BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

Greg Rogers
Gregg Stumberger
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

Tamar E. Finn
Edward W. Kirsch
Frank G. Lamancusa
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006

Rogelio E. Peña
Peña & Associates, LLC
4845 Pearl East Circle, Suite 101
Boulder, CO 80301

Counsel for Respondent Level 3 Communications, LLC

Dated: June 29, 2007

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. "VNXX" LEGAL ISSUES 2

A. COCAG and Other Industry Guidelines 2

1. Extent to Which Guidelines are Binding on the Commission 2

2. Industry Guidelines and Geographic Issues in Connection with Numbers and Number Assignments 3

3. Exceptions/Industry Practices 4

B. Washington State Statutes, Rules, Orders, Tariffs..................................... 6

1. Washington Statutes Do Not Proscribe FX-Like Services 6

2. FX-Like Services Are Easily Distinguishable from "Toll Bridging" and IP-In-The-Middle.. 9

3. Qwest's Tariff Does Not Prohibit the Exchange of FX-Like Services Traffic Or Somehow Import A Physical Presence Requirement Into Its ICAs with CLECs.......................................13

C. Interconnection Agreements...15

D. FCC/Federal Court/Other State Commission Decisions...........................15

1. The Telecommunications Act 15

2. FCC Orders 20

3. Federal Court Decisions: The 9th Circuit Upheld the California Commission's Decision That Reciprocal Compensation Was Owed for FX-like Traffic, While the 1st and 2nd Circuits Only Decided the State Jurisdiction Issue...27

4. VoIP Preemption/ESP Exemption: The Commission Is Preempted From Imposing a Local Presence Requirement On VoIP Services 29

5. Other State Commission Decisions Have Agreed With The Commission's Prior Decisions Permitting Reciprocal Compensation for Internet Bound And FX-like Traffic.................32

III. VNXX Relationship to Other Services..36

A. Foreign Exchange Service...36

1. CLEC FX-like Services Are Functionally Equivalent to Qwest's FX, OneFlex, Wholesale Dial and Other ILEC FX-like Services ..36

B. VNXX Traffic Is Not The Same As 800 Traffic 38

C. Market Line Expansion Services 39

TABLE OF CONTENTS
(continued)

Page

D. OneFlex & Other Services: Qwest's One Flex Service and Wholesale Dial Are Functionally the Same As CLEC FX-like Services 40

IV. VNXX POLICY CONSIDERATIONS 40

A. Cost Issues 41

B. Impact on Access Regime/Impact on Competition 45

C. Consumer Impact 49

D. Impact on Independent ILECs 51

E. Other Public Policy Considerations 51

V. STAFF PROPOSAL 51

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT 52

A. Standards for Approval of Negotiated ICA 52

B. Terms and Conditions 54

VII. CARRIER-SPECIFIC ISSUES 57

A. Level 3/Broadwing Counterclaim 57

B. Global Crossing Counterclaim 57

C. Other Carriers (Listed Individually) 57

VIII. CONCLUSION/RECOMMENDATIONS 58

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Global NAPS v. Verizon New England, Inc., 444 F.3d 59 (1st Cir. 2006)........................28

Global NAPS, Inc. v. Verizon New England, Inc., 454 F.3d 91 (2d Cir. 2006)................28

MCI Telecomm. Corp. v Bell Atlantic-Pennsylvania, 271 F.3d 491 (3d Cir. 2001).........25

MCIMetro Access *Transmission Services, Inc. v Bellsouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003) 25

Minnesota Public Utilities Commission, et al. v. the FCC, et al. Case Nos. 05-1069, 05-1122, 05-3114, and 05-3118, slip op. (8th Cir. 2007)..........................57

Qwest Corp. et al. v. FCC et al, 252 F.3d 462 (D.C. Cir. 2001) 21

Qwest Corporation v. Washington State Utilities and Transportation Commission et al., Case No. C06-956-JPD, Order Reversing and Remanding the Final Decisions of the WUTC, slip op. (D. Wash. Apr. 9, 2007).................................28

SNET v. MCI WorldCom Communications, Inc., 353 F.Supp.2d 287 (D. Ct. 2005)........35

SNET v. MCI WorldCom, 359 F.Supp.2d 229 (D. Ct. 2005) 35

Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998) 30

Southwestern Bell Tel. Co. v Public Utility Com'n of Texas, 348 F.3d 482 (5th Cir. 2003)..25

U.S. West Communications v MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000)...25

Verizon California, Inc. v. Peevey, 462 F.3d 1142 (9th Cir. 2006) 23, 28

WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002)...16, 17, 19

FEDERAL COMMUNICATIONS COMMISSION DECISIONS

Access Charge Reform, First Report and Order, 12 FCC Rcd 15982 (1997) 30, 31, 49

Administration of the North American Numbering Plan, Order, CC Docket 99-200, FCC 05-20 (rel. Feb. 1, 2005) 6

AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, FCC 04-97 (rel. April 21, 2004) 11-12

Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. April 27, 2001) 32

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (rel. Aug, 8, 1996) 53

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling, CC Docket No. 96-98, 14 FCC Rcd 3689 (1999) 17

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) 16, 20, 21, 42, 48

MTS and WTS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) 31

Numbering Resource Optimization, Report and Order and NPRM, CC Docket No. 99-200 (rel. Mar. 31, 2000) 27

Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, WC Docket No. 03-171, FCC 04-241 (Oct. 18, 2004) 21

Petition of the Oregon Public Utilities Commission et al., 15 FCC Rcd 23371 (2000) 26

Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 (2002) 22, 24

Provision of Access for 800 Service, CC Docket No. 86-10, FCC No. 93-84, 9 FCC Rcd 1423 (rel. Feb. 10, 1993) 38-39

Special Access Rates for Price Cap Local Exchange Carriers, AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking (rel. Jan. 31, 2005) 45

Starpower Communications, LLC v. Verizon South, Inc., FCC No. 03-278, 18 FCC Rcd 23625, Memorandum Opinion and Order (2003) 23

Toll Free Access Codes Database Services Management, Inc. Petition for Declaratory Ruling, CC Docket No. 95-155, FCC 00-237 (rel. July 5, 2000) 38

TSR Wireless, LLC. v. U S West Communications, Inc., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194 (rel. June 21, 2000) 21, 24

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd 22404 (2004) 26

Washington Utilities and Transportation Commission's Petition for Additional Delegated Authority to Implement Number Conservation Measures, NSD File No. 97-42, CC Docket No. 96-98 (filed Dec. 10, 1999) 26

WASHINGTON UTC DECISIONS

Amending, Adopting, and Repealing Rules in Chapter 480-120 WAC, Chapter 480-122 WAC, and Chapter 480-80 WAC Relating to Telecommunications, WUTC Docket No. UT-040015, General Order No. R-516 (Jan. 7, 2005) 3

Determining the Proper Classification of: U.S. MetroLink Corp., Second Supplemental Order, WUTC Docket No. U-88-2370-J, 1989 Wash. UTC LEXIS 40 (1989)...9, 10

Determining the Proper Classification of: United & Informed Citizen Advocate Network, Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, WUTC Docket No. UT-971515, 1999 Wash. UTC LEXIS 125 (1999)...9, 11

Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996, US WEST Communications Inc.'s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996, WUTC Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001) 17

Level 3 v. Qwest, WUTC Docket No. UT-053039, Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level 3's Petition for Interlocutory Review (Feb. 10, 2006).. 17-18

Level 3 v. Qwest, WUTC Docket No. UT-053039, Order No. 6 Denying Petition for Reconsideration (June 9, 2006) 18

Pac-West Telecomm, Inc. v. Qwest, WUTC Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition (Aug. 23, 2005)......................................17

Pac-West Telecomm, Inc. v. Qwest, WUTC Docket No. UT-053039, Order No. 5, Final Order Affirming and Clarifying Recommended Decision (Feb. 10, 2006).......18

Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252, WUTC Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision (Feb. 28, 2003).........................17

Petition for Arbitration of AT&T with Qwest, WUTC Docket No. UT-0333035, Order No. 4, Arbitrator's Report (Dec. 1, 2003) 5

Petition of Level 3 Communications, LLC For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and conditions of Interconnection with Qwest, WUTC Docket No. UT-063006, Order No. 12 (June 7, 2007)...29

Washington Exchange Carrier Assoc., et al. v LocalDial Corp., Order, 233 P.U.R.4th 208 (Wash. U.T.C., June 11, 2004) 11

OTHER STATE PUC DECISIONS

AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago Verified Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Illinois Bell Telephone Co. pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 03-0239, Arbitration Decision (Ill. C.C. Aug., 26 2003) 35

AT&T Communications of Maryland, Inc., Order No. 78724, Case No. 8882 (Md PSC Oct. 17, 2003) 33

AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-2001-455, Arbitration Order (Mo. PSC Jun. 14, 2001) 35

Cablevision Lightpath, Inc., Arbitration Order, Case 03-C-0578 (NY PSC Oct. 30, 2003) 34

Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Co., Docket No. 24015, Order on Reconsideration (Tex. PUC Nov. 4, 2004) 35

Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Co., Docket No. 24015, Order on Clarification (Tex. PUC Jan. 4, 2005) 36

Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service, Docket 28906 (Ala. PUC April 29, 2004) 34

Essex Telecom, Inc. v. Gallatin River Communications, LLC, Complaint and Request for Dispute Resolution, Docket No. 01-0427, Order (Ill. C.C. July 24, 2002) 35

Generic Investigation in re: Virtual NXX Codes, Docket No. I-00020093, Investigation Order (Pa PUC Oct. 14, 2005) 35

Global NAPs Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated, Docket No. 02-0253, Arbitration Decision (Ill. C.C. Oct. 1, 2002) 35

Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Docket 00-0075-TP, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sep. 10, 2002) 35

Opinion, *All Providers of Local and Interexchange Telecommunications Services in the State of Alabama Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket No. 28906 (2004 Ala. PUC Lexis 144) 34

Pacific Lightnet, Inc. Petition for Arbitration, Docket No. 03-0197, Proposed Decision And Order No. 22851 (Haw. PUC Sep. 14, 2006) 34

PacWest Telecom, Inc. v. Qwest Corporation, Docket No. T-01051B-05-0495, T-03693A-05-0495, (Ariz. C.C. June 29, 2006), *appealed*, *Qwest Corporation v. Arizona Corporation Comm'n*, Civil Docket No. 2:06-cv-02130-SRB (Sept. 6, 2006) 34

Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) Concerning Interconnection Rates, Terms, and Conditions, Order No. 79250, Case No. 8882 (Md PSC July 7, 2004) 33, 34

Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan, Case No. U-12382 (Mich. PSC Aug. 17, 2000) 33, 34

Petition of Global NAPs, Inc. for Arbitration of an Interconnection Agreement with Central Telephone Company – Nevada d/b/a Sprint of Nevada, pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. 01-10018, Order (Nev. PUC May 2, 2002) 35

Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Order, Case No. 2000-404 (Ky. PSC Mar. 14, 2001) 34

*Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missour*i, Case No TO-2006-0299, Final Commission Decision (Mo. PSC June 27 2006) 35

Verizon California, Inc., Application 02-06-024, Decision 03-05-075 (Cal. PUC May 22, 2003) 32

FEDERAL STATUTES

2 U.S.C. § 2342(1) 16

47 U.S.C. § 153(16) 19

47 U.S.C. § 153(43) 18

47 U.S.C. § 153(48) 19

47 U.S.C. § 155(c) 22

47 U.S.C. § 202(a) 55

47 U.S.C. § 203 ... 55

47 U.S.C. § 251(b) ... 17, 18

47 U.S.C. § 251(c) ... 24, 37

47 U.S.C. § 251(e) ... 26

47 U.S.C. § 251(g) ... 17

47 U.S.C. § 252(d) ... 43

47 U.S.C. § 252(e) ... 55

47 U.S.C § 253(a) ... 37

FEDERAL REGULATIONS

47 C.F.R. § 52.9 ... 27

47 C.F.R. § 52.15 ... 27

47 C.F.R. § 69.5 ... 30

STATE STATUTES AND REGULATIONS

RCW 80.36.170 ... 9

RCW 80.36.300 ... 48

WAC 480-120-021 ... 14

MISCELLANEOUS

GAO Report 07-80, Report to the Chairman, Committee on Government Reform, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services* (Nov. 2006) ... 45

BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

I. INTRODUCTION

1. Qwest has conceded that if the price is right, CLEC FX-like services are lawful. Staff also implicitly concedes that CLEC FX-like services are lawful, because it argues FX-like services should be permitted for ISP-bound and VoIP traffic. Notwithstanding these concessions, Qwest has wasted the time, money, and effort of the Commission and every party forced to participate in this charade. The Commission should put an end to this and explicitly find, once and for all, that CLEC FX-like services are permitted under state and federal law.

