, lines 4-14.

[41] *Id.*, p. 8, lines 15-25 and p. 9, lines 1-9.

[42] *In re Core Communications,* 455 F.3d 267, 271 (D.C. Cir. 2006); *ISP Remand Order* ¶ 44.

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terms, but do not prohibit VNXX.[43] The unstated premise of this argument is that an administrative agency's definitions have no meaning, except insofar as they are used in a substantive Commission rule. TCG's argument makes no sense at all. Definitions, whether in statutes or administrative rules, have meaning beyond their specific use in substantive rules. A good example of the application of this principle is the United States Supreme Court's reliance on the definition of "voting" in the federal Voting Rights Act to prohibit certain state practices, even though those specific practices were neither described nor prohibited in the substantive portions of the Act. The key was that the "voting" definition provided clear evidence of the intent of Congress.[44] The same is true here. The definitions provide the best evidence of the Commission's intent as to the meaning of critical telecommunications terms, and therefore they should be used to assist the Commission in determining the legality of certain practices, such as VNXX.

23. Qwest's reading of the definitions in Commission rules is not "tortured"—rather, it is consistent with the plain language of those rules. As outlined below, there are numerous references that either explicitly or implicitly signify that call rating is determined by geographic area. In addition, to the extent that those rules do not define every relevant term, they are supplemented by Qwest's tariff definitions, which have the force and effect of law. In Qwest's opening brief, it outlined the numerous tariff definitions—each consistent with the Commission's rules and each at one time approved by the Commission — that demonstrate that call rating is dependent

[43] TCG Br. ¶¶ 12-16.

[44] *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-66 (1969).

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on the physical location of the customers. See, for examples, the definitions of "premises," "local service," and others.[45]

24. Referring to WAC 480-120-021 (the definitions section of the Commission rules), Level 3 makes the extraordinary argument that the Commission's definition of "local calling area" is "devoid of any geographical underpinnings."[46] In light of this argument, the Commission's definition is worth quoting again: a "local calling area" is "one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges." (Emphasis added). One can only wonder what Level 3 believes the words "within which" mean, but it is obvious on its face that the word "within" is being used to describe calls that are made and completed inside specific geographical boundaries. This common sense interpretation is consistent with definitions for "within" in a commonly used dictionary that defines "within" as "used as a function word to indicate *enclosure or containment*," "on the inside," and "inside the bounds of a place or region."[47]

25. Moreover, Level 3 studiously ignores the Commission's definition of "interexchange," which is defined as "telephone calls, traffic, facilities or other items that *originate in one exchange and terminate in another*." (Emphasis added). Level 3 correctly asserts that the terms "exchange" and "local calling area" are not synonymous,[48] but that is because the Commission, in establishing LCAs, often combines more than one exchange into a single LCA—in other words, while an exchange may be an LCA, it is more common for a LCA to consist of several exchanges. Level 3's own price list does precisely that, identifying each exchange that it serves,

[45] Qwest Br. ¶¶ 39-42.

[46] Level 3 Br. ¶ 29.

[47] Webster's Third New International Dictionary at p. 2627 (C. Merriam & Co., 1966), emphasis added.

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and listing the other exchanges that are within what Level 3 calls *"[g]eographically-defined Local Calling Areas.*"[49] So, while an exchange and an LCA are not synonymous, LCAs typically consist of one or more exchanges (which even Level 3 acknowledges defines a geographical area). Simple logic thus dictates that if a particular LCA consists of three exchanges, and exchanges are defined as geographic areas, then the LCA containing the three exchanges is likewise a geographical entity—in other words, the LCA consists of the combined geographical areas of the three exchanges. Yet, despite this straightforward logic, Level 3 persists in claiming that the rules' definition of LCA is "devoid of any geographical underpinnings."[50]

26. It is also extraordinary that Level 3 ignores the provision in its current ICA with Qwest that defines "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" to mean "traffic that is originated and terminated *within* the *local calling area determined by the Commission*."[51] (Emphasis added). Once again that word "within" inevitably connotes a finite geographical area. That, combined with the LCAs defined in Level 3 Price List (which are based on Qwest's defined LCAs), renders that argument empty and disingenuous. This issue was specifically addressed by the Second Circuit in describing why CLECs should not be allowed to define their own LCAs for intercarrier compensation purposes:

> ILECs are currently fixed in state-commission-imposed regimes and, in that framework, provide the infrastructure for CLECs. Local calling areas defined by CLECs would permit such areas to be so broad as to eliminate all intercarrier compensation for ILECs. Permitting CLECs to define local service areas and thereby set the rules for the sharing

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[48] Level 3 Br. ¶ 28.

[49] Exhibit 474, at original p. 65. emphasis added; *see also id.* at original pp. 65-68.

[50] Level 3 Br. ¶ 29.

[51] Exhibit 474.

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of infrastructure would eventually require ILECs to absorb all the costs and allow CLECs to reap all the profits.[52]

27. It is worthwhile to again review the definitions in WAC 480-120-121 that bear on this issue:

> "Access charge" means a rate charged by a local exchange company to *an interexchange company* for the origination, transport, or termination of a call to or from a customer of the local exchange company. Such origination, transport, and termination may be accomplished either through switched access service or through special or dedicated access service.
>
> "Basic service" means service that includes the following: . . . *Support for local use*; . . . *Access to interexchange services*; . . . .
>
> "Central office" means a company facility that houses the *switching and trunking equipment serving a defined area.*
>
> "Exchange" means a *geographic area* established by a company for telecommunications service *within that area*.
>
> "Extended area service (EAS)" means telephone service extending *beyond a customer's exchange*, for which the customer may pay an additional flat-rate amount per month.
>
> "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.*
>
> "Local calling area" means one or more rate centers *within which* a customer can place calls without incurring long-distance (toll) charges. (Emphasis added).

It is impossible to read these rules without concluding that geography (and not telephone numbers) is the prime criterion of call rating. The complete silence in these rules on the use of telephone numbers for call rating is not an oversight.

28. The Joint CLECs take a different approach, arguing that these definitions, read together, neither explicitly prohibit nor allow FX service or VNXX.[53] Qwest's point in citing these definitions is

[52] *Global NAPs* II, 454 F.3d at 99.

[53] Jt. CLEC Br. ¶¶ 14-15.

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to support its contention, which is denied by some of the CLECs, that local calling is defined based on the geographic location of the customers, not the dialed numbers. The Joint CLECs' argument fails to recognize that exceptions, such as FX service, that were explicitly offered through tariff originally had to be explicitly approved by the Commission. FX is one such exception. But VNXX is not a recognized exception, for all of the reasons discussed under the COCAG section, and under applicable statutes, Commission orders, and Qwest's tariffs.

29. Finally, Level 3 emphasizes that the LCA definition refers to rate centers within which "a customer can place calls without incurring long-distance (toll) calls."[54] While Level 3 made no specific argument regarding this last clause, it has in other recent proceedings made an argument, based on a federal statute, that VNXX traffic cannot be subject to access charges because toll charges are not imposed on such calls. Level 3 then leaps to the conclusion that if no "toll rates" are charged, the calls must be treated as local for carrier compensation purposes.

30. Of course, the reason toll charges are not imposed by the caller's pre-subscribed IXC is because the CLECs have adopted a practice of assigning local numbers for ISPs to use. The result is that the *CLEC's number assignment practices* fool the billing system by not using the "1+" dialing pattern that typically denotes a toll call. A Pennsylvania decision describes how VNXX "tricks" the billing system:

> [T]he CLEC can create a situation in which a Verizon end-user can call a CLEC customer outside the Verizon end-user's local calling zone without paying a toll charge, thus expanding the Verizon end-user's local calling zone without providing *appropriate compensation* to Verizon for the transport outside the local calling area. *This situation, i.e., the virtual NXX assignment 'tricks' Verizon's billing systems into failing to levy toll charges on the Verizon end-user and into payment of reciprocal compensation.*"[55]

[54] Level 3 Br. ¶ 23.

[55] Opinion and Order, *Petition of Global NAPs South for Arbitration of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania,* 2003 WL 21135673, at Issue 4(c)(1) (Pa. PUC April 21, 2003) (note:

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31. In effect, the CLEC is acting as an IXC that has chosen not to impose a toll charges on its interexchange customers, but instead uses its number assignment practices to disguise these interexchange calls as non-interexchange calls and attempt to extract terminating compensation from the ILEC. A claim that Qwest is out of luck because the CLEC imposes no toll charges on these calls is a cynical argument that essentially says "If the CLEC can fool your billing system, then the CLEC wins."

32. An identical argument based on a federal statute was soundly rejected by the court in *Global NAPs II.* In that case, the CLEC claimed that "access charges are appropriate only in circumstances where a carrier imposes separate charges for long-distance calls."[56] The Court soundly rejected that argument, noting that "that the 'separate charge' language in the statute was written to underscore that 'tolls' applied exclusively to long-distance service and were charged separately. *But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers.* Thus, [the CLEC's] argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point."[57] Relying on *Global NAPs II*, the Iowa Board rejected the same Level 3 argument in Iowa.[58]

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[56] 454 F.3d at 97.

[57] *Id.* at 98 (emphasis added).

[58] Order on Reconsideration, *Level 3 Communications LLC v. Qwest Corporation*, 2006 WL 2067855 at *16 (Iowa Util. Bd., July 19, 2006) ("*Iowa Level 3 Order*"). Level 3 argued that "as long as no separate charge is made to the end user, access charges do not apply." The Iowa Board rejected this argument. *Id.* at *22.

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33. The *Global NAPs II* court's comments on the CLEC's scheme in that place puts the issue in it proper perspective: the CLEC's "desired use of virtual NXX simply disguises traffic subject to access charges as something else and forces [the ILEC to subsidize the CLEC's] services."[59]

3. Commission Orders

34. Level 3 offered the most extensive discussion of past Commission orders; ELI, the Joint CLECs, and TCG[60] relied only upon the 2003 *AT&T Arbitration Order*.[61] None mentioned the toll bridging cases addressed in Qwest's Brief.[62] Therefore, Qwest's reply will focus primarily on Level 3's analysis of Commission orders. Level 3 mischaracterizes the prior Commission decisions it discusses, but also ignores the fact that two of the orders upon which it relies (the *Pac-West* and *Level 3* decisions) have no legal effect because they were reversed and remanded. Further, the earlier *CenturyTel Order* reached the same conclusions as *PacWest* and *Level 3* and can no longer be considered good law.