2. The Commission should also continue its policy of requiring equivalent compensation for functionally equivalent services. To hold otherwise would violate federal law. Because CLEC FX-like services are the functional equivalent of ILEC FX services, they should be subject to the same intercarrier compensation rates. As the U.S. Court of Appeals for the Ninth Circuit, the FCC, and many other state commissions have recognized, the standard industry practice requires that intercarrier compensation be determined based on a comparison of

originating and terminating NPA-NXXs, regardless of whether the end user's service is provided by the ILEC or the CLEC.

3. The Commission should reject Staff's proposal, which represents a huge step backward in intercarrier compensation reform. Rather than moving toward a single rate for the identical termination function, Staff proposes to further complicate an already Byzantine system of intercarrier compensation by adding three new classes of traffic: CLEC FX-like voice (prohibited); CLEC FX-like ISP-bound (bill and keep); and CLEC FX-like VoIP (defer to FCC). The Commission should decline Staff's invitation to further complicate intercarrier compensation and uphold its policy that CLEC FX-like traffic is compensated at section 251(b)(5) or ISP-bound traffic rates.

II. "VNXX" LEGAL ISSUES

A. COCAG and Other Industry Guidelines

4. As Level 3 showed in its Opening Brief, FX-like services do not violate the non-binding provisions of the Central Office Code Assignment Guidelines ("COCAG"). Notwithstanding Qwest and Staff arguments to the contrary,[1] FX-like services are an industry exception to COCAG, COCAG is neither a "default" standard nor binding on the Commission, and both the FCC and the Commission have recognized that numbering resources are used for FX-like services without finding that such use has in any way violated the COCAG.

1. Extent to Which Guidelines are Binding on the Commission

5. Qwest calls COCAG more than "mere guidelines because adherence to them is an FCC mandate."[2] However, as Qwest has admitted,[3] only the *North American Numbering Plan Administrator* is required to adhere to the guidelines. States, carriers, and other service

[1] *See* Qwest's Opening Brief, ¶¶ 11-19.

[2] Qwest's Opening Brief, ¶ 13 (citing 47 C.F.R. § 52.13).

[3] *See* Qwest's Opening Brief, ¶ 13.

providers are under no obligation to adhere to the guidelines. Staff recognized this point: the COCAG is important to this proceeding "not because it binds this Commission to any result, but because it defines the commonly understood practice and standard within the industry…."[4] Staff argues that COCAG is a "default" that governs absent an explicit policy choice to deviate from COCAG.[5] However, Staff contradicts itself, admitting that in the past "the Commission has, in effect, authorized VNXX for ISP-bound traffic."[6]

6. Both the FCC and the Ninth Circuit have recognized that standard industry practice is to define "local" calling areas by NPA-NXX. Staff admits that a state may define the "local" calling area for purposes of intercarrier compensation based on a comparison of NPA-NXXs.[7] This is precisely what the Commission has done in prior cases and should do so again here.

7. In sum, Qwest and Staff have admitted that COCAG are in no way binding on this Commission. The Commission has previously rejected attempts by parties to foist industry guidelines upon the Commission without Commission review and affirmative approval, and it should do so again here.[8] The Commission has not adopted the COCAG by reference in WAC 480-120-999 and it should decline to do so in this proceeding. Because the COCAG are guidelines, not "regulations," the Commission should reject Qwest's arguments.

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

8. A careful review of the COCAG demonstrates its general inapplicability to the

---

[4] Commission Staff's Opening Brief, ¶ 31.

[5] Staff Opening Brief, ¶ 30-1.

[6] Commission Staff's Opening Brief, ¶ 54.

[7] Staff Opening Brief, ¶ 29.

[8] *Amending, Adopting, and Repealing Rules in Chapter 480-120 WAC, Chapter 480-122 WAC, and Chapter 480-80 WAC Relating to Telecommunications*, WUTC Docket No. UT-040015, General Order No. R-516, ¶ 45 (Jan. 7, 2005).

issues presented in this proceeding. First, the COCAG guidelines recognize that the geographic basis for the administration of numbering resources is an *assumption* of the guidelines, *not a requirement* of the guidelines.[9] Further, the COCAG do not concern call *rating*, but rather focus exclusively on call *routing*. Specifically, the COCAG note that while the numbering code scheme is used to route calls, it is not necessarily used to rate calls.[10] Finally, the industry guidelines for assignment of telephone numbers to end user customers are not found in the COCAG, but are instead found in a separate document: *Guidelines for the Administration of Telephone Numbers*.[11] These guidelines contain several requirements for assignment of numbers – such as a requirement for sequential number assignment and restrictions on reserving numbers – but they have no provision restricting the use of numbers on a geographic basis. In sum, the guidelines established in the COCAG have no relevance whatsoever to the provision of FX-like services, or the assignment of telephone numbering resources to end users, notwithstanding Qwest's and Staff's arguments to the contrary.

3. Exceptions/Industry Practices

9. In any event, the COCAG provides exceptions to its general, non-binding assumptions. The Commission has previously found "VNXX" service is

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

[9] "It is *assumed* from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customers premise physically located in the same rate center that the CO codes/blocks are assigned." COCAG, § 2.14 (emphasis supplied).

[10] COCAG § 2.1 states: The NANP is the basic numbering scheme for the public switched telecommunications networks in the nineteen countries that are participants in the North American Numbering Plan. NANP resources are used to route calls to subscriber terminals, and *may* be included in the call record for the purpose of rating calls. (emphasis supplied).

[11] *See* Industry Numbering Committee, *Guidelines for the Administration of Telephone Numbers* (Aug. 15, 2003), available at: http://www.atis.org/inc/docs/finaldocs/TN-Administration-Guidelines-Final-Document- 8-15-03.doc.

Act of 1996.[12]

10. Qwest and Staff try to hide behind the fact that FX-like services are not explicitly listed as an exception in the COCAG[13] (or that FX-like services have not been explicitly recognized as an exception through industry fora). However, the fact that this Commission has already recognized the functional equivalence between FX and FX-like services means that it has implicitly, if not explicitly, recognized an exception to COCAG.

11. Implicitly admitting that the guidelines contemplate other, unstated exceptions, Qwest argues that "widely used" industry practices cannot be an unstated exception in the COCAG.[14] "VNXX is far too widely used by CLECs, and those serving ISPs in particular, to be something that can fairly be described as an 'exception.'"[15] Qwest contrasts its unfounded and unsubstantiated estimate of CLEC VNXX use—"VNXX use is … widely used by CLECs and those serving ISPs…"—with its FX service—only 0.22% of its 1.8 million access lines in Washington are used for FX services —ignoring the numerous other FX-like services that Qwest provides. Apart from the fact that Qwest has not and cannot quantify the number of CLEC FX-like access lines, Qwest also cannot unilaterally define what qualifies as an "exception." One could just as easily argue that FX service is "widely used" because nearly all ILECs include an FX product in their tariff.

12. Moreover, under Qwest's logic, nomadic VoIP services, which are also "widely used" in Washington, could not be an exempted service under COCAG. Dozens of nomadic VoIP providers are currently using numbering resources to provide numbers to end users in areas

---

[12] *Petition for Arbitration of AT&T with Qwest*, WUTC Docket No. UT-0333035 ("*AT&T Arbitration*"), Order No. 4, Arbitrator's Report, ¶ 36, n.20 (Dec. 1, 2003) (emphasis supplied).

[13] *See* Qwest's Opening Brief, ¶ 20.

[14] Qwest's Opening Brief, ¶ 20.

[15] Qwest's Opening Brief, ¶¶ 11-20.

outside of the rate center where those numbers are "assigned," and have even been given the right to obtain numbering resources directly from NANPA to do so.[16] Yet Staff has recognized that this VoIP industry practice does not violate COCAG.[17]

13. In sum, Qwest's arguments that the COCAG only allows one exception for FX services ignores this Commission's determination that FX and FX-like services are functional equivalents, ignores the plain language of the COCAG that permits other unlisted exceptions, and fails to recognize the non-binding nature of the COCAG on this Commission in the first place.

B. Washington State Statutes, Rules, Orders, Tariffs

14. Qwest spends numerous pages in its brief claiming that CLEC FX-like services violate Qwest's tariffs and state law. Yet in the same brief, Qwest tries to tie the lawfulness of the service to intercarrier compensation: "VNXX traffic is and remains unlawful when both carriers who participate in the origination and termination of the VNXX traffic have not agreed to the terms and conditions for the exchange of that traffic."[18] Qwest does not even purport to explain how the law and its tariffs could be applied to make the same service lawful or unlawful depending on how carriers compensate each other for the exchange of traffic. This is further proof that Qwest's arguments are specious and without merit.

1. Washington Statutes Do Not Proscribe FX-Like Services

15. Qwest makes no factual or legal showing that use of FX-like services in any way violate the statutory sections it cites and quotes in its Opening Brief.

[16] *Administration of the North American Numbering Plan*, Order, CC Docket 99-200, FCC 05-20 (rel. Feb. 1, 2005) ("*SBC-IS Order*").

[17] *See* Commission Staff's Opening Brief, ¶ 70.

[18] Qwest's Opening Brief, ¶ 116.

16. With respect to RCW 80.36.80,[19] Qwest appears to be arguing that use of FX-like service, in and of itself, is not "fair, just, and reasonable" because competitive carriers such as Level 3 do not impose an "additional" charge for locally dialed ISP-bound traffic.[20] However, Qwest provides no basis for alleging that FX-like services are anything other than "fair, just, and reasonable." Level 3 denies that it does not charge its customers for services rendered, including any numbering and routing services provided. Offering free service is simply not a viable business model. Qwest may not use its own services as a benchmark to argue that all FX-like services must impose an additional charge for the FX-like number assignment practice and/or network configuration. Federal law prohibits such discrimination and instead requires that no statute or regulation discriminate based on differences in incumbent and competitive networks. In short, the measure of what is fair, just and reasonable is not, and may not be, whether Qwest is able to compete with its competitors on price.

17. Qwest also cites RCW 80.36.140, claiming that Level 3's FX-like services are unjust and unreasonable in that they require Qwest "to incur costs that should be compensated by the Respondents, who may then more appropriately obtain compensation from their end users."[21] But RCW 80.36.140 does not prescribe the conduct of any carrier. Rather, it sets forth statutory requirements (placed on the Commission) *after* the Commission determines that a violation of another provision has occurred. Because Qwest cannot show that FX-like services are proscribed, there is no basis for Qwest's claim that the Commission should adjust the rates for its competitors' FX-like services. Second, Qwest makes no showing that Level 3's alleged activity requires Qwest to incur costs, or how such activity violates the dictates of RCW

[19] *See* Qwest's Opening Brief, ¶ 23.

[20] *See* Qwest Complaint, at 5.

[21] *See* Qwest's Opening Brief, ¶ 24.

80.36.140. To the contrary, as admitted by Qwest's Mr. Brotherson[22] and Staff's Mr. Williamson,[23] a LEC's use of FX-like services does not require the originating LEC to incur any additional costs. In sum, that provision is wholly inapposite to the issues before the Commission, and there is no basis to claim that Level 3 has in any way "violated" that provision.

18. Similarly, Qwest claims that Level 3 has violated RCW 80.36.160 through the use and promotion of FX-like services.[24] "Respondents are engaging in unreasonable practices, resulting in a failure to utilize the toll networks of all telecommunications carriers equitably and effectively, in violation of RCW 80.36.160."[25]

19. Again, RCW 80.36.160 is not a provision that prescribes conduct, it simply states that the Commission may require certain carrier action *after* an investigation. As such, there is no basis for Qwest's claim that Level 3 violated this provision. Further,, the Commission should not "prescribe" different interconnection, routing, or intercarrier compensation for FX-like services. Instead, all FX-like services should be rated and routed just as all other locally-dialed calls are rated and routed. Qwest makes no showing that Level 3's FX-like services result in a failure to utilize the toll networks of all telecommunications carriers equitably and effectively. But for FX-like services, these calls would not be placed. No end user is going to place a toll call to reach an ISP. Elimination of FX-like services would therefore not result in additional toll calls, but instead would result in a restricted market for ISP services in rural areas in Washington, most likely inuring to the benefit of the ISP's affiliated with Qwest and other incumbent LECs in Washington. In sum, RCW 80.36.160 has no requirements that Level 3

[22] *See* Brotherson, TR. 401:10-402:3.

[23] *See* Williamson, TR. 453:16-21.

[24] *See* Qwest's Opening Brief, ¶ 25.

[25] *Id.*

could have violated, and Qwest's arguments to the contrary are specious.[26]

20. Finally, Qwest claims that Level 3 has violated RCW 80.36.170 through the use of FX-like services because Qwest claims that such services "avoid proper payment of access charges and/or toll rates."[27] However, Qwest ignores the statute's key qualification: "*This section shall not apply to contracts offered by a telecommunications company classified as competitive or to contracts for services classified as competitive under RCW 80.36.320 and 80.36.330.*"[28] In Washington, Level 3 is a competitively classified telecommunications company. As such, this statutory provision is wholly inapplicable to Level 3's provision of FX-like services.

21. In sum, just because a statute uses the phrase "fair, just and reasonable," or variants thereof, it does not prohibit the provision of FX-like services. Qwest has pointed to no statute that prescribes FX-like services. Nor has Qwest shown that FX-like service is unfair, unjust, or unreasonable, as those terms are used in each respective statute. Qwest's arguments that these statutory provisions are in any way applicable to FX-like services are wholly unfounded, and should be dismissed by the Commission.

2. FX-Like Services Are Easily Distinguishable from "Toll Bridging" and IP-In-The-Middle

22. The "toll bridging" cases that Qwest and WITA rely on[29] are irrelevant to this

---

[26] Further, Level 3 denies that it is offering a toll service requiring the use of Qwest's toll networks. At no point does a locally dialed call originated by a Qwest end user customer destined for a Level 3 customer make use of Qwest's toll networks. The call is carried via Qwest's local facilities to the Level 3 POI in Seattle, at which point Level 3 is responsible for transport and termination of the call, using Level 3 and not Qwest facilities. Qwest is in essence seeking payment for services that it has not rendered.

[27] Qwest's Opening Brief, ¶26.

[28] RCW 80.36.170 (emphasis supplied).

[29] *SeeDetermining the Proper Classification of: U.S. MetroLink Corp.*, Second Supplemental Order, WUTC Docket No. U-88-2370-J (1989), 1989 Wash. UTC LEXIS 40 ("*MetroLink*");*Determining the Proper Classification of: United & Informed Citizen Advocate Network*, Fourth Supplemental Order, Commission Decision and Final Cease and Desist Order, WUTC Docket No. UT-971515 (1999), 1999 Wash. UTC LEXIS 125 ("*U & I CAN*"). *See also* Qwest's Opening Brief, ¶¶ 30-36.

proceeding. The FX-like service provided by CLECs is nothing like the "toll-bridging" undertaken by MetroLink and U & I CAN. First, the *MetroLink* order cited by Qwest involved a Commission finding that an interexchange service provider (*i.e.*, a "toll bridger") was subject to Commission regulation. The case did not turn on the propriety of MetroLink's service.[30]

23. Likewise, the *U & I CAN* case also involved the Commission's determination that a service provider did, in fact, provide a regulated telecommunications service. While the Commission in that case found the practice of "toll bridging" to be unlawful, the method by which MetroLink and U & I CAN provided their services are in stark contrast to CLEC FX-like services at issue in this proceeding:

> MetroLink manufactures, sells and leases a device known as a Telexpand. The Telexpand receives, translates, controls and directs transmission of signals to and through the central office switching equipment of the local exchange company to recreate a call conferencing or call forwarding function. MetroLink markets a service which allows subscribers to bridge overlapping EAS areas, thereby avoiding toll charges. The subscriber places a call to the Telexpand number. When the Telexpand answers, the subscriber enters a personal identification number which is checked for authorization and recorded for billing purposes. The Telexpand forwards the number to the U S WEST central office, which treats the request as an original local call and dials the requested number. The Telexpand then drops off the line. The net result is that toll charges are avoided by the caller.[31]

Further,

> U & I CAN operates its telecommunications system by using call-forwarding features it (or its members on its behalf) purchases from the local exchange company. U & I CAN uses a personal computer containing a voice mail card. When the computer receives a call, the voice mail card will "flash hook" and redial. The software in the computer answers calls and requests the calling party to identify the party being called. To complete the EAS bridge, the voice mail card in U&I CAN's computer transmits a series of three tones to the calling party. In response, the calling party enters his or her personal identification number. The computer gives another audible tone, at which signal, the calling party then enters

[30] Qwest also acknowledges that there are technical differences between "toll bridging" and CLEC FX-like services. Qwest's Opening Brief, ¶ 31. If the "technical differences" are irrelevant to the toll bridging comparison, then Qwest's FX service is also like toll bridging and should similarly be prohibited by the Commission.

[31] *MetroLink*, *29.

the telephone number of the party being called. The computer transmits a final series of tones to the calling party, who is then connected with the party being called.[32]

24. CLEC FX-like services do not rely on retail services provided by ILECs, nor do they "bridge" between different calling areas. Instead, CLECs use their own switches and facilities to provide these services, which operate as functional equivalents to ILEC FX services. Like Qwest, CLEC FX-like services pay for the transport to the answering location, and do not ride over ILEC facilities without compensation. The DEOT/DTT interconnection trunks utilized by CLECs to transport VNXX calls are functionally equivalent to the PRI trunks used by Qwest in its FX-like services. Further, unlike the toll bridgers, CLEC local interconnection transport facilities establish a "local" presence in the local calling area. From a technical perspective, Level 3's use of a point of interconnection ("POI") and/or direct end office transport to assume responsibility for the transport and termination of FX-like traffic demonstrates the fundamental difference between FX-like services and toll bridging. In short, the manner in which CLECs and "toll bridgers" provide their respective services is fundamentally different.

25. If the test is whether an end user can make a call across exchanges without incurring toll charges, then Qwest's FX service "has precisely the same effect as toll bridging" and Qwest should not be permitted to avoid access charges "simply because technological or legal loopholes might allow such avoidance."[33] However, that is not the test established by the Commission. Qwest has shown no improper use of its network. The Commission should reject the toll bridging analogy.

26. CLEC FX-like services are not akin to "IP-in-the-middle" services either.[34] "IP-

[32] *U & I CAN*, *8-*9. (internal citations omitted).

[33] Qwest Opening Brief, ¶ 30.

[34] WITA's Opening Brief, ¶ 7. *Washington Exchange Carrier Assoc., et al. v LocalDial Corp.*, Order, 233 P.U.R.4th 208 (Wash. U.T.C., June 11, 2004) ("*LocalDial*"); *AT&T's Petition for Declaratory Ruling that AT&T's*

in-the-middle" is a VoIP call that begins in time division multiplex ("TDM") format on the PSTN, is routed to a computer gateway and converted into Internet Protocol ("IP"), routed over the Internet, reconverted back into TDM format, and then sent to its final destination on the PSTN. In *LocalDial* and the *AT&T Order*, the Commission and the FCC determined, respectively, that such services are "telecommunications" as opposed to "information services." Because "telecommunications services" are subject to state and federal jurisdiction, LocalDial and AT&T were both required to pay access charges just as other providers of pure PSTN services are required to do.[35] As with "toll bridging," FX-like service is fundamentally different from VoIP IP-in-the-middle. There is no dispute that FX-like calls are telecommunications. Rather, the dispute is about whether FX-like telecommunications should be classified, for intercarrier compensation purposes, like traditional ILEC FX telecommunications.

27. Staff has recognized the technical differences between toll bridging and IP-in-the-middle services on the one hand, and CLEC FX-like services on the other: "["VNXX," toll bridging and "IP-in-the-middle"] differ in how they technically achieve their goal."[36] Staff, however, fails to note that ILEC FX services reach the same practical result of allowing "end users to call from one local calling area to another without incurring toll charges."[37] In sum, the significant technical and service classification differences between FX-like, toll-bridging, and

---

Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, FCC 04-97 (rel. April 21, 2004) ("*AT&T Order*").

[35] The service at issue in the AT&T Order departs significantly from the FX-like services offered by CLECs. The FCC imposed interexchange access charges on AT&T's service after noting that AT&T's service consisted of "an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines." *AT&T Order*, ¶ 1.

[36] Williamson, Exh. No. RW-1T, 24:3-5. Qwest similarly acknowledges that FX-like services are not provided the same way as "toll bridging" services, instead focusing on the end-user results of each of these services "While VNXX is more sophisticated than toll bridging, it is functionally no different - end users can make calls to distant LCAs without incurring toll charges." Qwest's Opening Brief, ¶ 31.

[37] *Id.*

"IP-in-the-middle" services show that Qwest's, WITA's, and Staff's claimed comparisons are inapposite. As the Commission has recognized, the most relevant analogous service to CLEC FX-like service is ILEC FX service. Both permit end users to call from one local calling area to another without incurring toll charges.

28. Notwithstanding these similarities, Qwest argues for a discriminatory result aimed at hampering the development of competitive services. Qwest claims that there are technical differences between FX and "VNXX" that justify differing regulation of these respective services.[38] However, Qwest cannot use technical differences to distinguish FX-like services from FX services on the one hand and then ignore those technical differences in analogizing FX-like services to toll bridging. If Qwest's argument is that FX-like services and toll bridging services should both be prohibited because they result in end users "avoiding" toll charges, then ILEC FX services should be prohibited on the same basis. If, on the other hand, Qwest is arguing that the end-user result is permissible, but the means to reach that result in the toll bridging cases are unlawful, then the significant technical differences, including the transport and local presence established by CLECs when providing VNXX, render Qwest's arguments moot with respect to FX-like services.