35. Level 3 relies on the *AT&T Arbitration Order*, suggesting that it constitutes inviolable precedent, that Qwest is repeating arguments it previously made and lost, and therefore those arguments should again be rejected.[63] But prior arbitration orders only provide guidance on what is lawful and what constitutes sound public policy to the extent they have not been

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[59] 454 F.3d at 103. The CLECs' "no separate charge" argument can be made only because the CLECs' numbering practices fool Qwest's billing system. Having created the problem, the CLECs then argue that Qwest, not them, should bear the consequences of their actions. The unfairness of that position is obvious.

[60] Level 3 Br. ¶¶ 26-34; ELI Br., at p. 9, lines 1-22; Jt. CLEC Br. ¶ 16; TCG Br. ¶¶ 16-17.

[61] 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 (WUTC, Dec.1, 2003) ("*AT&T Arbitration Order*")

[62] Qwest Br. ¶¶ 29-36.

[63] ELI Br. ¶ 27.

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overturned on appeal and to the extent they remain consistent with governing federal authority.[64] The recent *Qwest* decision overturned the Commission's decision on the scope of the compensability of VNXX traffic under the *ISP Remand Order*. Thus, prior Commission rulings that all ISP traffic is subject to compensation are no longer the law of Washington. Thus, the only surviving precedent on the VNXX question from that order is the Commission's rejection of AT&T's proposed definition for local traffic that would have clearly allowed VNXX.[65]

36. Other CLECs join in an argument based on a statement made by the Arbitrator in the *AT&T Arbitration Order* that "AT&T should be entitled to take advantage of the *same exceptions* to the typical relationship between NPA-NXX and a single local calling area as Qwest takes advantage of in offering FX and Internet access numbers."[66] From this statement, the CLECs leap to the conclusion that the Commission had given *carte blanche* to CLECs to provide their own version of FX. The language does not support that interpretation, as the Commission was clear through the phrase "the same exceptions" that whatever a CLEC does must be the substantially the same as what Qwest does when it offers FX. The record shows that none of the CLECs provide anything like Qwest's FX service. Second, even if one could read this language as sanctioning the types of sham FX provided by the CLECs in this docket, nothing in the quoted language defines the intercarrier compensation that should apply to traffic exchanged under such an arrangement—that is, nothing mandates that Qwest should pay terminating compensation or that it should be responsible to transport the traffic for free. Thus, there is nothing in the *AT&T Arbitration Order* that stands for the proposition that VNXX is lawful or that it should be allowed without limitations by CLECs. Rather, the only rational reading of the

[64] *See* Qwest Br. ¶ 51.

[65] *AT&T Arbitration Order* ¶¶ 25-38.

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order is that CLECs should not be foreclosed from offering a competitive FX product, but that "FX," as defined by the CLECs to mean that virtually all traffic is exchanged via VNXX, is "too sweeping in its potential effect"[67] "and has potentially unacceptable consequences in terms of intercarrier compensation."[68]

37. The guidance from other Commission decisions is that VNXX is not local. Further, *Metrolink, U & I CAN*, and *Local Dial* are clear that carriers must pay in accordance with the law for access to the network.[69] In addition, while Washington has clear policies encouraging competition, those policies have consistently been applied to encourage legitimate competition, not to favor one competitor over another, not to allow or encourage arbitrage, and not to place one group of carriers under rules that do not apply to others in the industry. Yet these are the consequences that would result from a decision allowing VNXX to be treated as local traffic. Such a decision would repudiate years of precedent, and would, to the detriment of many carriers and consumers in the state, wipe away any effective distinction between local and interexchange calling.

38. Given that the central rulings of *CenturyTel*, *Pac-West*, and *Level 3* are no longer good law, Level 3's reliance upon them[70] is misplaced. Those decisions did not address the question at hand, and there is nothing to suggest that "end user perception" should govern intercarrier compensation. Indeed, there are obvious reasons why CLECs want to make certain calling

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[66] *Id.* ¶ 28.

[67] *Id.* ¶ 38.

[68] *Id.* ¶ 36.

[69] See Qwest's discussion of *Metrolink* and *U & I CAN* at Qwest Br. ¶¶ 32-35. See Staff's discussion of *Local Dial* at Staff Br. ¶ 115.

[70] Level 3 Br. ¶ 27.

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arrangements appear local to their end users, but the fact that technology allows it to happen does not automatically convert the call from interexchange to local for legal, regulatory, or intercarrier compensation purposes.[71]

39. Level 3 also relies on the *2001 U S WEST Order*, an early order that was entered in connection with Qwest's section 271 compliance docket. However, in a complete lack of candor to the Commission, Level 3 fails to disclose that the initial order was reversed by the Commission on the very issue that Level 3 cites it for.[72] Level 3's discussion of the *2001 U S WEST Order* is fraught with errors.[73] First, even if the order actually reflected the Commission's final ruling, which it does not, Level 3 takes the discussion of ISP traffic completely out of the limited context in which it occurred "significant local use restriction." Further, even if the fundamental infirmity to Level 3's "authority" on this issue did not exist, the order is not on point as it did not explicitly address VNXX traffic; indeed, there is nothing to suggest that VNXX traffic was even at issue. Even if the order stood for the proposition claimed by Level 3, there is nothing

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[71] The rationale and analysis that supported the *CenturyTel Order* is no longer sustainable under the *Qwest* decision, yet Level 3 stubbornly refuses to acknowledge that the Commission has not decided the issue whether VNXX is permissible and, if so, under what conditions, despite the Arbitrator's statement that "the Commission has *not* approved or rejected the use of VNXX arrangements for ISP-bound traffic or any other traffic in interconnection agreements in this state." Order No. 3, *Level 3 Communications v. Qwest Corporation,* Docket No. UT-053039 ¶ 42 (WUTC, August 26, 2005). In affirming, for the most part, the Arbitrator's decision, the Commission likewise affirmed that it had not decided the ultimate questions about the propriety of VNXX traffic. Order No. 5, *Level 3 Communications v. Qwest Corporation,* Docket No. UT-053039 ¶ 35 (WUTC, February 10, 2006). Level 3 continues to try to convince the Commission, even though the contrary is readily apparent, that the Commission *has* decided this issue, and mischaracterizes the holdings and the status of the *CenturyTel* case as well as the orders in *Pac-West* and *Level 3*.

[72] 24th Supplemental Order, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* UT-003022 & UT-003040 (WUTC, Dec. 20, 2001), where the Commission determined that it is preempted by the FCC's *ISP Remand Order* and reverses the ALJ's determination on this issue: "The Commission believes, as Qwest proposes, that states have been preempted by the FCC's *ISP Remand Order* on this question, and that ISP-bound traffic must be treated as interstate for the purpose of determining local use of the facilities in question. However, because we have ordered Qwest to remove usage-based criteria from consideration of facilities being priced as EELs, our changed position acknowledging Federal preemption has no practical effect. If, in the future, the FCC makes a final determination that a local-use restrictions must be applied to intrastate purchases of EELs, such restrictions should count ISP-bound traffic as interstate rather than local." *Id.* ¶ 27.

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whatever to suggest that it ever addressed the issues of this case, in particular the distinction between VNXX and local ISP traffic. The order post-dated the *ISP Remand Order* by only three months, and there is no reason to believe that the ALJ's holding was any broader than the holding in the *ISP Remand Order*. At that time VNXX was not an issue, and, though the *2001 U S WEST Order* does not specifically say, it is reasonable to conclude that the "ISP traffic" the Commission was discussing was not VNXX traffic, but rather local ISP traffic.

40. Level 3's reliance on an earlier Qwest/Level 3 Arbitration order is irrelevant,[74] given that a final order in a current Qwest/Level 3 docket has now been rendered[75] that supersedes that decision.

41. Level 3's accusation that Qwest relied on dicta in the *AT&T Arbitration Order*[76] is a make-weight argument. Qwest did not represent that the dicta in that case was a holding. Qwest merely argues that the dicta states a reasonable course of action, consistent with the FCC's policy that carriers should move toward bill-and-keep, and that CLECs should reduce their reliance on compensation for dial-up ISP calls, a proposition that was not dicta in the *ISP Remand Order*.[77] In ruling on the scope of the *ISP Remand Order*, the Commission did not believe that it was required to first make a determination regarding whether VNXX was local or interexchange, and it was in that context in which all the prior decisions were made. Under the *Qwest* remand, the Commission must first determine if VNXX is local traffic. If it is not, the

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[73] Level 3 Br. ¶ 28.

[74] *Id*. ¶ 30.

[75] Order No. 12, *In the Matter of the Petition of Level 3 Communication, LLP. For Arbitration . . .with Qwest Corporation*, Docket UT-063006 (WUTC, June 7, 2007) ("*Level 3 Final Order*").

[76] Level 3 Br. ¶ 30.

[77] *ISP Remand Order* ¶ 7 ("our 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").

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authorities are uniform in holding that it is not compensable under the *ISP Remand Order*.[78] In the face of four circuit decisions and the recent *Qwest* decision, Level 3's effort to try to convince the Commission that its earlier decisions are locked in stone simply makes no sense.[79]

4. Qwest's Tariffs

42. Respondents' arguments regarding the impact of Qwest's tariffs is limited. ATI and the Joint CLECs do not even mention them. ELI and Level 3 address them briefly.

43. ELI makes two arguments. First, ELI mischaracterizes Qwest's access tariffs.[80] The premise of its argument—that Qwest's access "tariff only applies to Qwest's service offerings"—is wrong because the tariff does not govern the relationship between Qwest and typical end users; rather, it governs the relationship between Qwest and carriers who are carrying interexchange traffic. If the traffic is not local and not subject to the ICA, it is subject to the tariffed rates for interexchange service. It is also false that Qwest is trying to eliminate FX provided by other carriers. Setting aside the debate whether what the CLECs are providing a service that bears any real resemblance to FX service, the Qwest/Verizon settlement shows that, without waiving its legal rights, Qwest is willing to exchange VNXX traffic, but is unwilling to subsidize other carriers' operations by paying for terminating compensation for traffic that is not local. Qwest has no incentive to try to eliminate true FX service—it is an extremely tiny segment of Qwest's

[78] Qwest Br. ¶¶ 68-71.