3. Qwest's Tariff Does Not Prohibit the Exchange of FX-Like Services Traffic Or Somehow Import A Physical Presence Requirement Into Its ICAs with CLECs

29. Qwest is wrong when it argues that its tariffs prohibit FX-like services. As explained below, Qwest's tariffs do not support Qwest's strained argument. However, if they did, Qwest would be in violation of its tariff. If Qwest's tariff requires that a customer *premise* be located in a local service area (which Qwest abbreviates as "LCA" in its Brief), Qwest's FX, Wholesale Dial, OneFlex, and other services would violate that tariff because Qwest's customer

[38] *See* Qwest's Opening Brief, ¶¶ 85-94.

does not have a *premise* in the LCA. Qwest's settlement with Verizon would also violate its tariff, because Qwest does not require Verizon's customers to maintain a premise in an LCA. Under Qwest's tortured logic, any service that assigns a phone number to an end user without a physical presence in the LCA, including Qwest's own FX service and VoIP services, would be prohibited.

30. Although Qwest places multiple definitions from its tariff side-by-side in its brief, it does not walk through how those definitions are related to each other, to the class of calls that are subject to reciprocal/ISP-bound compensation, or to the interconnection agreements Qwest claims incorporate them. Qwest can point to no provision in Level 3's interconnection agreement, however, that actually incorporates these tariff definitions.

31. "Local exchange" and "local service" are the only definitions cited by Qwest that rely on the location of the customer premise. But these definitions are not at issue in this proceeding. Instead, the claims made by Qwest raise the questions of whether locally-dialed calls to FX-like customers are subject to reciprocal/ISP-bound compensation or whether the provision of FX-like services somehow violate the definition of "local calling area," under the Commission's rules.[39]

32. Pursuant to WAC 480-120-021, "'[l]ocal calling area' means one or more rate centers within which a customer can place calls without incurring long-distance (toll) charges."[40] Like Qwest's definition of "local service area," this definition makes no reference to a customer's physical location and, contrary to Staff's assertion, ¶ 45, it does not "speak[ ] to the geographical location of the customer." Qwest defines a call as "local" under Section 5.1.A.2 of

[39] Qwest's tariff defines "local exchange," but not "exchange," based on the customer premise.

[40] WAC 480-120-021. Qwest's tariffed definition of LCA uses the term "exchange access service," which is not defined in Qwest's tariff, and the term "exchange," which is defined. While Qwest's tariffed definition of "exchange" includes a geographic area established by a company for telecommunications service within that area, it does not contain any customer premise requirement.

its tariff as "calls placed to telephone numbers where message toll charges do not apply." Like the Commission's definition of LCA, Qwest's tariff defines LCA and local calling based in part on whether the end user customer incurs a toll charge for placing a call. Qwest admits that its end users are not charged toll charges for placing locally-dialed calls to Level 3's FX-like customers.[41] Therefore, nothing in Qwest's tariff prohibits Level 3 from offering a retail FX-like service to a customer whose premises are located outside of the LCA.[42]

33. The folly of Qwest's logic is apparent. Intercarrier compensation and the propriety of CLEC FX-like services cannot be determined solely on the basis of Qwest's retail tariff definitions. Because FX-like services do not violate the Commission's definition of LCA either, they are permitted under Washington law.

C. Interconnection Agreements

34. Level 3 has no further response with respect to this topic beyond those arguments set forth in its Opening Brief.

D. FCC/Federal Court/Other State Commission Decisions

1. The Telecommunications Act

a. Section 251(b)(5) Provides the Default Intercarrier Compensation System Required for *All* Telecommunications Traffic, And Section 251(g) Does Not Carve Out Locally Dialed Calls to ISPs And ESPs As Qwest Alleges

35. Qwest argues that sections 251(b)(5) and 251(g) support imposing access charges on FX-like traffic. As Level 3 showed in its Opening Brief, the FCC findings on which Qwest relies have subsequently been rejected, both by a federal circuit court and the FCC. Because Qwest continues to ignore these holdings, Level 3 once again shows why Qwest cannot rely on

[41] *See* Qwest's Opening Brief, ¶¶ 86-87.

[42] Although Qwest claims that Level 3's former price list "recognizes" geographically based LCA's, ¶ 45, Qwest can point to no language in Level 3's price list that defines a local call based on the location of a customer's premise.

section 251(g) to support its discriminatory preference for above-cost access charges on only FX-like traffic.

36. Qwest argues that the meaning of "section 251(g) is clear" and "Congress did not intend to interfere with pre-existing compensation regimes, such as the access charge regime" which Qwest alleges applies to all locally-dialed ISP and ESP-bound traffic.[43] Qwest supports this position by arguing that in the *ISP Remand Order* the FCC announced a "key decision" and held that "through section 251(g), Congress limited the reach of section 251(b)(5) to exclude ISP-bound traffic.[44]" Finally, Qwest repeats its tired refrain that Section 251(b)(5) applies *only* to the exchange of "local traffic" because the Act "was never intended to destroy the decades-long distinction between local and interexchange calling."[45] Unfortunately for Qwest, its section 251(g) arguments were expressly rejected in the D.C. Circuit's *Worldcom* decision[46] and are foreclosed by the unambiguous text of the Act. Moreover, its "local traffic" distinction was repudiated by the FCC.[47]

37. First, the FCC's so-called "key" conclusion was unambiguously rejected by the D.C. Circuit - *the only circuit court that has ruled on the issue*.[48] In *WorldCom*, the Court held that section 251(g) could not exclude ISP-bound traffic from section 251(b)(5), because section

---

[43] Qwest's Opening Brief, ¶¶ 53, 59.

[44] Qwest's Opening Brief, ¶ 59.

[45] *See, e.g.,* Qwest's Opening Brief, ¶¶ 53, 59; Brotherson, Exh. No. LBB-1T 19:18-20:23, 21:13 ("The parties do not agree on the means of compensation for VNXX traffic" … "Reciprocal compensation is the payment between Qwest and CLECs for the transport and termination of local traffic to its respective networks." "CLECs do not pay Qwest the access charges").

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

[47] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"); Level 3's Opening Brief, ¶¶ 39-42, 49-50.

[48] The federal Hobbs Act provides that federal courts of appeals have "exclusive jurisdiction" to "determine the validity of … all final orders of the FCC." 2 U.S.C. § 2342(1). Thus, the D.C. Circuit's conclusion that ISP-bound traffic is not excluded from section 251(b)(5) by 251(g) binds the Commission.

251(g) merely preserves certain pre-existing rules and no such rule applied to compensation for ISP-bound traffic. Specifically, the court held:

> [I]t seems uncontested - and the [FCC] declared in the Initial Order - that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. The best the [FCC] can do on this score is to point to pre-existing LEC obligations to provide interstate access to ISPs. Indeed, the [FCC] does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, here would remain the fact that § 251(g) speaks only of services provided 'to interexchange carriers and information service providers;' LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP.[49]

The FCC agrees that it had "*no [pre-1996 Act] rule* governing intercarrier compensation for ISP-bound traffic."[50] Further, locally-dialed FX and FX-like calls are not exchanged with an IXC and are not subject to any "equal access" obligations as required by section 251(g), so again, as underscored by the D.C. Circuit Court, section 251(g) cannot apply to such traffic.[51] Thus, section 251(g) cannot "preserve" access charges for ISP-bound traffic.[52] Accordingly, consistent with this Commission's numerous prior decisions, the default intercarrier compensation regime of section 251(b)(5) applies to ISP-bound traffic.[53]

---

[49] *WorldCom,* 288 F.3d 429, 433-34.

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

[51] *WorldCom*, 288 F.3d 433-34; Section 251(g) provides in the relevant part: each LEC, "shall provide exchange access, information access, and exchange services for such access *to interexchange carriers* and information service providers in accordance with the same equal access and non discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding" enactment of the Act. 47 U.S.C. § 251(g) (emphasis supplied).

[52] Level 3's Opening Brief, ¶¶ 39-42.

[53] 47 U.S.C. § 251(b)(5); Level 3's Opening Brief, ¶¶ 39-42, 49-50; *see also Investigation into US WEST Communications, Inc's Compliance with Section 271 of the Telecommunications Act of 1996,US WEST Communications Inc.'s Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Thirteenth Supplemental Order Initial Order (Workshop Three) (July 2001) ("*2001 US West Order*"); *Pac-West Telecomm, Inc. v. Qwest*, WUTC Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition (Aug. 23, 2005) ("*Pac-West Order No.3*"); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. Section 252,* WUTC Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision , ¶ 7 (Feb. 28, 2003) ("*CenturyTel Order*"); *Level 3 v. Qwest,* WUTC Docket No. UT-053039, Order No. 5 Accepting Interlocutory Review; Granting, in Part, and Denying, in Part, Level

38. Moreover, section 251(b)(5) applies *on its face* to *all* telecommunications traffic, not just "local" telecommunications traffic. Section 251(b)(5) provides that all LECs have the "duty to establish reciprocal compensation arrangement for the transport and termination of *telecommunications*."[54] Congress deliberately chose the broad statutory term "telecommunications" and *not* "local traffic" or the much narrower term "telephone exchange service" to describe the scope of LEC's termination and intercarrier compensation obligations under Section 251(b)(5). Congress could have limited the scope of Section 251(b)(5) to the transport and termination of communications originating and terminating within the same LEC local calling area as urged by Qwest – but it chose not to.[55]

39. The D.C. Circuit's decision in *WorldCom* underscores that the plain meaning of Section 251(b)(5) means precisely what it says. Likewise, other IP-enabled communications such as locally-dialed calls to ISPs and ESPs and FX-like calls were also not addressed by relevant pre-1996 FCC rules, to the extent these types of traffic even existed prior to the 1996 Act. Because Section 251(b)(5) *on its face* covers all telecommunications, including all Internet-bound traffic and there are *no* relevant pre-1996 Act rules, it is plain that intercarrier compensation applies to locally dialed calls to ISPs and ESPs.[56]

b. ISP-Bound Traffic Is Not "Exchange Access" Nor "Telephone Toll Service And Does Not Fall Within 251(g)

40. Notwithstanding the plain meaning of section 251(g) and *WorldCom*, Qwest attempts to salvage its argument that section 251(g) maintains the "distinction between local and

---

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

[54] 47 U.S.C. § 251(b)(5) (emphasis supplied). "Telecommunications" is defined in the Act as: "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[55] Level 3's Opening Brief, ¶¶ 39-42.

[56] Level 3's Opening Brief, ¶¶ 39-42, 49-50; Global Crossing *et al.* Opening Brief, ¶¶ 17-21.

interexchange calling" for ISP-bound traffic by noting that the Act "retains the definitions of 'telephone exchange service' ('service within a telephone exchange') and 'telephone toll service,'"[57] and implying that ISP-bound traffic falls within section 251(g).

41. First, as noted above, Congress deliberately chose the broad statutory term all "telecommunications" and *not* "local traffic" or the much narrower term "telephone exchange service" to describe the scope of all LEC's intercarrier compensation obligations under Section 251(b)(5).[58]

42. Second, FX-like and locally-dialed ISP and ESP-bound traffic is not telephone toll or exchange access traffic as suggested by Qwest.[59] The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[60] "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[61] The other two terms in section 251(g) are not defined in the statute or FCC rules.

43. FX or Virtual NXX traffic is not exchange access, for two reasons. First, when an end user calls an FX or FX-like number, that end user is not billed for making a toll call. Therefore, there is no "separate charge not included in contracts with subscribers for exchange service," and calls to FX numbers cannot satisfy the definition of exchange access. Second, the phrase "telephone service between stations in different exchange areas" encompasses the standard industry practice of rating a call based on NPA-NXX codes. "Stations" is not defined,

---

[57] Qwest's Opening Brief, ¶¶ 52-53.

[58] Global Crossing *et al.* Opening Brief, ¶¶ 18-21; *WorldCom*, 433-34.

[59] Qwest's Opening Brief, ¶¶ 52-53.

[60] 47 U.S.C. § 153(16).

[61] 47 U.S.C. § 153(48).

but it is reasonable to conclude that "stations" is analogous to telephone numbers. If "stations" meant "physical locations of the end users," all FX calls would be "exchange access" and access charges would be owed for all FX traffic, and Qwest acknowledges that is not the case. In fact, ILECs themselves contend that FX service is a local exchange service.[62] Therefore, a call between customers whose telephone numbers are associated with the same local calling area is between two stations in the same exchange area.

2. FCC Orders

a. In the *ISP Remand Order*, the FCC Repudiated the "Local" Distinction That Qwest Relies Upon And Imposed a Rate of $0.0007, Not Bill-and-Keep on ISP-Bound Traffic

44. Qwest maintains that the "FCC has consistently retained the distinction between local and interexhange calling."[63] The "local" distinction that Qwest seeks to rely upon has been completely repudiated by the FCC and is inapposite. In the *ISP Remand Order*, the FCC determined that it had "*erred in focusing on the nature of the service (i.e., local or long distance)* … for the purposes of interpreting the relevant scope of Section 251(b)(5)," rather than looking to the language of the statute itself.[64] The D.C. Circuit did not disturb this conclusion. Nevertheless, Qwest urges this Commission to commit exactly the same error. Instead, this Commission must do what the FCC did and find that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers … to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[65]

---

62 *See, e.g.,* Brotherson, Exh. No. LBB-1T, 243; Global Crossing *et al.* Opening Brief., ¶ 28.

63 Qwest's Opening Brief, ¶ 54.

64 *ISP Remand Order*, at 9164, ¶ 26 (emphasis supplied).

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

45. Qwest states that one of the FCC's "key" conclusions in the *ISP Remand Order* was that "a bill-and-keep compensation regime would be the most 'efficient recovery mechanism' for ISP traffic because of concerns over regulatory arbitrage."[66] But the FCC never imposed bill-and-keep for ISP-bound traffic. To the contrary, the FCC recognized that CLECs incur a cost to transport and terminate traffic that originates on ILEC networks.[67]

46. Moreover, in the *Core Order*, the FCC underscored that "[m]arket developments since 2001 *have eased the concerns* about growth of dial-up ISP traffic that led the [FCC] to adopt the" interim intercarrier compensation regime for ISP-bound traffic, including any concerns about CLEC arbitrage opportunities.[68] Accordingly, rather than impose bill-and-keep, the FCC significantly expanded the ISP-bound traffic subject to intercarrier compensation by forbearing from applying the growth caps and new markets rules of the *ISP Remand Order*.[69]

b. The FCC Determined in the VA Arbitration Order and Starpower that Section 251(b)(5) Compensation Applies to Locally-dialed ISP-bound Traffic

47. Qwest's assertion that "there are no FCC orders that directly address VNXX"[70] is flatly wrong. The FCC has twice ruled that intercarrier compensation applies to locally-dialed FX-like traffic under section 251(b)(5). First, The Wireline Competition Bureau, "acting through authority expressly delegated from the [FCC]," rejected the same arguments presented by Qwest

---

[66] Qwest's Opening Brief, ¶ 54.

[67] *ISP Remand Order*, at 92 ("Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic."). *See also TSR Wireless, LLC. v. U S West Communications, Inc.,* File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001).

[68] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241, ¶¶ 20-21 (Oct. 18, 2004) ("*Core Order*") (emphasis supplied).

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

[70] Qwest Opening Brief, ¶ 54.

in this proceeding, including Verizon's complaint that the current call rating regime permits CLECs to "provide a virtual foreign exchange ('virtual FX') service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between legacy rate centers."[71] Verizon argued, as Qwest does in the instant case, that call "rating should be accomplished by comparing the geographic locations of the starting and ending points of a call," and that its FX service is different from CLEC FX-like service because FX service is provisioned using a dedicated private line.[72]

48. Verizon's efforts to change the way carriers are required to compensate each other for such traffic were rejected. The FCC concluded:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which *carriers rate calls by comparing the originating and terminating NPA-NXX codes*. We therefore accept the petitioners' proposed language and *reject Verizon's language that would rate calls according to their geographical end points*. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[73]

Qwest will no doubt argue that the *VA Arbitration Order* is decision of the Wireline Competition Bureau and not the FCC. However, the Wireline Bureau rendered this decision pursuant to a delegation of authority by the FCC under section 155(c) of the Act which gives the decision the same force and effect as a decision by the FCC commissioners.[74]

---

71 *See Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039, ¶ 286 (2002) ("*VA Arbitration Order*"). The Virginia State Corporation Commission failed to act on three Section 252(b) petitions for arbitration against Verizon presented by AT&T Communications of Virginia, Inc., WorldCom, Inc. and Cox Virginia Telcom, Inc. Thus, pursuant to Section 252(e)(5), the Wireline Bureau resolved the arbitration issues arising in these arbitrations, including VNXX compensation issues. *VA Arbitration Order*, ¶¶ 1-2, 301.

72 *VA Arbitration Order*, ¶ 287.

73 *VA Arbitration Order*, ¶¶ 286, 301.

74 47 U.S.C. § 155(c)(1)-(3).

49. In *Starpower*, the FCC found significant that Verizon:

> provides a service to its own customers that is similar to virtual NXX service that Starpower provides to its ISP customers. Specifically, Verizon South's Foreign Exchange service permits a customer to obtain a telephone number associated with a local exchange area in which that customer has no physical presence. Verizon South rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer (not the physical location of the customer).[75]

The FCC concluded that "at all relevant times the industry practice" has been to rate calls by comparing the NPA-NXXs and not the physical location of the customer.[76] Thus, the FCC rejected Verizon's arguments that VNXX traffic was not subject to reciprocal compensation, and ordered Verizon to pay $12,059,149 in reciprocal compensation for VNXX and other ISP-bound traffic.[77] Moreover, the Ninth Circuit reach the same conclusion and upheld the California Commission's determinations that (1) reciprocal compensation applies to VNXX traffic, and (2) determining whether reciprocal compensation applies to a call "depends solely upon the NPA-NXX of the calling and called parties .. and *does not depend on the routing of the call, even if it is outside the local calling area*."[78]

50. Consistent with the *VA Arbitration Order* and *Starpower*, the Staff concedes that currently "the billing systems only record the originating and terminating telephone numbers" so that there is no viable means to determine the physical location of another company's customer.[79] The Commission should affirm this industry practice and hold that FX-like calls should continue to be subject to intercarrier compensation under Section 251(b)(5) or the FCC's

[75] *Starpower Communications, LLC v. Verizon South, Inc.*, FCC No. 03-278, 18 FCC Rcd 23625, Memorandum Opinion and Order, ¶ 10 (2003) ("*Starpower*").

[76] *Starpower*, ¶¶ 9-10, 14 ("We also find relevant Verizon South's concession that it engaged in the very same conduct that it now alleges is unlawful when done by Starpower. Specifically, Verizon billed and collected reciprocal compensation for calls placed by a CLEC customer to a Verizon South Foreign Exchange customer with a 'local' NXX, even when those calls were between parties physically located in different local calling areas.").

[77] *Starpower*, ¶¶ 6, 22.

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

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

interim regime for ISP traffic in part because there is no viable means to rate calls other than to compare the NXX codes, and because Qwest's FX service is functionally similar to CLEC FX-like services.

c. The FCC Was Fully Aware of the Widespread Use of VNXX Long Before It Issued the *ISP Remand Order*

51. Staff erroneously states that "[p]rior to the *ISP Remand Order*, CLECs put modem banks in each local calling area" to support dial-up ISP-bound traffic and implies that after the *ISP Remand Order* CLECs abandoned this practice.[80] Qwest similarly states that around 2000, the VNXX issue "became more prevalent because of the adoption by ILECs of policies allowing CLECs to exchange traffic at a single point of interconnection in each LATA."[81]

52. As demonstrated by Level 3 in its Opening Brief, the use of so-called "VNXX" arrangements was widespread prior to the release of the FCC's *ISP Remand Order* and the FCC, Qwest and the ILECs were well aware of this practice.[82]

53. The use of so-called "VNXX" codes was not a response to the generous "adoption by ILECs of polices allowing a single [POI] in each LATA."[83] The Act, the FCC and the courts recognize that CLECs are not required to mimic the traditional hub-and-spoke network design of the ILECs and must be able to determine the most efficient location for the exchange of traffic based on their advanced network architectures.[84] The ILECs fought the single POI per LATA

[80] Commission Staff's Opening Brief, ¶ 63.

[81] Qwest's Opening Brief, ¶¶ 55, 62.

[82] Level 3's Opening Brief, ¶¶ 51-52.

[83] Qwest's Opening Brief, ¶¶ 55, 62.

[84] 47 U.S.C. § 251(c)(2)(B); *TSR Wireless*, ¶ 34; *VA Arbitration Order* , ¶¶ 66, 67 n. 187. The *VA Arbitration Order* provides a succinct summary of many of the obligations an ILEC bears under federal rules: "(1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent LEC's network at only one place in a LATA; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities."

rule at every step and lost at the FCC and in the courts.[85] Qwest seeks to undermine both the single POI per LATA rule and the long-standing calling-party's-network-pays regime by imposing a local presence requirement on FX-like traffic that has no basis in law. Qwest's position should be rejected because it is both unlawful and economically inefficient to penalize CLECs through imposition of a local presence requirement for having a more advanced network and using a single POI per LATA as contemplated by the Act.[86]

d. Other FCC Orders: Any Attempt to Restrict the Use of Numbering Resources for VoIP And FX-like Services Or Impose a Physical Presence Requirement Would Exceed the Commission's Delegated Numbering Authority And Jurisdiction

54. Staff states that the "FCC noted that it had already delegated some of its authority to state public utility commissions to deal with the [VNXX] issue."[87] Contrary to Staff's position, the Commission's numbering authority does not extend to FX-like services used for ISP-bound or VoIP traffic. In fact, even Staff acknowledges that "the assignment of geographic telephone numbers to nomadic VoIP providers is an FCC-authorized exception to the COCAG and any contrary state regulation."[88] Level 3 agrees. As demonstrated in Level 3's Opening

[85] *MCIMetro* Access *Transmission Services, Inc. v Bellsouth Telecommunications, Inc.*, 352 F.3d 872, 879-880 (4th Cir. 2003) (CLECs should be allowed to select any POI within the incumbent's network to interconnect. Additionally, ILECs are responsible for the cost of transporting traffic that originates on its side of the POI. Rule 703(b) "is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."); *Southwestern Bell Tel. Co. v Public Utility Com'n of Texas*, 348 F.3d 482, 486 (5th Cir. 2003) (Court found that FCC had previously confirmed that: "[] a CLEC is permitted to choose to interconnect with ILECs at any technically feasible point, including a single-LATA-POI; and, [] an ILEC is prohibited from imposing charges for delivering its local traffic to a POI outside the ILEC's local calling area." CLECs can choose the most efficient points at which to exchange traffic with ILECs and ILECs are prohibited "from assessing 'charges on any other telecommunications carrier for telecommunications traffic that originates on the [ILEC]'s network.'"); *MCI Telecomm. Corp. v Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3d Cir. 2001) ("… CLEC cannot be required to interconnect at points where it has not requested to do so."); *U.S. West Communs. v MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999), cert. denied, 530 U.S. 1284 (2000) (local exchange carriers must permit interconnection at any technically feasible point within their network).

[86] Level 3's Opening Brief, ¶¶ 43-46.

[87] Commission Staff's Opening Brief, ¶ 65.