[79] Level 3's final paragraphs on Commission orders focus on the *PacWest* and *Level 3* order that were the subject of the *Qwest* decision. Level 3 Br. ¶¶ 32-34. For obvious reasons, those decisions can only be viewed now in light of the requirements of *Qwest*, which, inexplicably, Level 3 fails to even mention.

[80] ELI Br., at p. 5, Lines 10-23.

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business, and as long as all customers of FX pay their fair share of the costs associated with the provision of a ubiquitous network, as Qwest's FX customers do, Qwest has no objection to it.[81]

44. Second, ELI attributes an argument to Qwest that Qwest did not make; ELI says that Qwest claims that by "filing its Exchange and Network Services Tariff which the Commission accepted, it has somehow made VNXX service provided by ELI illegal."[82] What Qwest has argued is that Qwest's tariffs demonstrate that the statutes and rules are geographically based.[83] Thus, to the extent a CLEC attempts to create an FX service that relies on Qwest's local network (and on Qwest's transport facilities), calling such a service FX service is a sham. Further, as discussed above, Qwest's tariffs are directly relevant to ELI because of the ICA provision that makes them so.

45. Level 3 attempts to deflect Qwest's tariff argument by a selective and misleading reference to a single definition in Qwest's tariff, "local calling," but ignores several others provisions that could not be more clear that call rating is based on geography.[84]

5. Qwest Has Not Conceded the Legality of VNXX

46. Several Respondents claim that, because Qwest's settlement with Verizon allows Verizon to exchange VNXX traffic with Qwest, Qwest has abandoned any claim that VNXX is unlawful under state and federal law.[85] No authority is cited for this claim. Parties, in a settlement of

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[81] Finally, ELI never explains or supports its allegation that Qwest's tariffed FX service is inconsistent with Qwest's definition of FX in this case. ELI Br., at p. 5, lines 18-19. A bare allegation with no supporting facts or other analysis should be given no weight.

[82] *Id*., at p. 6, lines 7-9.

[83] Qwest Br. ¶¶ 39-42.

[84] See *id.* ¶¶ 38-42, especially ¶ 39, for a full description of several relevant tariff provisions. Qwest's brief addressed the impact of its access tariff and the CLECs' own price lists, on the issues in this case. Qwest Br. ¶¶ 43-47. Other than one argument by ELI regarding Qwest's access tariff, none of the CLECs addressed the implications of either the access tariff or the price lists.

[85] Level 3 Br. ¶ 2; ATI Br., p. 2-4, Joint CLEC Br. ¶¶ 1-3, 7.

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disputes on an issue that establishes a prospective business relationship, may agree to provisions in an agreement that they believe would not be their responsibility in a litigated case. Such agreements are common, are encouraged by the Act, and do not mean that the parties entering them have waived their legal positions or are estopped from asserting them.

47. An analogy illustrates the point. If a landowner owns a piece of property and someone decides to drive over a portion of the property, the trespassing party, assuming he has no easement or other prescriptive right, would be civilly liable for trespass (and, depending on the circumstances, perhaps criminally liable as well). The trespasser might disagree with the landowner, and might even be willing to litigate the matter. However, the landowner and the trespasser may consensually enter a contract that gives the trespasser a defined right to cross the landowner's property under specific terms; the landowner, in return, receives some form of consideration and the right to enforce the agreement in the event of its breach.

48. Parties like Verizon and Qwest can agree in an ICA to exchange VNXX traffic, even though both contend that each is right on the fundamental legal issue whether VNXX traffic is lawful, and that, if litigated, their positions would be upheld.. Qwest and Verizon have agreed to an arrangement that allows Verizon to exchange VNXX traffic with Qwest, a practice that, in the absence of the agreement, Qwest would claim is unlawful. In the case of an ICA, the issue extends beyond the two parties. As part of its non-discrimination obligations under section 252, Qwest also makes the ICA—the entire ICA—available to any CLEC who is willing to agree to the same terms and conditions to which Verizon and Qwest agreed, by developing a unitary rate across the entire region to accomplish the bill-and-keep plan for ISP-bound VNXX traffic. Under the law, there are multiple elements that must be met to establish waiver or estoppel.

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None of the CLECs have made any effort to define the elements, let alone establish that they have been met. Their claim that Qwest has conceded this issue is completely without support. The only thing the Verizon settlement demonstrates is that, given fair terms and conditions, Qwest will agree to exchange VNXX traffic.

C. Interconnection Agreements

49. For the most part, with the exceptions of ELI's reference to its ICA and a Level 3 cost argument, Respondents ignored the status and effect of current ICAs.

1. ELI ICA

50. ELI argues that nothing in its ICA with Qwest renders VNXX unlawful.[86] To the contrary, the current ELI/Qwest 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."[87] The same ICA contains provisions relating to the exchange of "IntraLATA Toll." For example, section (C)2.3.6 states that the "[a]pplicable *Qwest Switched Access Tariff* rates apply to Exchange Access (IntraLATA) traffic routed to an access tandem, or directly to an end office. Relevant rate elements could include Tandem Switching, Tandem Transmission, Interconnection Charge, Local Switching, and Carrier Common Line, as appropriate." (Emphasis added). On the other hand, local traffic is subject to compensation, either at the voice rate or at the ISP rate, depending on the type of traffic. To suggest that there is no distinction in the ICA between the compensation regimes for local and interexchange traffic is simply wrong. The same kinds of distinctions are inherent in the ICAs of other carriers.

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[86] ELI Br., at p. 10, lines 2-12.

[87] Exhibit 434 (emphasis added).

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2. Financial Responsibility for Transport

51. This issue is important for two reasons. First, Level 3 argues that all facilities on Qwest's side of a point of interconnection ("POI") are the financial responsibility of Qwest.[88] Second, in the final order in the current Qwest/Level 3 arbitration (Docket UT-063006), the Commission affirmed the ALJ's recommendation to employ a relative use factor ("RUF") in the ICA (a position that Qwest agrees with), but concluded that "the Commission will refrain from deciding how to apply the RUF until the issues of classification and compensation for VNXX traffic, and compensation for ISP-bound traffic, have been resolved."[89] Thus, Level 3's argument that this issue has been definitively resolved is incorrect. In light of the Commission's decision to defer the RUF issue, it is important for Qwest to express its positions on the issue.

52. There is no legal prohibition on imposing transport costs for ISP traffic on a CLEC; moreover, the application of cost causation principles requires that CLECs bear these costs. The RUF issue relates to financial responsibility for two of Qwest's LIS transport services (entrance facilities and direct trunk transport), both provided on Qwest's side of a POI. In the 2003 arbitration, the Commission determined that FCC Rules 703(b) and 709(b)[90] require that ISP-bound traffic be attributed to the originating carrier in the RUF.[91] A reanalysis of the RUF issue in light of current authority demonstrates that making the CLECs financially responsible for ISP traffic is consistent with good public and economic policy, is entirely consistent with FCC rules, and is consistent with recent rulings in five other Qwest states.

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[88] Level 3 Br. ¶¶ 36-38.

[89] *Level 3 Final Order* ¶ 22.

[90] 47 C.F.R. §§ 51.703(b) and 51.709(b).

[91] Fourth Supplemental Order, *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC and Qwest Corporation Pursuant to 47 U.S.C. Section 252*, Docket UT-023042, ¶¶ 35-40 (February 5, 2003) ("*Level 3 Arbitration Decision*").

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53. Rules 703(b) and 709(b) govern only the transport and termination of "telecommunications traffic."[92] The FCC's rules specifically exclude "interstate or intrastate exchange access, information access, or exchange services for such access" from "telecommunications" traffic.[93] In *Peevey*, the Ninth Circuit determined, as a matter of federal law, that VNXX traffic is interexchange traffic that falls within two categories of traffic ("exchange access" and "information access") not subject to Rules 703(b) and 709(b).[94]

54. *Peevey* applies the same analysis to VNXX traffic that was applied by a Colorado federal court to ISP-bound traffic in *Level 3 Communications v. Colorado PUC* ("*Colorado Level 3*").[95] In *Colorado Level 3*, the court held that it was appropriate to make the terminating carrier responsible for ISP-bound traffic because Rules 703(b) and 709(b) do not apply to traffic that is "interstate or intrastate exchange access, information access, or exchange access services for such access."[96] Since ISP-bound traffic is categorized by the FCC as "information access" traffic, the Colorado court held that Rules 703(b) and 709(b) did not apply.[97] In its post-hearing briefs in UT-063006, Level 3 attempted to argue that footnote 149 of the *ISP Remand Order* required Qwest to bear the cost of transporting ISP-bound traffic. Footnote 149 states:

> This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' obligations under our part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations

[92] 47 C.F.R. § 51.701(a).

[93] 47 C.F.R. § 51.701(b).

[94] 462 F.3d at 1157-58. The court ruled that because VNXX traffic is interexchange traffic it is "exchange access" and agreed that ISP traffic is "information access." Rule 51.701(b) excludes both categories from "telecommunications" traffic. Thus neither falls under either Rule 703(b) or 709(b).

[95] 300 F.Supp.2d 1069, 1075-81 (D. Colo. 2003).

[96] *Id.* at 1075-76.

[97] *Id.* at 1077-79.

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to transport traffic to points of interconnection.[98]

In the prior arbitration with Level 3, the Commission interpreted footnote 149 to mean that the pre-*ISP Remand Order* obligations to transport traffic to the POI were not changed by the *ISP Remand Order*.[99]

55. Footnote 149, however, actually supports Qwest's position that Level 3 is responsible under the RUF for all VNXX traffic. That is because the FCC's pre-*ISP Remand Order* rules that required the ILEC to bear the cost of transporting traffic to the POI applied only to local telecommunications traffic. Prior to the *ISP Remand Order*, Rule 51.701 of the FCC's reciprocal compensation rules provided that "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of *local* telecommunications traffic between LECs and other telecommunications providers."[100] As the FCC expressly recognized in the *Local Competition Order*, the Act preserved the right of local exchange carriers who originate interexchange traffic to charge access charges for the origination and transport of interexchange traffic to a POI with an IXC.[101]

56. Qwest's proposed language attributes VNXX ISP traffic to the terminating carrier rather than the originating carrier because it is economically sound to do so. When a dial-up customer places a call to an ISP, he or she is acting as a customer of the ISP.[102] The CLEC, the

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[98] *ISP Remand Order*, n. 149; emphasis added.