[88] Commission Staff's Opening Brief, ¶ 70.

Brief, the Commission is preempted from regulating the manner in which VoIP service providers' gain access to numbering resources that are necessary to market entry.[89]

55. The FCC has plenary authority over numbering administration; however, pursuant to Section 251(e), the FCC may delegate discrete numbering authority to state commissions.[90] The Washington Commission requested in March of 1998, and received, a limited grant of delegated authority over discrete numbering issues such as number conservation.[91] However, this authority was strictly limited to issues expressly delegated. Given that VoIP services that integrate with the PSTN are a recent phenomena, the Commission could not have requested, and thus was never granted, authority to restrict the manner in which VoIP providers obtain number resources from CLECs and the use of FX-like number assignment practices for VoIP and ISP bound traffic.[92]

56. Nowhere in the delegation order does the FCC even discuss the issue of FX-like services or VoIP traffic. Since the Commission never petitioned for the authority to regulate numbering practices relating to these services, and the FCC did not consider it, such authority was not granted.[93] Indeed, any attempt by the Commission to regulate the use of FX-like codes,

---

[89] Level 3 Opening Brief, ¶¶ 58-59. *See generally Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

[90] Section 251(e) provides that: the FCC "shall have exclusive jurisdiction over those portions of the [NANP] that pertain to the United States. Nothing in this paragraph shall preclude the [FCC] from delegating to State commissions … all or any portion of such jurisdiction. 47 U.S.C. § 251(e).

[91] *Washington Utilities and Transportation Commission's Petition for Additional Delegated Authority to Implement Number Conservation Measures*, NSD File No. 97-42, CC Docket No. 96-98, *1 (filed December 10, 1999).

[92] *Petition of the Oregon Public Utilities Commission et al.,* 15 FCC Rcd 23371, 23373, 23397-8, & 23400-01 (2000).

[93] Further, much, if not all, of the authority delegated to the Washington Commission has been superseded by later orders in the FCC's *Number Resource Optimization Docket.* In fact, the Commission explicitly stated in the *Washington Delegation Order* that it was granting the Washington Commission "interim" authority, and that the "grant of delegated authority should not be construed as a prejudgment of any of the remaining numbering resource optimization measures on which the FCC has sought public comment in the Numbering Resource Optimization Notice." The limited nature of the Commission's delegated authority is underscored by the fact that the Commission rejected some of the Washington Commission's requests. *Id* at 23395.

VoIP numbering practices, or to impose a local presence requirement for FX-like services would violate federal law and exceed the Commission's existing delegated numbering authority. Moreover, any attempt to prohibit or otherwise restrict the use of numbering resources for CLEC FX-like services without prohibiting ILEC FX and FX-like services in an identical manner would violate FCC rules that prohibit the administration of numbering resources in a manner that "disfavors" an industry segment and "unduly favor[s] one telecommunications technology over another."[94]

57. Finally, the FCC does not permit state commissions to define physical readiness requirements for carrier numbering. Rather, the FCC allowed states to specify what type of evidence is required to establish facilities readiness among the variety of methods the FCC found acceptable, such as contracts for unbundled network elements, business plans, interconnection agreements.[95] Because Qwest's proposed physical location and customer local presence requirement for FX-like traffic are not included in the FCC's list of acceptable facilities readiness evidence, imposing these requirements would violate federal law as well as exceed the Commission's limited, delegated numbering authority. Moreover, a local presence requirement and any other restrictions on FX-like services would frustrate the FCC's numbering policies which exist to: (1) facilitate entry into the communications marketplace; (2) *not unduly favor or disfavor any particular industry segment or group of communications consumers; and (3) not unduly favor one technology over the another.*[96]

3. Federal Court Decisions: The 9th Circuit Upheld the California Commission's Decision That Reciprocal Compensation Was Owed for FX-like Traffic, While the 1st And 2nd Circuits Only Decided the

[94] 47 C.F.R. § 52.9.

[95] *Numbering Resource Optimization*, Report and Order and NPRM, CC Docket No. 99-200, ¶ 97 (rel. March 31, 2000); 47 C.F.R. § 52.15.

[96] *See* 47 C.F.R. § 52.9(b) (emphasis supplied).

State Jurisdiction Issue

58. WITA argues that decisions by the First, Second and Ninth Circuit "can reasonably be read as holding that intrastate access charges apply to interexchange (i.e., between local calling areas) VNXX calling, even for ISP-bound calls.[97]" Contrary to WITA's wishful thinking, the First and Second Circuit Courts of Appeal ultimately decided only that state commissions were not preempted by federal law from determining the compensation for ISP-bound traffic that is FX-like in nature.[98]

59. Moreover, the Ninth Circuit in *Peevey* upheld the California commission's decision that FX-like traffic is subject to reciprocal compensation under section 251(b)(5) and rejected Verizon's arguments that access charges should apply.[99] Recently, the Washington District Court acknowledged that *Peevey* determined that reciprocal compensation applies to CLEC FX-like traffic and concluded that the WUTC could reach the same conclusion.[100] Level 3 agrees with the Washington District Court and Staff that the Commission "'could reach the same result' (*i.e.,* requiring Qwest to pay the CLECs compensation on VNXX calls)" as the California Commission and Ninth Circuit.[101] Because its substantive determination in the *Level 3 Order No. 5* and at least four earlier decisions were correct, this Commission should reach the same result both in this proceeding and on remand from the Court, relying on state and federal law

[97] Opening Brief of the Washington Independent Telephone Association ("WITA"), ¶ 10.

[98] *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 99-101 (2d Cir. 2006); *Global NAPS v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006).

[99] *Peevey*, 462 F.3d 1142, 1158-59 ("Pac-West is entitled to reciprocal compensation for traffic that appears to originate and terminate within a single exchange by virtue of Pac-West's assignment of … so-called 'Virtual Local' or 'VNXX traffic.'").

[100] *Qwest Corporation v. Washington State Utilities and Transportation Commission et al.*, Case No. C06-956-JPD, Order Reversing and Remanding the Final Decisions of the WUTC, slip op., at 26 (D. Wash. Apr. 9, 2007) ("By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue … *It is plausible that the ultimate conclusion of the WUTC will not change.*") (emphasis supplied).

[101] Commission Staff's Opening Brief, ¶ 67; *Qwest v. WUTC et al.*, at 26 (April 9, 2007); *Peevey*, at 1159 ("Pac-West is entitled to reciprocal compensation for Virtual NXX traffic.").

rather than federal preemption by the *ISP Remand Order*.

4. VoIP Preemption/ESP Exemption: The Commission Is Preempted From Imposing a Local Presence Requirement On VoIP Services

60. The Commission recently confirmed that "[i]n its *Vonage Order*, the FCC determined that it is responsible for establishing the appropriate regulatory treatment for VoIP and other IP-enabled services and preempted the states from imposing 'traditional common carrier economic regulations' on VoIP services."[102] Because the Commission is preempted from imposing market entry regulation and imposing "traditional common carrier" regulations on VoIP services and lacks jurisdiction over VoIP numbering issues, it is preempted from prohibiting the use of VNXX or imposing a local presence requirement for VoIP traffic as advocated by Qwest.[103]

61. Qwest argues that the ESP Exemption "does not give an ESP a *carte blanche* exemption from access charges throughout a LATA in which it has purchased local service in only one or a few local calling areas."[104] Further, Qwest argues that the "ESP's location for call rating purposes is its POP," and the VoIP providers is not "allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a POP in that LCA."[105]

62. Qwest reads limitations into the ESP exemption that simply do not exist. The FCC did not state anywhere in its rules or in the orders establishing the ESP Exemption that the ESP must have a POP in the LCA to qualify for the ESP exemption. Rather, the FCC has repeatedly determined that ESPs are permitted to purchase local business access lines and special access

[102] *Petition of Level 3 Communications, LLC For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and conditions of Interconnection with Qwest*, WUTC Docket No. UT-063006, Order No. 12, ¶ 41 (June 7, 2007).

[103] Qwest's Opening Brief, ¶¶ 72, 79-80, the *Vonage Order* "does not mean that state commissions lack the jurisdiction to determine call classification and VNXX issues relating to VoIP traffic"

[104] Qwest's Opening Brief, ¶ 76.

[105] Qwest's Opening Brief, ¶¶ 74-78.

services as end users. When they purchase these services, ESPs are not required to pay access charges, without any such "POP" qualifications. The FCC has limited the application of access charges to common carrier "interexchange carriers" and to circuit-switched "telecommunications services."[106] ESPs are not "interexchange carriers" nor are they common carriers, and the VoIP services exchanged by Level 3 are not circuit-switched telecommunications services.

63. History leaves no doubt as to the meaning of the FCC's ESP Exemption. For example, in 1997 the FCC affirmed its 1983 decision that ESPs should remain outside the access charge regime that applies to common carrier interexchange carriers and their circuit-switched traffic and stated:

> ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, *even for calls that appear to transverse state boundaries*. The business line rates are significantly lower than the equivalent access charges, given the ISP's high volume of usage. ISPs typically pay incumbent LECs a flat monthly rate for their connections regardless of the amount of usage they generate.[107]

Qwest can point to no FCC rule or order that states the ESP must have a POP in the LCA as prerequisite to qualifying for the ESP Exemption. To Qwest's consternation, the FCC simply chose to treat ESPs differently from "interexchange carriers" in order to promote competition and because "it is not clear that ISPs use the public switched network in a manner analogous to IXCs."[108]

---

[106] *See, e.g.,Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 342, at 346-347 (1997) ("*Access Charge Reform Order*") (emphasis supplied), *aff'd, Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998) ("The access charge system was designed for basic voice telephony provided over a *circuit switched network*, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.") (emphasis supplied). The relevant FCC rule provides that "Carrier's carrier charges shall be computed and assessed upon *all interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5 (emphasis supplied).

[107] *Access Charge Reform Order*, ¶ 342 (emphasis supplied).

[108] Qwest's Opening Brief, ¶¶ 76-77 ("Yet, under identical circumstances, an IXC would pay terminating access charges"); *Access Charge Reform Order*, ¶ 345.

64. The FCC further explained the policy basis for the ESP Exemption as follows:

> We explained that *the existing access charge system includes non-cost-based rates and inefficient rate structures*. We stated that there is *no reason to extend such a system to an additional class of customers*, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. We explained that ISPs should not be subjected to an interstate regulatory system *designed for circuit-switched interexchange* voice telephony simply because ISPs use incumbent networks to receive calls …[109]

65. This discredits Qwest's tired argument that it needs access charges to recover its costs. The FCC was "not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs."[110] In light of these policy concerns, after the passage of the 1996 Act, the FCC confirmed and stated broadly that "the existing pricing structure for ISPs should remain in place, and *incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs*."[111] The FCC's clear, unqualified declarative statements such as this are flatly inconsistent with Qwest's just-invented local POP requirement. Thus, the Commission is precluded from extending the access charge system with its attendant "non-cost-based rates" and "inefficient rate structures" to ESP traffic. In the face of repeated challenges by the RBOCs, the FCC repeatedly has concluded that this policy serves the public interest and should not be altered:

> We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry and advances the goals of the Act to 'preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[112]

[109] *Access Charge Reform Order*, ¶¶ 343, 344-346.

[110] *Access Charge Reform Order*, ¶¶ 346-347 ("The access charge system was designed for basic voice telephony provided over a circuit switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.").

[111] *Access Charge Reform Order*, ¶ 344.

[112] *Id. See, e.g., MTS and WTS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682, 711, ¶ 83 (1983).

66. More recently the FCC affirmed that its existing rules apply access charges to the circuit-switched traffic of IXCs and not ESPs such as VoIP providers: "ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption."[113] In sum, the FCC has been clear, ESPs are exempt from the access charges that under certain circumstances apply to the circuit-switched voice traffic of IXCs. Moreover, the FCC has never required a provider to have a POP in every local calling area in order to qualify for the ESP Exemption as argued by Qwest.

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

67. Although state commission decisions are not uniform on the issue of FX-like services, the vast majority of states permit FX-like number assignment practices and most reject ILEC demands for originating access on calls to FX-like customers. Although this Commission's precedent permitting FX-like services and requiring compensation for terminating traffic to FX-like customers is directly on point, other parties inaccurately summarize other state commission decisions in an attempt to sway this Commission from its prior findings. In this section, Level 3 responds to those inaccurate characterizations.

68. Staff acknowledges that the Ninth Circuit upheld reciprocal compensation for ISP-bound VNXX traffic and that, on remand the Commission could once again lawfully reach the same conclusion.[114] The CPUC "applied its own balancing test in determining that as a matter of fair policy that VNXX traffic is subject to reciprocal compensation as 'local traffic'" under state, not federal law.[115] This Commission should make the same determination.

[113] *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking, ¶¶ 6 (rel. April 27, 2001).

[114] Commission Staff's Opening Brief, ¶ 67.

[115] *Verizon California, Inc.*, Application 02-06-024, Decision 03-05-075, (Cal. PUC May 22, 2003).

69. As Staff admits, "it is difficult to generalize about other state commission decisions" on FX-like services.[116] Nevertheless, Qwest, Staff, and WITA point to certain state decisions that have banned FX-like services, or have otherwise imposed access charges on such traffic. Based on these few decisions, they argue that "the majority of states" have concluded that FX-like services violate the distinction between local and interexchange calling and are not subject to reciprocal compensation. This unsupported and conclusory statement is belied by the facts. First, except for two outliers, no states cited by Qwest, Staff, or WITA have banned FX-like services outright.[117] Further, while some states have imposed access charges on such traffic, most have declined to do so.

70. WITA inaccurately states that the "weight of the state commission cases" is that VNXX "is subject to intrastate access," relying on decisions in Florida, Maine, Nevada, and Connecticut.[118] While a few states have admittedly applied access charges, the FCC in the *VA Arbitration Orders* and many other state commissions[119] have concluded that standard industry practice and practical considerations require use of an NXX comparison for call rating and intercarrier compensation, rather than the comparison of geographic end points advocated by the ILECs.

71. For example, the Alabama Public Utilities Commission determined that LECs may assign telephone numbers to end users physically located outside the rate center to which

[116] Commission Staff's Opening Brief, ¶ 72.

[117] Qwest's Opening Brief, ¶¶ 81-83.

[118] WITA's Opening Brief, ¶ 11.

[119] *See e.g. Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) Concerning Interconnection Rates, Terms, and Conditions,* Order No. 79250, Case No. 8882, at Issue 3 (Md PSC July 7, 2004) ("*Md Order No. 79250*") (FX-like calls "are local because the status of a call as local or toll is determined, pursuant to standard industry practice, by the telephone numbers of the calling and called parties, not by their physical location); *see also AT&T Communications of Maryland, Inc.,* Order No. 78724, Case No. 8882 (Md PSC Oct. 17, 2003); *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan,* Case No. U-12382, at 6 (Mich. PSC Aug. 17, 2000) (billing system identifies such calls as local based on the NXX codes).

the telephone number they are assigned is homed, having found that the practice raised no issues concerning number exhaustion or number portability.[120]

72. In addition to Washington and California, other states have determined that reciprocal compensation is owed for the exchange of CLEC FX-like traffic to ISPs, including Arizona,[121] Hawaii,[122] Kentucky,[123] Maryland,[124] Michigan,[125] and New York.[126]

73. Finally, Level 3 notes that many of the decisions cited by Staff discuss the benefits of FX-like services, have declined to impose access charges on such services, or have otherwise provided more substance on these issues than Staff's brief portrays. For example, in Alabama, Florida, Nevada, and Pennsylvania, those commissions found that FX-like services do not violate state or federal law, assignment of telephone numbers outside of the rate centers to which those numbers are "homed" is permissible, or otherwise determined that such numbering practices and traffic routing does not lead to number exhaustion or violate telephone numbering guidelines.[127] Further, while some states have declared that reciprocal compensation is not due

[120] *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906 (Ala. PUC April 29, 2004).

[121] *PacWest Telecom, Inc. v. Qwest Corporation*, Docket No. T-01051B-05-0495, T-03693A-05-0495, ¶¶ 20, 25-28 (Ariz. C.C. June 29, 2006). Qwest has appealed this decision to a federal district court. *Qwest Corporation v. Arizona Corporation Comm'n*, Civil Docket No. 2:06-cv-02130-SRB (Sept. 6, 2006).

[122] *Pacific Lightnet, Inc. Petition for Arbitration*, Docket No. 03-0197, Proposed Decision And Order No. 22851 (Haw. PUC Sep. 14, 2006).

[123] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Order, Case No. 2000-404 (Ky. PSC Mar. 14, 2001).

[124] *Md Order No. 79250*, at Issue 3.

[125] *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan,* Case No. U-12382, at 6 (Mich. PSC Aug. 17, 2000) (billing systems identifies such calls as local based on the NXX codes).

[126] *Cablevision Lightpath, Inc.*, Arbitration Order, Case 03-C-0578 (NY PSC Oct. 30, 2003).

[127] **Alabama**: The PUC decided that LECs may assign telephone numbers to end users physically located outside the rate center to which the telephone number they are assigned is homed, having found that there were no issues concerning number exhaustion or number portability. Opinion, *All Providers of Local and Interexchange Telecommunications Services in the State of Alabama Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket No. 28906 (2004 Ala. PUC Lexis 144). **Florida**: For traffic that is delivered to non-ISP customers, The Florida commission decided that, while carriers are permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone

for FX-like traffic, several of those states rejecting reciprocal compensation also rejected ILEC pleas for originating access charges, including Connecticut, Missouri, and Texas.[128] In sum, the

---

number is homed, intercarrier compensation for calls to these numbers is based upon the geographical end points of the calls. However, it stopped short of imposing access charges on such traffic. *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket 00-0075-TP, Order No. PSC-02-1248-FOF-TP, at 26, 33-34 (Fla. PSC Sep. 10, 2002). **Illinois**: The Illinois Commerce Commission ("ICC") has expressly ruled that the use of virtual NXX codes is permissible. For example, on October 1, 2002, the ICC determined in an arbitration that "Virtual NXXs are beneficial to the customers that want them, provide worthwhile competition to the ILEC's FX services and contravene no law or regulation." *Global NAPs Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated*, Docket No. 02-0253, Arbitration Decision, at 15 (Ill. C.C. Oct. 1, 2002) ("*Illinois GNAPS Arbitration*"); *see, AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago Verified Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Illinois Bell Telephone Co. pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 03-0239, Arbitration Decision, at 124 (Ill. C.C. Aug., 26 2003) ("*AT&T Illinois Arbitration*"). While the ICC has declined to impose reciprocal compensation on such calls, the agency has also repeatedly rejected ILEC arguments that virtual NXX traffic should be subject to originating access charges. *Illinois GNAPS Arbitration*, at 16; *Essex Telecom, Inc. v. Gallatin River Communications, LLC, Complaint and Request for Dispute Resolution,* Docket No. 01-0427, Order, at 16, 25 (Ill. C.C. July 24, 2002). **Nevada**: In the arbitration proceeding between Global NAPs, Inc. and Sprint-Nevada, the commission ruled that GNAPs may assign VNXX numbers, but intercarrier compensation shall not apply to FX and FX type services. *Petition of Global NAPs, Inc. for Arbitration of an Interconnection Agreement with Central Telephone Company – Nevada d/b/a Sprint of Nevada, pursuant to Section 252 of the Telecommunications Act of 1996*, Docket No. 01-10018, Order (Nev. PUC May 2, 2002). **Pennsylvania**: Pennsylvania law does not prohibit VNXX arrangements. In an Order entered on October 14, 2005, the Pennsylvania Public Utility Commission ("PA PUC") stated that: "there are no provisions in Act 183 that impact the legality of VNXX arrangements in Pennsylvania. Moreover, we determine that there are no public policy considerations that warrant a prohibition against the use of VNXX arrangements by telecommunications providers in Pennsylvania. Accordingly, we decline to implement any regulatory or policy changes regarding the use of VNXX arrangements in Pennsylvania." *Generic Investigation in re: Virtual NXX Codes*, Docket No. I-00020093, Investigation Order, at 9 (Pa PUC Oct. 14, 2005). The question of whether reciprocal compensation or access charges apply to such traffic, however, remains unclear.

[128] **Connecticut**: The Connecticut Department of Public Utility Control held that non-ISP-bound VNXX traffic was not subject to reciprocal compensation, but not subject to access charges, either. Subsequently, the Connecticut federal district court determined that the FCC's *ISP Remand Order* applies to all ISP-Bound traffic without exception. *SNET v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 299 (D. Ct. 2005). Further, the district court determined that the DPUC could not create a classification of telecommunications traffic that, according to the DPUC, is not exchange access but also not subject to reciprocal compensation. *Id.* at 298. The court left open on remand whether VNXX and FX traffic that is not ISP-Bound is subject to reciprocal compensation. *SNET v. MCI WorldCom*, 359 F.Supp.2d 229, 230 (D. Ct. 2005). **Missouri**: In an arbitration proceeding between AT&T subsidiaries and Southwestern Bell, the Missouri Public Service Commission ruled that virtual NXX traffic is not classified as local traffic. *AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, Arbitration Order (Mo. PSC Jun. 14, 2001). However, the Commission did not say that access charges were applicable in that arbitration. In a subsequent order, the Commission established that such traffic would be subject to bill and keep. *Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missour*i, Case No TO-2006-0299, Final Commission Decision, (Mo. PSC June 27 2006). **Texas**: The Texas commission has determined that the "*ISP Remand Order* compensation regime applies to all ISP-bound traffic." *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Co.*, Docket No. 24015, Order on Reconsideration, at 2-3 (Tex. PUC Nov. 4, 2004). However, the PUC did not specify the rate that would result from applying the FCC's

"weight of other state commission cases" does not support imposing originating access charges on FX-like traffic. Many states have found that reciprocal compensation applies, and others have found that neither reciprocal compensation nor access charges apply to such traffic.

III. VNXX RELATIONSHIP TO OTHER SERVICES

A. Foreign Exchange Service

1. CLEC FX-like Services Are Functionally Equivalent to Qwest's FX, OneFlex, Wholesale Dial and Other ILEC FX-like Services

74. Qwest alleges that there are "dramatic differences" between its FX and FX-like services and CLEC FX-like services. It complains that Pac-West and Level 3 have "only a single switch located in Seattle" and "do not have anything like the network that Qwest has in Washington."[129] However, both Staff and Qwest apparently concede that from an end user perspective, Qwest's FX, OneFlex, Wholesale Dial and CLECs' so-called "VNXX" services are functionally indistinguishable.[130]

75. The "differences" in how ILECs and CLECs provision FX-like services arise because CLECs do not use the legacy "hub-and-spoke" architecture that characterizes Qwest's network. As shown in Level 3's Opening Brief, adopting a service or compensation distinction

---

compensation regime. In response to Southwestern Bell's Motion for Clarification, the PUC determined that "to the extent that the Commission has not required compensation for traffic, bill and keep effectively applies." Docket No. 24015, Order on Clarification, at 1 (Tex. PUC Jan. 4, 2005). The PUC stated that in Docket No. 21982, it focused "on compensation for local traffic only and did not set a rate for FX traffic." Accordingly, the PUC clarified that "bill and keep continues to apply to ISP-bound FX traffic." *Id.* The Texas commission withdrew its earlier decisions applying access charges to traffic bound for ISPs outside the local calling area and "to non-ISP-bound FX-type traffic and requiring 10-digit screening." Docket No. 24015, Order on Reconsideration, at 2-3. The PUC stated it would determine "the appropriate intercarrier compensation for non-ISP-bound FX-type traffic in Docket No. 28821," and would consider the issue of "segregating and tracking FX-type traffic in the same docket." *Id.*

[129] Qwest's Opening Brief, ¶¶ 90-91.