[99] *Level 3 Arbitration Decision*, at 9-11.

[100] First Report and Order*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("*Local Competition Order*") Appendix B, § 701(a) (*emphasis added*) (found at 11 FCC Rcd at 16228).

[101] *Local Competition Order* ¶¶ 176, 1033-34. Level 3's reliance on footnote 149 only underscores why the *ISP Remand Order* should be interpreted only to prescribe intercarrier compensation for calls placed to an ISP in the same LCA as the calling party. Only then does the preservation of the rules applicable to local traffic (Rules 51.703 and 51.709) make sense.

[102] Direct Testimony of Dr. William Fitzsimmons, Exhibit 101T, at pp. 5-8.

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terminating carrier, has undertaken to gather the ISP traffic on behalf of the ISP, and uses Qwest's network to do so.[103] So that ISPs will bear the full cost of providing Internet service, the flow of compensation must follow the chain of cost causation. The Respondents should pay for originating ISP traffic on Qwest's network. The Respondents can then pass this cost and its own transport and termination cost to its ISP customers. The ISPs can then pass these costs and their own additional costs to their customers, who are the ultimate cost-causers.[104]

57. Interpreting Rules 703(b) and 709(b) to require CLECs to bear the full cost of transporting ISP traffic, and in particular, VNXX ISP traffic, is the only economically rational approach. If a CLEC bears the cost of origination and dedicated transport, then the ISP and ultimately the ISP's dial-up customers will be required to compensate the CLEC for the origination and transport costs incurred to provide dial-up service. If those costs are shifted to Qwest, as the CLECs seek to do in this proceeding, then Qwest either unfairly bears the cost without compensation or has to recover those costs from ratepayers generally, including those who do not use dial-up service, a result that runs counter to the FCC's stated policy. 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."[105]

58. With companies like PacWest and Level 3, virtually all of the traffic exchanged between Qwest and the CLEC is one-way ISP traffic from Qwest's network to ISPs on their networks, a large part of it is clearly "VNXX" traffic.[106] Qwest's approach to RUF provides that the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. The Iowa, Colorado, Oregon,

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[103] Rebuttal Testimony of Dr. William Fitzsimmons, Exhibit 103T, at pp. 3-4.

[104] *Id.*

[105] *ISP Remand Order* ¶ 87.

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Wyoming, and Arizona commissions have all recently found this to be appropriate.[107] In each of these decisions, the commissions expressly adopted Qwest's interpretations of FCC Rule 703(b). In the recent order in Oregon, the Commission, relying on *Peevey*, addressed the underlying reasoning for imposing such duties on the CLEC:

> Level 3's argument fails to take into account the prevailing case law regarding this issue. As explained above, the Ninth Circuit in Peevey specifically recognized that: (a) VNXX traffic is interexchange traffic, and (b) "the FCC has expressly excluded interexchange traffic from the reach of § 703(b)." . . .
>
> In addition, Level 3 fails to acknowledge that the FCC's Part 51 rules, including § 51.703(b) apply only to "telecommunications." In the *ISP Remand* Order, the FCC revised its Part 51 rules to classify ISP-bound traffic as "information access," rather than "telecommunications." As emphasized by the Ninth Circuit, the revised rules adopted in the *ISP Remand Order* "remain binding." Thus, contrary to Level 3's assertion, Rule § 51.703(b) does not apply to ISP-bound traffic, including VNXX-routed ISP-bound traffic.[108]

59. As the Colorado commission has recognized in a Level 3 arbitration, when a caller dials its ISP, it is acting primarily as a customer of the ISP:

> We find Qwest's ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that

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[106] Confidential Exhibits 4 & 8; Exhibits 25 & 26.

[107] Order on Reconsideration, *Level 3 Communications LLC v. Qwest Corporation*, 2006 WL 2067855 at *10 (Iowa Util. Bd., July 19, 2006) ("*Iowa Level 3 Order*"); 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, ¶¶ 20-22 (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; *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 *21-*22, *36-*37 (Ore. PUC, March 14, 2007) ("*Oregon Level 3 Order*"); Memorandum Opinion, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket Nos. 70043-TK-05-10 and 70000-TK-05-1132, at 11 (Wyo. PSC, April 30, 2007); Decision No. 68817, *Re Level 3 Communications LLC*, 2006 WL 2078565, at *45 (AZ Corp. Comm'n, June 29, 2006).

[108] *Oregon Level 3 Order,* 2007 WL 978413, at *22; see also *id*. at *36-*37.

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> the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.[109]

60. Qwest's RUF position properly makes the terminating carrier responsible for ISP traffic so that the cost of providing service to ISPs is borne by the ISPs and through them by the ultimate cost causers, their dial up customers. In contrast, the CLECs would either (1) leave Qwest holding the bag for the costs of originating and transporting ISP and VNXX traffic or (2) result in these costs being borne by ratepayers generally. Neither of these outcomes sends the proper economic signals since these are costs for which the CLECs should be responsible.[110]

D. FCC/Federal Court/ Other State Commission Decisions

61. As noted, perhaps the most extraordinary aspect of the briefs filed by Respondents is their effort to ignore the definitive line of cases; neither of the *Global NAPS* decisions nor the *Qwest* decision figures in their analysis, an omission that speaks volumes. At the same time, the Respondents' analysis of the *ISP Remand Order* and the *Intercarrier NPRM* is spotty at best.

1. *Peevey*

62. One of the recurrent themes of Respondents' briefs is the false claim that the Ninth Circuit's *Peevey* decision supports their position. For example, Level 3 cites *Peevey* for the proposition

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[109] Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, p. 18, ¶ 20 (CO PUC 2001).

[110] In its argument on Single POI in the LATA, Level 3 relies on a pre-*ISP Remand Order* FCC decision, *TSR Wireless v. U S WEST Communications,* 15 FCC Rcd 11166 (2000). Level 3 Br., n. 93. In *TSR Wireless*, the paging carriers asserted they were entitled to reciprocal compensation, and that under Rule 703(b) ILECs were prohibited from charging the paging carriers for the costs of one-way interconnection trunks used to carry *local* paging calls that originated on the incumbent ILECs' networks. The paging carriers based their claim on the language of then-existing Rule 703(b): "A LEC may not assess charges on any other telecommunications carrier for *local* telecommunications traffic that originates on the LEC's network." *TSR Wireless* is not pertinent here because the traffic at issue was intra-MTA wireless traffic that clearly fell within the term "local telecommunications traffic" under the rules in force at the time. In contrast, this case involves ISP traffic that falls within the category of

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that the Ninth Circuit upheld a California Public Utilities Commission ("CPUC") decision holding that terminating compensation be paid for VNXX traffic. Level 3 and the Joint CLECs also rely on *Peevey* for its claim that the CPUC found that call rating in California was based on the NXX of the parties to the call and not on their location and that it is standard industry practice to rate calls in this manner.[111]

63. These citations to *Peevey* are noteworthy for what they ignore. The most significant error made by Respondents is their conclusion that, because the Ninth Circuit upheld the CPUC's conclusion that in California call rating was based on telephone numbers, the same rule automatically applies in Washington. This ignores the fact that the CPUC made its decision on call rating on the basis of California law and unique Pacific Bell tariffs. *Peevey* creates no general rule that call rating is based on telephone numbers in all states. That determination is left to each state commission. As *Global NAPs II* held, call rating and the establishment of LCAs, has not been preempted by the FCC and thus, that issue is one for the state commissions. The *Qwest* court agreed with that principle, which is why it remanded that issue to the Commission.

64. In *Peevey*, after affirming the CPUC's decision on call rating based on Pacific telephone tariffs in Section V of the decision, the court, in section VI of *Peevey* turned to a forward-looking discussion of call rating and VNXX. Here, the court could not have been more clear that, in its view, the NXX theory is not viable. Among other things, in Section VI of the decision, the Ninth Circuit reached the following conclusions:

"information access" that is excluded from Rules 703(b) and 709(b).

[111] Level 3 Br. ¶¶ 55-57.

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- The compensation regime of the *ISP Remand Order* applies only to "local ISP-bound traffic" and does "not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic."[112] Thus, as a matter of federal law, the *ISP Remand Order's* compensation scheme applies only to "local ISP-bound traffic."

- "VNXX traffic is interexchange traffic that is *not* subject to the FCC's reciprocal compensation rules."[113]

- For purposes of determining whether traffic is VNXX traffic, the relevant end point is where the CLEC's "'network ends' and the call is picked up by the customer. Since that is the end of [the CLEC's] responsibility for the call, it should also be the relevant end point for purposes of determining whether the call is local of VNXX."[114]

- VNXX traffic is "exchange access" and therefore is not "telecommunications traffic" for purposes of Rule 51.703(b).[115]

In light of these clear holdings, the CLECs' reliance on *Peevey* is without merit.

2. The Claim that the Local/Interexchange Distinction is Dead

65. Level 3 makes a major point of claiming that the local/interexchange distinction is dead because, in the *ISP Remand Order*, the FCC chose to use statutory language instead of the term "local."[116] This position is tone deaf to the FCC's stated purpose for not using that term. In fact, the FCC stated that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' *not being a statutorily defined category*, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)."[117]

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[112] 462 F.3d at 1159.

[113] *Id.* at 1158, emphasis in original.

[114] *Id.* at 1159.

[115] *Id*. at 1157-58.

[116] Level 3 Brief ¶¶ 39-42, 49.

[117] *ISP Remand Order* ¶ 34; emphasis added. In the *ISP Remand Order*, the FCC was responding to *Bell Atlantic Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), where the D. C. Circuit had criticized the FCC's use of the local/long distance distinction in the *ISP Declaratory Order.* Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory*

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However, the FCC's decision to rely on statutory language does not mean that the FCC eliminated the distinction between local and long distance calls.

66. First, the Act itself retains the concept of local traffic. The term "telephone exchange service,"[118] a statutorily-defined term, clearly refers to what is commonly called "local" service. So the concept of local service has not been excised from the Act.

67. Second, in remanding, *but not vacating*, the *ISP Remand Order*, the court in *WorldCom v. FCC*[119] explicitly noted several grounds upon which the decision could be justified: "there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)):"

> [W]e do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act), . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the "telecommunications" covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); see § 252(d) (B)(i) (referring to bill-and-keep). *Indeed, these are only samples of the issues we do not decide . . . .*[120]

Order").

[118] 47 U.S.C. § 153(47): "The term 'telephone exchange service' means (A) *service within a telephone exchange,* or within a connected system of telephone exchanges *within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange, and which is covered by the exchange service charge*, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." (emphasis added). *North Carolina Util. Comm'n v. FCC,* 552 F.2d 1036, 1044 (4th Cir. 1976) ("The term 'telephone exchange service' is a statutory term of art, and means service *within* a discrete local exchange system") (emphasis added).

[119] 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

[120] *Id.* at 434; emphasis added. On this point, the Joint CLECs make the unique argument that because the *WorldCom* decision criticized the FCC's section 251(g) rationale for the *ISP Remand Order* and remanded the case back to the FCC, all VNXX traffic is subject to reciprocal compensation under section 251(b)(5). Jt. CLEC Br. ¶¶ 18-21. There are three problems with this conclusion. First, no court has agreed with it, and many have had an opportunity to do so. Second, it ignores the fact that the *WorldCom* court remanded the *ISP Remand Order* back to the FCC but did not vacate the decision (or the rules promulgated thereunder) because it concluded that "there is plainly a non-trivial likelihood the Commission has authority to elect such a system." 288 F.3d at 434. Thus, the *ISP Remand Order* remains binding and effective, as do the existing FCC rules. Third, since the *ISP Remand Order*—which remains fully in effect—found that local ISP traffic falls into a category other thanSection 251(b)(5) and adopted rules that exclude ISP and VNXX traffic from "telecommunications traffic," there is no legal theory

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The *WorldCom* court thus identified a variety of theories upon which the compensation system of the *ISP Remand Order* could be found to be lawful. To suggest that the local/interexchange call distinction has been completely abandoned by the FCC simply because the FCC decided to focus on particular statutory language is simply wrong

68. Third, in the *ISP Remand Order*, the FCC ruled that it did not want to interfere with either interstate or intrastate charges. Of course, the very idea of access charges is completely meaningless if there is no distinction between local and interexchange traffic:

> [W]e again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but has no such concerns about the effects on analogous intrastate mechanisms.[121]

Because it explicitly retained the access charges, any claim that the FCC has abandoned the local/interexchange distinctions is directly inconsistent with the FCC's own stated intention.

69. Fourth, if, as Level 3 contends, the FCC resolved compensation for VNXX-routed ISP traffic in the *ISP Remand Order*, it is curious why the FCC would ask for comments on how, as it did in its *Intercarrier Compensation NPRM*,[122] it should address that precise issue.

70. Finally, the two *Global NAPs* decisions and *Peevey* put to rest any claim that the local/interexchange distinction was made extinct by the FCC. In *Global NAPs I,* the First

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that supports the Joint CLECs' conclusion.

[121] *ISP Remand Order*, n. 66; emphasis added. Level 3 and also ignores similar portions of the *ISP Remand Order* "Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g). These services remain subject to [FCC] jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of state commissions). *This analysis properly applies to the access services that incumbent LECs provide . . . to connect subscribers with the ISPs for Internet-bound traffic*." *Id.* ¶ 39, emphasis added.

[122] Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 ¶ 115 (2001) ("*Intercarrier Compensation NPRM*").

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Circuit upheld a decision of the Massachusetts commission to impose access charges on VNXX traffic. The CLEC argued that the *ISP Remand Order* represented a broad preemption of a state commission's power to assess access charges on ISP traffic. The court noted that there is no language in the *ISP Remand Order* "that explicitly preempts state regulation of access charges for the *non-local ISP traffic* at issue.[123] If the term "local" no longer has any meaning, then one can only wonder why the First Circuit continued to discuss the distinction between local and long distance calls throughout its decision. Indeed, its holding is that "the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls*.[124] To the First Circuit, the local/interexchange distinction remains alive and well. In *Global NAPs II*, the Second Circuit affirmed a Vermont Board decision to ban VNXX-routing. Like *Global NAPs I*, the case is comprehensible only if there is a continued distinction between local and interexchange calls. The final paragraph reinforces the distinction between local calls not subject to access charges, and interexchange calls that are: "[The CLEC's] desired use of virtual NXX simply disguises traffic subject to access charges as something else and would force Verizon to subsidize [the CLEC's] services."[125] Without a distinction between interexchange calls (the calls that are "disguised") and local calls, which are not subject to access charges, the conclusion of *Global NAPs II* would be nonsensical. Finally, *Peevey* ruled that "VNXX traffic is *interexchange traffic*,"[126] a conclusion that has meaning only if local traffic still exists. The assertion that the local/interexchange distinction is dead is unsupported and makes no sense.

[123] 454 F.3d at 72, emphasis added.

[124] *Id.* at 61, emphasis added.

[125] 454 F.3d at 103.

[126] *Id.* at 1158, emphasis added.

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3. Level 3's Section 253 Argument.

71. Level 3 claims that Qwest's position opposing VNXX would violate section 253 by raising a barrier to entry.[127] This claim was recently considered and rejected in *Global NAPs II*, where the CLEC argued that the Vermont Board's banning of VNXX would violate section 253:

> Similarly, the Board's virtual NXX decision here does not constitute a general barrier to entry as proscribed by 47 U.S.C. § 253, since a prohibition of virtual NXX does not necessarily prevent Global from entering the market. In some circumstances, certain state prohibitions may run afoul of § 253(a), even if these prohibitions are not total. . . . But analysis here must proceed on a case-by-case basis, and while a prohibition of virtual NXX might once have been fatal to Global, its counsel conceded at oral argument that such is no longer the case. Contrary to Global's contentions, . . .47 U.S.C. § 253 [does not] confer[] blanket authority on carriers to provide any interstate service in any manner unfettered by state regulation.[128]

4. *Core Forbearance Order*

72. Level 3 makes two arguments regarding the impact of the *Core Forbearance Order*.[129] First, it claims that by eliminating the growth caps and new markets rules, "the FCC rejected bill-and-keep for this ISP traffic and opted instead for a more uniform compensation regime."[130] As usual, Level 3 cites no authority for its claim that the FCC "rejected bill-and-keep." A review of the *Core Forbearance Order* indicates that while bill-and-keep was referred to several times in describing the *ISP Remand Order,* nothing in those references suggests that the FCC abandoned bill-and-keep as a long-term compensation mechanism for ISP traffic. While bill-and-keep was mentioned a handful of times in the *Core Forbearance Order* none of these references suggest, let alone hold, that bill-and-keep was inappropriate for ISP traffic.[131] Second, Level 3 claims

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[127] Level 3 Br. ¶¶ 47-48.

[128] 454 F.3d at 102.

[129] 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*").

[130] Level 3 Br. ¶ 53.

[131] Bill-and-keep is referenced in paragraphs 2, 5-6, 9, 14, and 24 of the *Core Forbearance Order.*

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that the FCC, in the *Core Forbearance Order*, concluded that its earlier concerns about "market distortions" and "inappropriate arbitrage opportunities" were things of the past.[132] Yet the FCC said precisely the opposite in the *Core Forbearance Order*. The FCC noted that the applicant "does not challenge the continuing validity of the public interest rationale provided by the Commission when it adopted *these rules*."[133] Then, discussing rate caps, the FCC stated that the applicant "does not challenge the [FCC's] conclusion that rate caps help *avoid arbitrage and market distortions* that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic."[134] The FCC then reaffirmed the policy rationales that justify the rate caps.[135] Level 3's claim that "economic distortions" and "arbitrage opportunities" are no longer of concern to the FCC bears no resemblance to what the FCC actually said.[136]

5. Single POI per LATA

73. Level 3's single POI per LATA argument[137] is one it has repeatedly made with no success. After distilling its argument down, it consists of two points. First, Level 3 claims the right to exchange traffic with Qwest at a single point in each LATA, a proposition that Qwest does not dispute.[138] Indeed, the fact that most of the CLECs have a single switch in the Seattle area demonstrates that Qwest interconnects with them in precisely that manner. Second, and most importantly, Level 3's real argument is about compensation. Despite having built a highly centralized network (i.e., one switch in a state, limited transport facilities, and no local exchange

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[132] Level 3 Br. ¶ 54.

[133] *Core Forbearance Order* ¶ 18, emphasis added. The reference to "[t]hese rules" is to all of the rules adopted by the FCC in the *ISP Remand Order*

[134] *Id.* emphasis added.

[135] *Id.* ¶ 23.

[136] For an accurate description of the *Core Forbearance Order, see* Qwest's Br. ¶¶ 63-65.

[137] Level 3 Br. ¶¶ 43-46.

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facilities), Level 3 wants to receive intercarrier compensation as though it had built a ubiquitous, decentralized network. Qwest's point in response is simple: a carrier may build its network as it chooses, but its network design decisions have compensation implications. Qwest certainly does not require nor does it suggest that Level 3 (or any other CLEC) must build a network just like Qwest's network. But if a carrier chooses to centralize what little network it may actually build, it should not be allowed to pretend for compensation purposes that it has built an extensive, decentralized network. If a CLEC is allowed to receive compensation based on such a pretense, the result is an obvious subsidy. The Second Circuit was clear that this was not what the drafters of the federal Act envisioned:

> But where a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. *Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business*.[139]

That is the issue in the VNXX debate.

6. VoIP Preemption/ESP Exemption

74. Only ELI made any comment on the ESP Exemption, and that was to say that the issues was irrelevant for this proceeding.[140] In light of that, Qwest merely reiterates the points it made in its opening brief.[141]

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[138] There are some minor exceptions related to technical feasibility.

[139] *Global NAPs II*, 454 F.3d at 103, emphasis added.

[140] ELI Br., at p. 14, lines 7-12.

[141] Qwest Br. ¶¶ 72-80.

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II. VNXX RELATIONSHIP TO OTHER SERVICES

A. Foreign Exchange ("FX") Service

75. In its opening brief, Qwest presented a detailed discussion of FX and the differences between it and VNXX. Most of the CLECs made erroneous arguments that FX and VNXX are the same. In fact, FX service and VNXX are not at all the same. Qwest will not repeat all of its extensive arguments on this point,[142] but will instead respond to a handful of new issues (or twists on old issues) raised in Respondents' briefs that bear further discussion.

76. Level 3 says the distinctions described by Qwest between its FX and VNXX are "distinctions without a difference."[143] ELI says that only difference between ELI's FX service and Qwest's FX service is that ELI does not use a local switch.[144] Neither argument is supported by the facts.

77. The CLECs avoid any discussion of the existence of a Qwest local network in each LCA in which it operates in Washington. This network consists of the extensive (and very expensive) loop plant that connects most customers to the network.[145] It also consists of the switch that Qwest places in each LCA (often several switches are deployed within a single multi-exchange LCA). No CLEC, not even those like ELI who actually serve local exchange customers, has built anything like it. Yet no one disputes that this network is absolutely necessary for the Respondents to gather traffic for their ISP customers. Without Qwest's extensive network, they would have no business. This is the same network for which IXCs compensate Qwest for interexchange calls through originating access.

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[142] Qwest Br. ¶¶ 85-94.

[143] Level 3 Br. ¶ 65.

[144] ELI Br., at p. 19.

[145] Qwest readily acknowledges that some CLECs, though certainly not ones like Level 3 and PacWest, may in some areas invest in some loop plant and may actually provide local service to customers. Typically, however, such service is offered in concentrated business areas to business customers.

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78. The second major network element is transport. While ELI touts the fact that it has an extensive transport network in Washington, its witness acknowledged that it also subscribes to LIS services like direct trunked transport and entrance facilities (these services, of course, are TELRIC rated).[146] But under current ICAs, given the one-way nature of ISP traffic, Qwest bears all or virtually all of such LIS transport costs. So, when a CLEC says it offers FX, in most cases it does so with free use of Qwest's local network for call origination and, to the extent LIS is used, it obtains free transport.

79. Contrast this, then, to Qwest's FX service. The customer must purchase local exchange service in the LCA in which it wants to obtain FX service (and thus compensates Qwest for origination costs). The customer must also purchase private line service at tariffed private line rates (thus paying the full retail rate to transport the traffic to another LCA). And the Qwest FX customer has no right to terminating compensation. The CLECs demand terminating compensation on all ISP traffic. Thus, the services that the CLECs like to call FX service bear no resemblance to Qwest's FX service. ELI's claim that the only difference between Qwest FX and its FX service is that ELI uses a remote switch is not true. ELI ignores the fact that Qwest's end office switch must be used to route the call to ELI and likewise ignores both origination and transport costs.

80. The court in *Global NAPs II*, in its description of FX, recognized the fundamental differences between a true FX and VNXX, and that an ILEC incurs the costs described above:

> [A]lthough virtual NXX and FX share some similarities, there is one fundamental difference: retail customers using FX service purchase a foreign exchange line, *paying the costs both of installation of the line and of transportation of bulk traffic between the two points of communication*. Virtual NXX customers, on the other hand, *do not purchase any lines or pay transportation costs, but rely on the terminating carrier to provide the service without cost*. The prohibition of virtual NXX does not necessarily

[146] ELI's Exhibit 422; Tr. 770:7-25.

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> prevent users from obtaining nongeographically correlated numbers; *the ban simply requires that someone pay Verizon for use of its infrastructure*.[147]

In the end, the issue in this docket comes down to whether CLECs are going to be allowed a free ride on a network created by and paid for by Qwest.[148]

B. 800 Service

81. In an effort to blunt Qwest's argument that VNXX is much like 1-800 service, the CLECs concentrate on minor technical distinctions. For example, Level 3 points out that with 1-800 service, the calling party dials "1+."[149] That is true, but it misses the point. If ISPs were to buy a real 1-800 service, Qwest's concern would be met, because the ISP would be shouldering financial responsibility for calls for which it and its dial-up end users are responsible. The problem with VNXX is that, while it looks and smells like a 1-800 service (though without the "1+" element) the CLECs disguise the calls as local calls. The Joint CLECs point to small differences between how 1-800 service and VNXX are provided, noting that 1-800 service relies on a national database and VNXX does not.[150] Exhibit 173, Qwest's comparison of 1-800 service and VNXX, points that difference out, but it is a minor difference. Both a VNXX and a 1-800 call require a "data dip" for routing purposes. The only difference is that a VNXX call (because it is dialed like a local call) uses data in the end office switch while a 1-800 call uses the nationwide database. Otherwise, the calls are indistinguishable. Yet if the CLECs' proposals are sustained, the compensation applied to these kinds of calls will be dramatically different.

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[147] 454 F.3d at 103, emphasis added.

[148] It is for that reason that little credence should paid to the statement in the *AT&T Arbitration Order* about CLEC FX service. There is nothing to indicate in that order that the Commission contemplated the sham FX service represented by VNXX.

[149] Level 3 Br. ¶ 70.

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82. It is worth noting that the equivalence of VNXX and 1-800 service is not just a Qwest position. The South Carolina commission and the Vermont board have both reached the same conclusion.[151]

C. QCC's Wholesale Dial Service/MEL/OneFlex

83. The CLECs give only brief attention to Qwest's Market Expansion Line ("MEL") service and QCC's Wholesale Dial and OneFlex.

84. Level 3 acknowledges that MEL customers pay toll charges for calls routed outside the LCA, but complain that if a CLEC subscriber uses MEL, who forwards it on to another LCA, the CLEC should be entitled to originating access.[152] Of course, in Level 3's case, this complaint is completely theoretical in nature since Level 3 appears to have no such local customers, given that 99.93 percent of traffic exchanged with Qwest originates with Qwest.[153] The Joint CLECs argue that MEL, Qwest FX, and VNXX all enable a customer in one LCA to reach a customer in another LCA.[154] That, of course, is true, but in the case of MEL and FX, the end user pays for local service; in the case of MEL the customer pays toll charges and with FX the customer pays retail private line rates. With VNXX nothing in the nature of local exchange charges are incurred and if the CLEC uses LIS, it does not currently pay transport. Those are fundamental differences.

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[150] Jt. CLEC Br. ¶ 32.

[151] Qwest Br. ¶ 96.

[152] Level 3 Br. ¶ 72.

[153] Exhibit 26.

[154] Jt. CLEC Br. ¶ 34.

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85. Little more needs to be said about QCC's OneFlex service. Qwest's opening brief demonstrated how this service honors LCAs.[155] Staff's brief provides an accurate description of it.[156] While criticizing OneFlex,[157] no CLEC challenges the manner in which OneFlex assures that LCAs are honored and how it differs from VNXX. The Iowa Board recently addressed the differences between OneFlex and VNXX:

> [T]he Board offers the following analysis and findings: OneFlex is not VNXX. Qwest's offering of OneFlex service is fundamentally different from Level 3's VNXX proposal in at least one way: Level 3 has not cited any evidence in this record that Qwest's system uses another carrier's network in Iowa to carry interexchange calls without compensation to that other carrier. This has been the Board's primary concern with VNXX service from the time it was first presented to the Board; Level 3's proposal does not offer an answer to this problem, while Qwest's service avoids it altogether. There may be other features that distinguish OneFlex from VNXX, but this one, by itself, appears to be sufficient.
>
> Moreover, as Qwest points out, a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. According to Qwest, when structured this way the service has no impact on the public switched telephone network (PSTN). This also differentiates OneFlex from VNXX.[158]

86. Finally, the CLECs offer nothing new on Wholesale Dial. Level 3's primary argument is that Level 3's Managed Modem service and Qwest's Wholesale Dial service both give ISPs an ability for their end users to get on the Internet, which is true.[159] But Level 3 ignores how the services are provided. Where QCC buys a local service in each LCA call PRI, Level 3 pays nothing to originate traffic. Where QCC pays retail private lines rates for transport, Level 3 demands free transport (and even if it loses on that issue, it would only pay TELRIC-rated LIS

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[155] Qwest Br. ¶¶ 99-100.

[156] Staff Br. ¶¶ 88-89.

[157] Level 3 Br. ¶ 73, ELI BR, pp. 20-21; Jt. CLEC Br. ¶¶ 38-39.

[158] *Iowa Level 3 Order,* 2006 WL 2067855, at *18.

[159] Level Br. ¶¶ 74-77.

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transport). Where QCC may not demand terminating compensation, Level 3 demands terminating compensation on all ISP minutes. Thus, with Wholesale Dial, cost causation and cost recovery are aligned. With VNXX, cost causation and cost recovery are not aligned. With VNXX, costs are not recovered from the cost causer.

III. VNXX POLICY CONSIDERATIONS

A. Cost Issues

87. Several CLECs claim that it costs Qwest no more to deliver a VNXX call to a CLEC POI than to deliver a local voice call to a CLEC POI.[160] Qwest already addressed this argument in its opening brief,[161] and will not repeat its full response here. Suffice it to say that the cost issue is a red herring. The real question is which existing intercarrier compensation model applies to the traffic in question. Just as the cost is no different between the two calls described above, it also costs no more to deliver a "1+" call to an IXC POP, but that does not mean the IXC need not pay access charges. Qwest, along with everyone else in the industry, supports changes to intercarrier compensation, but until those changes are made for the *entire industry*, it would be extremely shortsighted policy to allow one group of carriers to operate under its own set of highly advantageous rules.

88. The Joint CLECs dismiss the concern that widespread VNXX could impact local exchange rates.[162] Their two arguments are (1) that it costs no more to deliver VNXX traffic to a CLEC POI than to deliver a local call and (2) there is no evidentiary basis for a concern about pressure to increase basic rates. Both arguments miss the point. They ignore another important fact: that

[160] Level 3 Br. ¶¶ 79-84, ELI BR., pp. 22-23; Jt. CLEC Br. ¶¶ 41-45.

[161] Qwest Br. ¶¶ 102-05.

[162] Jt. CLEC Br. ¶¶ 44-45.

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if VNXX eliminates the local/toll distinction, toll calling (and thus access charges) will suffer drastic reductions, if not complete elimination. Thus, the cost support from access charges will also be eliminated or greatly diminished. CLECs typically criticize access charges as subsidy-laden.[163] If one accepts that as true, then the elimination of such charges will place pressure on benefited services such as local exchange service. The issue, therefore, is not the cost of delivering a call to a POI, but the elimination of a revenue stream that helps cover some of the costs of local exchange service that benefits all local exchange customers, not the limited subset of dial-up ISP customers. Qwest's position does not require a cost study—it is simply a matter of common sense. If one significant revenue source goes away, all other things being equal, it will place pressure on other prices. The FCC shares the same concern. In commenting on the various cost recovery alternatives for ISP traffic, the FCC noted that "ILECs might recover these costs from all of their local customers, including those who do not call ISPs," but then rejected that idea with the following unequivocal statement of policy: "There 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."[164]

B. Impact on Access Regime/Impact on Competition

1. Access Charges

89. Not surprisingly, all the CLECs argue that access charges should not apply to VNXX traffic. As *Global NAPs II* points out, access charges are the appropriate compensation regime for interexchange traffic, and VNXX is interexchange traffic. But there are clear alternatives to access charges. First is the QCC model, where PRIs and private lines are purchased does not

[163] Level 3 acknowledges that access charges are a support mechanism for basic services. Level 3 Br. ¶ 88.

[164] *ISP Remand Order* ¶ 87.

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involve access charges. Second, a CLEC may opt into the Verizon agreement and avoid access charges. Third, the Commission could adopt the Oregon approach where VNXX traffic is allowed, no access charges are applicable, but CLECs can collect no terminating compensation and are required to pay for private line transport.[165] Finally, there is the Staff proposal, which is similar to the Oregon approach except that TELRIC-rated transport could be used for ISP traffic (and no access charges or terminating compensation is allowed on qualifying VNXX traffic).

90. Thus, the CLECs' hue and cry about access charges is simply that, a meaningless description of a worst case scenario that, given the variety of alternatives available, need never take place. However, the critical point is one of proper cost recovery. For example, Qwest recognizes that, short of the imposition of access charges, it is unlikely to be able to recover its originating costs for ISP traffic. If pure cost recovery issues were followed, such a mechanism (which need not be originating access) would be put in place. However, to the extent such a mechanism is not put in place and Qwest must forego recovery of originating costs, it would be the height of unfairness to allow CLECs to recover any kind of terminating charges on the same traffic.

2. Competition.

91. For precisely the same reasons articulated in the preceding section, there is no reason that rejecting the CLECs' position will harm competition. Yet, at the same time, it would be inappropriate for the Commission's to engage in a process of handicapping competitors, assuring that some win and others lose. The CLECs argue that compensation should be based on economic efficiency. Mr. Williamson quite correctly says that the rules are the rules, and should be followed. The fact that the CLECs' network structures do not lend themselves to a real FX service is a choice of their own making. All of them have regulatory staffs well versed

[165] *Oregon Level 3 Order*, 2007 WL 978413, at *28.

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in intercarrier compensation. All of them have participated in the FCC's intercarrier dockets, either directly or through trade organizations. Yet they chose to build their networks as they did, and they, not Qwest, should bear the intercarrier compensation implications of their decisions. Having made those decisions, the CLECs now want it both ways. They tout their highly efficient, highly centralized networks, but want to be treated as though they built a network like Qwest's—which, ironically, they are quick to condemn as outmoded and inefficient. It would be grossly unfair to allow them to build one network and then, for compensation purpose, be treated as though they had built another purely hypothetical network.

C. Consumer Impact

92. There is no reason that the decisions of the Commission in this docket should spell the end of dial-up service in Washington. The Colorado experience confirms this. Several years ago, the Colorado commission ruled that ISP traffic is exchanged at a zero termination rate and that CLECs must pay TELRIC-priced transport for ISP traffic. Nonetheless, Level 3 (and other carriers) continue to serve ISPs in Colorado. Tr. 607-09. In fact, of all the Qwest states, more minutes are exchanged between Level 3 and Qwest in Colorado than in any other state. Tr. 607:10-15.

93. Finally, as a matter of policy, the Commission should be adopting policies that encourage less dial-up and more broadband use. That does not mean that dial-up should be priced out of the market (and there is no evidence that it will be), but it does mean that the costs of dial-up should be borne by dial-up end users and the ISPs who benefit from their business relationship. It likewise means that Qwest should not be the subsidizer of dial-up access to the Internet.

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D. Impact on Independent ILECs

94. WITA's brief supports the positions of Qwest with one exception—its position on the Verizon settlement, which is addressed by Verizon.

E. Other Public Policy Considerations

95. Two issues bear brief comment. First, ATI argues that if VNXX is found unlawful, then the question of the proper pricing scheme is not before the Commission and should be decided in a separate docket.[166] Qwest disagrees. There is absolutely no need for a separate pricing docket to institute a bill-and-keep regime for terminating compensation. With regard to transport, two rates are already established, private line transport rates, and TELRIC-rated LIS transport.

96. Second, TCG argues that FCC is well down the road to resolving these issues in its intercarrier compensation docket; thus TCG suggests that the Commission wait for the FCC to act, but in the meantime allow VNXX, but require a bill-and-keep regime.[167] The fact is that we just passed the sixth anniversary of the April 2001 NPRM that began the FCC's intercarrier compensation docket, and no end appears imminent. While TCG's proposed bill-and-keep approach is a sensible one for terminating compensation, there are more issues in this docket than terminating compensation. Other commissions have acted on these issues and there is no reason that the Washington commission should push these important current issues into the future.

IV. STAFF PROPOSAL

97. Qwest will address only one issue regarding the Staff proposal, which is Level 3's claim that mandatory bill-and-keep is both bad policy and unlawful.[168] Qwest has already addressed why

[166] ATI Br, at p. 2.

[167] TCG Br. ¶¶ 27-28.

[168] Level 3 Br. ¶¶ 99-102, 107-09.

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bill-and-keep makes sense from a policy and cost causation perspective. However, Level 3's claim that mandatory bill-and-keep is unlawful has no legal or logical support. First, Level 3, following its usual pattern, cites no legal authority for this proposition. Second, the *ISP Remand Order* made it clear that the $.0007 rate for local ISP traffic is a "cap," which implies that anything below that is also lawful.[169] Indeed, the *ISP Remand Order* noted that the interim regime it was adopting was merely a step toward bill-and-keep. Qwest is unaware of any party ever having challenged the legality of that policy. Third, bill-and-keep has been required in both Iowa and Colorado for years. In fact, the commissions in both states recently issued orders in the Qwest/Level 3 arbitrations, and Level 3 made no argument in either that mandatory bill-and-keep was unlawful. Further, the Colorado bill-and-keep policy has been reviewed in federal court and found to be lawful.[170]

V. QWEST/VERIZON ACCESS SETTLEMENT

98. Qwest addressed the details of the rationale of its settlement with Verizon in its opening brief and will not repeat those points.[171] However, Qwest will address points made by Level 3 and the Joint CLECs. Verizon will address the issue raised by WITA.

99. Level 3 makes the incomprehensible argument that the settlement discriminates against it because Verizon has a low level of VNXX.[172] This, Level 3 says, skews the agreement in favor

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[169] *ISP Remand Order* ¶¶ 7-8.

[170] *Colorado Level 3*, 300 F.Supp.2d at 1079-81. In 2005, the Colorado federal district court rendered an unpublished decision in *AT&T Communications v. Qwest Corp.*, Civil Action No. 04-cv-000532-EWN-OES (D. Colo., June 10, 2005) (Attached as Attachment A), wherein the court, following its earlier decision, rejected a claim that the Colorado commission had erroneously imposed the cost of transporting ISP traffic on AT&T (the CLEC). (Attachment A, at pp. 21-26). The court also specifically addressed the lawfulness of imposing a bill-and-keep regime on ISP traffic, finding that it was completely consistent with the *ISP Remand Order.* (Attachment A, at pp. 11-16).

[171] Qwest Br. ¶¶ 113-23.

[172] Level 3 Br. ¶ 117.

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of carriers like Verizon. The response to that is quite simple. If the agreement is not advantageous to Level 3 then it should not opt into it. But just because a negotiated ICA between two parties (neither of whom have an incentive to do anything other than protect their own business interests) is not equally alluring to Level 3 does not establish discrimination, and it does not mean that Level 3 has no other options, including operating under the ICA that the Commission is in the process of establishing in Washington or opting into another agreement. But the fact that Verizon has agreed to terms that Level 3 does not like does not even begin to establish unlawful discrimination.[173]

100. The Joint CLECs raise no objection to the overall agreement, but claim that the requiring a region-wide opt in is discriminatory.[174] They cite no authority for this proposition. The Verizon agreement was negotiated on a 14-state basis, and its provisions require that its terms be set on the basis of region-wide traffic studies, which are essential to develop the unitary rate. Because those are essential terms, any opt in must be on the same basis, or a CLEC will be able to opt in where it is of greatest advantage, and not opt in where it is not to its advantage. In that circumstance, the opt in would not meet the current rules requiring complete opt in to an ICA. The result, ironically, would be discriminatory to Qwest and Verizon. Finally, to the extent the Joint CLECs are concerned that only companies that currently operate in all fourteen states would be able to opt in, that is not the case. All the CLEC would need to do is enter the ICA based on all states (within the fourteen states) in which it operates and if it enters the market in other states thereafter its relationship in that state would be subject to the agreement.[175]

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[173] While the Colorado commission has not yet ruled on Level 3's challenge to the settlement, it recently rejected Level 3's request for a stay from the requirement to file a compliant ICA in the Qwest/Level 3 arbitration docket.

[174] Jt. CLEC Br. ¶¶ 60-62.

[175] Finally, it is worth noting that two other parties—ELI and TCG—express no opposition to the settlement. If

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VI. CARRIER SPECIFIC ISSUES

A. Level 3 / Broadwing Counterclaim

1. General Issues

101. Broadwing's claim for past due amounts is unsubstantiated. Broadwing's evidence consisted only of invoices and general statements with regard to its billing systems. This level of proof is insufficient. In order to prevail, Broadwing must establish that it accurately billed Qwest only those minutes originated on Qwest's network and terminated to Broadwing customers, and, for traffic billed as local, Broadwing must establish that all of those minutes are local minutes. Broadwing has established neither. The minutes billed to Qwest are either non-local VNXX, or they are more likely than not, transiting minutes that are not billable to Qwest. Broadwing's arguments regarding the accuracy and reliability of its billing systems are irrelevant, as Broadwing's witness McNeil admitted that the accuracy of the systems was evaluated only insofar as they processed data, but that no audit had been conducted with regard to the accuracy of the data inputs. Tr. 693-94. It is those inputs that Qwest believes are flawed, thereby producing bills that overstate Qwest's financial responsibility to Broadwing on some traffic.

2. VNXX Traffic

102. Qwest has established that VNXX traffic between two exchanges (in other words, interexchange traffic). Qwest's tariffs define local calls as those calls that originate and terminate within the same LCA, and Broadwing is bound to that definition under the parties' ICA.[176] Broadwing candidly admitted that it rates calls based on the dialed numbers, and therefore some portion of

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they viewed the agreement as discriminatory or detrimental to them, one can reasonably assume that they would have objected to it.

[176] Exhibit 242, at p. 7 (Section III.PP): "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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the minutes billed are VNXX and therefore not local minutes. Thus, consistent with Qwest's argument in its opening brief,[177] Qwest has established that the minutes billed by Broadwing and disputed by Qwest are tainted with non-compensable VNXX traffic. Broadwing failed to meet its burden of proving that its invoices reflect only local traffic or Qwest-originated toll for which access charges are due.

103. Broadwing turns the burden of proof requirements on their head. Broadwing claims that because *Qwest* cannot identify the VNXX traffic with any certainty, Qwest should lose on the counterclaim.[178] However, that is not the standard in complaint cases at the Commission. Qwest has the burden of proof on its complaint. But as a counterclaimant, Broadwing has the burden of proof for its claims, and must establish that the traffic is compensable.[179] Proving that it billed Qwest, which is all Broadwing has done, is not sufficient.

104. Furthermore, Broadwing misunderstands or has misinterpreted how Qwest determined that portions of Broadwing's traffic is VNXX. Qwest used the switch location as one indicator that traffic is not local, but also looked at whether traffic was in balance or not, and specifically stated that the switch location was not determinative.[180] Traffic that is wildly out of balance indicates that Broadwing does not have customers in the LCAs in which much of the VNXX traffic is originated – if they did, then traffic would flow both ways and would not be identified as VNXX. And, while Broadwing speculates that Qwest might improperly categorize a Tacoma-to-Tacoma call as VNXX, the fact is that Broadwing is only speculating—it provided

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[177] Qwest Br. ¶ 150-52.

[178] Broadwing Br. ¶ 36.

[179] The party making a claim is the moving party and therefore bears the burden of proof to establish its claim. Fifth Supplemental Order, *GTE Northwest v. Whidbey Telephone Co,* 1996 WASH. UTC LEXIS 23, at *814-*15 (WUTC, April 2, 1996).

[180] Direct Testimony of Larry Brotherson, Exhibit 1T, at pp. 45-47.

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no evidence on that point. Qwest filed its evidence regarding VNXX in November 2006, and Broadwing had ample opportunity to rebut that evidence or bring forth facts tending to establish that it was not using VNXX, or even that it had customers in certain LCAs whose traffic was allegedly miscategorized by Qwest, yet Broadwing did none of these things.[181] Indeed, as noted above, Broadwing admits to using VNXX routing.

105. Broadwing claims that Qwest's VNXX analysis is an "educated guess."[182] This is not true. Qwest demonstrated, with detailed testimony that its method for determining VNXX traffic is reliable and accurate. Qwest used a three step process to determine if traffic was VNXX and, if the study showed VNXX to be used, it estimated the quantities.[183] Mr. Brotherson provided a detailed description of the methodology and how it was used make a conservative estimate of VNXX traffic by carrier.[184]

106. Broadwing's argument that Qwest's methodology is unreliable is disingenuous. All Broadwing is really saying is that because Broadwing and other CLECs are *so good* at disguising interexchange traffic, there can be no remedy for Qwest, because Qwest has not perfectly cracked the code for deciphering what traffic is VNXX and what traffic is really local. In response to such an argument, Qwest suggests that that is why Qwest's first request for relief in this matter was to outlaw the practice entirely. However, the bottom line is that simply because some carriers are particularly ingenious about breaking the law, it does not mean that they should be allowed to continue to do so or to hide behind any ambiguities they created.

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[181] Qwest's evidence regarding Broadwing specifically is contained in Exhibits 9 and 13. See Direct Testimony of Larry Brotherson, Exhibit 1T, at pp. 50-52. Broadwing did not deny the accuracy of this testimony, which was based on Broadwing's responses to discovery requests.

[182] Broadwing Br. ¶ 37.

[183] Direct Testimony of Larry Brotherson, Exhibit 1T, at pp. 45-46.

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3. Pre-*Core* Billing

107. There is no provision in the parties' amendment that states that the caps are not effective after December 31, 2003. Broadwing's arguments that the caps "self-destructed" either by virtue of the language of the *ISP Remand Order* or by virtue of language in the ICA (language that is identical to that in the *ISP Remand Order*) are without merit. Broadwing's arguments, as discussed in Qwest's opening brief,[185] are (1) inconsistent with how Broadwing itself interpreted the ICA, (2) are inconsistent with all parties' advocacy in the Core case, and (3) are inconsistent with the FCC's decision in the *Core Forebearance Order*. Furthermore, as with much of the other traffic at issue, the "pre-*Core*" minutes are likely VNXX minutes, and not compensable, even if the caps were not in place. Broadwing's argument that the parties agreed in the ICA to end the caps, separate and apart from the *ISP Remand Order's* provisions,[186] is not supported in the record. Qwest refuted that interpretation of the ICA, and Broadwing did not at the time it claims that the caps ended, or otherwise act in a manner consistent with the interpretation it now supports. Indeed, Broadwing's behavior is consistent with the intent of the parties that the caps were to continue. Broadwing's failure to bill Qwest for these minutes until many months later corroborates that interpretation. Broadwing's current position in a *post-hoc* attempt to re-write the ICA in way that Qwest never agreed to and that is inconsistent with all other evidence.

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[184] *Id.*, at pp. 45-49, Exhibits 9 & 13.

[185] Qwest Br. ¶¶ 147-49.

[186] Broadwing Br. ¶ 39.

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4. Transit/Third Party Traffic

108. On this issue, Broadwing again attempts to shift the burden of proof to Qwest, claiming that Qwest has supported its case only with "guesswork."[187] In fact, Broadwing has failed to provide persuasive evidence or establish sufficient facts to allow the Commission to conclude that Broadwing is entitled to be compensated for the minutes it has billed. Broadwing has only provided invoices and conclusory allegations. And, even though Broadwing claims to exclude transit traffic, Broadwing does not explain how it might have done so prior to the end of 2005, when Broadwing first began purchasing transit records from Qwest. Tr. 723:8-11. Indeed, if it did not need transit records in order to exclude that traffic, Broadwing has offered no other reason as to why it is purchasing those records today. Simply because Qwest's witnesses used the words "believe" and "suspects" and "most likely" does not mean Qwest is guessing. It means that based on the research that Qwest did – detailed in the testimony – Qwest reached rational and defensible conclusions about this traffic. Qwest's evidence is more than sufficient for the Commission to reach the same conclusions.

B. Global Crossing Counterclaim

109. Global Crossing ("Global") discusses its counterclaim in just under two pages in its Opening Brief.[188] Global and Qwest agree that all of the disputed minutes are associated with VNXX traffic. For all the reasons set forth elsewhere in this brief, and in response to Level 3's counterclaim in particular, VNXX minutes are not compensable as local traffic and therefore Qwest, as a matter of law, owes nothing to Global.

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[187] *Id.* ¶ 41.

[188] Jt. CLEC Br. ¶¶ 64-66.

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110. Furthermore, Global's brief demonstrates its confusion. For example, in one paragraph, Global makes a point of the fact that Qwest has agreed that the traffic is VNXX,[189] but in the next paragraph Global contends that Ms. Peters' testimony establishes that the traffic is not VNXX.[190] However, regardless of what Ms. Peters said in her prefiled testimony, the weight of the evidence establishes that Global is providing VNXX service, or some variation of VNXX that allows it to avoid otherwise applicable access charges. Global admits that it would rate a call based on dialed numbers, not the geographic location of the customers. Tr. 665:21-666:13. Yet Global admits that the ICA between Global and Qwest mandates that Qwest's tariffs determine whether a call is local for purposes of the ICA, Tr. 672:1-10, and Qwest has previously established that its tariffs determine whether a call is local based on geographic location of customers. Global further admits that it allows its own customers to call throughout the LATA without incurring toll charges, Tr. 674:7-11, and that it would route a Seattle to Olympia call over local trunks, not toll trunks. Tr. 675:24-676:4. This practice is what prevents Qwest from being able to identify the calls as toll, because they are interexchange calls improperly routed over local trunks.[191] Thus, it is clear that Global has not established the most critical element of its claim, which is whether the disputed amounts are associated with local traffic. Indeed, Qwest's evidence establishes that this traffic is not local and that Global is not entitled to compensation.

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[189] *Id.* ¶ 65.

[190] *Id.* ¶ 66, citing Peters Direct Testimony, Ex. 441T, at pp. 4-5.

[191] In its recent *Level 3 Final Order*, the Commission refused to allow Level 3 to combine all traffic on LIS trunks, noting that "Level 3 is asking Qwest to use interconnection trunks that have not been designed to carry interexchange traffic," *Level 3 Final Order* ¶ 34. The Commission agreed with the Arbitrator that it would impose significant costs on Qwest to reconfigure LIS trunks to record traffic for billing purposes. *Id.* ¶ 24.

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VII. CONCLUSION/RECOMMENDATIONS

111. 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.

112. 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.

113. Finally, Qwest requests that the Commission, based on the arguments set forth above, rule that the terminating carrier (typically CLECs) be financially responsible for the transport of ISP traffic and, in particular, VNXX ISP traffic.

DATED this 29th day of June, 2007.

QWEST

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