[130] Commission Staff's Opening Brief, ¶ 79 ("FX and VNXX may be similar from a functional standpoint"); *see, e.g.*, (Brotherson, Exh. No. LBB-1T, 38:1 (both FX and CLEC FX-like calls "are answered in a different LCA than where the call originated."); Brotherson, TR. 243:17-25; Linse, Exh. No. PL-1T, 8:12-19; Brotherson, TR. 244:23-245:1, 247:20-248:5(Q. "This to me describes a service where if you're in Omaha, Nebraska, you can get a Denver Telephone number, and you as an end user can call your friends and family in Denver on a local basis. Would you agree that that's what this effectively describes … A. I would agree that that's a close characterization [of OneFlex].").

based on these network characteristics would violate the Act's prohibition on barriers to entry in section 253(a) undermine the CLEC's right to interconnect at a single POI without mimicking the ILEC network.[131] The Act does not encourage or require replication of the ILEC's network and, without the use of FX-like services, CLECs would have to replicate the ILEC's network to compete. As applications such as VoIP are increasingly divorced from the facilities on which they ride, it makes little sense to impose a local presence requirement as proposed by Qwest that is technologically unnecessary to the services being provided.[132]

76. Qwest's attempts to characterize "VNXX" service as different from FX and its own FX-like services only raise minor provisioning distinctions that make no difference.[133] As Level 3 demonstrated in its Opening Brief, the bottom line is that the CLEC services to which Qwest refers as "VNXX" provide the same functionality as Qwest's FX and FX-like services from the end user's perspective. Moreover, the CLEC establishes a so-called local presence with its POI and/or DEOT/DTT interconnection trunks.[134] Level 3's use of interconnection transport is the functional equivalent of Qwest's use of a private line for FX service and PRI for Qwest's FX-like services as each is often provisioned as a logical circuit on transport fiber shared by other users.[135]

77. Staff asserts "that VNXX is not the only way for CLECs" to provision FX-like services" and suggests that "a CLEC could locate a channel bank or subscriber carrier facility (through which it *remotes a piece of its existing switch*) in the local exchange."[136] As Level 3 showed in its Opening Brief, Staff's triple transport proposal is absurd and economically

---

[131] Level 3 Opening Brief, ¶¶ 43-48; 47 U.S.C §§ 253(a), 251(c)(2)(B).

[132] Level 3 Opening Brief, ¶¶ 75-77.

[133] Global Crossing *et al.* Opening Brief, ¶¶ 26-28.

[134] Level 3 Opening Brief, ¶¶ 75-77.

[135] Level 3 Opening Brief, ¶¶ 66, 74-77.

[136] Commission Staff's Opening Brief, ¶ 83.

inefficient, as even staff and Qwest recognize.[137]

B. VNXX Traffic Is Not The Same As 800 Traffic

78. Qwest, WITA and Staff are wrong to suggest that CLEC FX-like services are the same as 8XX services.[138] WITA argues that "VNXX services most closely resemble an 800 service" and the "only difference" is that the "carrier transporting the 800 call pays access charges."[139] Qwest takes a similar position.[140] As Qwest admits, however, from the consumer's perspective 800, VNXX, FX, ILEC FX-like, and some locally dialed ISP bound services *all* offer the same results – dial-up access to the Internet without the imposition of additional per minute of use charges.[141]

79. The 8XX analogy is inapposite. 8XX calls use the familiar 1+ dialing pattern and consumers expect calls to be routed to an IXC for completion. Dial-up Internet calls have always been predominately locally dialed, which means a 1+ dialing pattern is not used nor are the services of an IXC.[142] Further, 800 services require updates to a national SMS/800 database and a toll-free database dip for routing[143] whereas FX-like services do not use the 800 database. Also, 800 services typically offer a wide area of service for toll-free calling with a single 800 number, often nation-wide toll-free calling, whereas FX-like services typically facilitate such calling in a single local calling area.[144] Moreover, Qwest admits that its FX service and MEL

---

[137] Williamson, TR. 438:15-24l; Brotherson, Exh. No. LBB-IT, 293:15-212.

[138] *See,* Level 3's Opening Brief, ¶¶ 70-71; Global Crossing *et al.* Opening Brief, ¶¶ 32-33.

[139] WITA's Opening Brief, ¶¶ 12-14.

[140] Qwest's Opening Brief, ¶ 84; *See, e.g.*, Brotherson, Exh. No. LBB-1T, 35:9-12; Linse, Exh. No. PL-1T, 8:6-9.

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

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

[143] *Toll Free Access Codes Database Services Management, Inc. Petition for Declaratory Ruling,* CC Docket No. 95-155, FCC 00-237, ¶¶ 2-3, 31-33 (rel. July 5, 2000); *Provision of Access for 800 Service,* CC Docket No. 86-10, FCC No. 93-84, 9 FCC Rcd 1423, ¶¶ 2, 4-5, 19, 25, 41 (rel. Feb. 10, 1993) ("*CompTel Order*").

[144] *Id.* The 800 system also has the capability to perform complex vertical routing including: (1) call validation, which ensures that the calls originate from the subscribed service areas; (2) translation of 800 numbers

services provide the same functionality as 800 services by, among other items, providing a local presence in a foreign exchange to permit toll-free dialing, such that these services should also be treated like 800 services by Qwest's logic.[145] Therefore, if the Commission were to accept WITA's analogy, it would have to impose access charges on both FX and FX-like traffic. However, as Level 3 has shown, imposing access charges would violate the Act and Commission precedent and be bad public policy. The Commission should therefore reject WITA's 8XX analogy as a basis for imposing access charges.

C. Market Line Expansion Services

80. Qwest fails to explain in its Opening Brief and throughout the proceeding why its MEL product – or any other call forwarding feature that treats toll calls as local calls for intercarrier compensation purposes – is any less of an "arbitrage" of the intercarrier compensation system than Qwest accuses "VNXX" to be.[146] Qwest's discriminatory position should be rejected by the Commission.

D. OneFlex & Other Services: Qwest's One Flex Service and Wholesale Dial Are Functionally the Same As CLEC FX-like Services

81. According to Qwest's website, Qwest's One Flex service provides "virtual phone numbers" … so a customer "doesn't have to pay long-distance charges."[147] Qwest's One Flex,

---

into POTS numbers; (3) alternative POTS translation, which allows subscribers to vary the destination of 800 calls based on factors such as time of day, or place of origination of the call; and (4) multiple carrier routing, which allows subscribers to use different carriers based on similar types of factor. These functions are not typically offered in CLEC FX-like services. *Comptel Order*, ¶ 5.

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

[146] Level 3's Opening Brief, ¶ 72; Global Crossing *et al.* Opening Brief, ¶¶ 34-37.

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

151

like its other FX-like services, is functionally similar to CLEC FX-like services,[148] yet Qwest proposes to prohibit only CLEC VNXX and FX-like services and impose access charges on CLEC FX-like services and not its own FX-like services.[149] Qwest's anti-competitive, unlawful, and discriminatory position should be rejected.

82. Qwest attempts to distinguish its OneFlex and Wholesale Dial Services from CLEC FX-like services by emphasizing that its ESP affiliate (QCC) purchases PRI or equivalent services from Qwest ILEC "in each of the local calling areas where these virtual numbers are assigned."[150]

83. Qwest admits that QCC obtains virtual number from Qwest to route VoIP traffic but says it purchases PRIs which distinguishes One Flex from FX-like. QCC does not have a physical customer premise in the LCA, it merely has the end of the PRI it purchased from Qwest. The only reason QCC has any local presence is because the ILEC parent has a ubiquitous network that CLECs and VoIP service providers are not required to replicate. The PRI is functionally and technically no different than CLEC transport. OneFlex is functionally the same as CLEC FX-like.

IV. VNXX POLICY CONSIDERATIONS

A. Cost Issues

84. Level 3 does not argue with Qwest that "cost causation requires the cost-causer - the dial-up customer - to bear the cost of providing dial-up service,"[151] and so it does, in charges for local service. As Level 3 demonstrated in its Opening Brief, Qwest and other ILECs simply

[148] Brotherson, TR. 247:21248:5; Level 3's Opening Brief, ¶ 73.

[149] Global Crossing *et al.* Opening Brief, ¶¶ 26-31.

[150] Qwest's Opening Brief, ¶¶ 88, 99.

[151] Qwest's Opening Brief, ¶ 104.

transport the traffic to the same POI as for any other local call.[152] Rather than address this fact head-on, Qwest begs the question that FX-like traffic is interexchange in nature, and then concludes that access charges should apply.[153] However, Qwest has offered no testimony that its interexchange costs (or any costs) have increased to handle FX-like traffic, or that it has added capacity as a result.

85. Staff describes the dedicated FX trunk that Qwest uses in its FX service and tries to equate this to the interconnection transport with which it delivers FX-like traffic to Level 3, implying that Level 3 has unfairly shifted its transport costs to Qwest.[154] However, this loaded analogy is wrong. Qwest's dedicated FX trunk extends from the local exchange area all the way to the FX customer's end office, whereas the Qwest transport to Level 3 for FX-like traffic only goes to its POI with Level 3. From that point, Level 3 assumes the full cost of all DEOT/DTT trunks to the customer's end office. Thus, as Level 3 described in its Opening Brief,[155] both the Level 3 network and the Qwest network provide dial-up service to ISP customers by substantially the same network functionality and are provisioned in a similar manner, with costs allocated to the appropriate party. The only difference is that Qwest uses PRI trunks instead of the DEOT/DTT trunks that Level 3 uses. Level 3 is *not* obtaining private-line transport from Qwest, as Staff alleges. Level 3 obtains interconnection facilities from Qwest to pick traffic up from the POI. Similarly, Qwest fulfills its duty to bring interconnecting traffic to the agreed upon POI over its network, at no additional cost than any other local call.

86. Staff has taken an odd approach to the cost analysis. Rather than focus on

[152] Level 3's Opening Brief, ¶¶ 78-82.

[153] Qwest's Opening Brief, ¶ 104.

[154] Commission Staff's Opening Brief, ¶ 98.

[155] Level 3's Opening Brief , ¶¶ 75-77.

Qwest's costs (which it admits are no higher as a result of FX-like traffic),[156] but instead on the cost efficiencies that Level 3 enjoys. Staff instead focuses on the cost efficiencies it claims CLECs enjoy. Staff argues that FX-like arrangements unfairly impose interoffice transport costs on Qwest. The Commission, according to Staff, required the ILEC to transport calls outside the rate center to a CLEC's switch because it expected the CLEC to bear transport costs in delivering that call back to the original rate center. With FX-like calls, the return leg is avoided, which Staff perceives to be unfair to Qwest.[157]

87. Staff makes much of the fact that Level 3 can avoid building useless trunks back to the Qwest local calling area[158] (in the "triple trunking" arrangement that Level 3 described in its Opening Brief and which staff admits is impractical), but again fails to tie this to any additional burden imposed on Qwest, other than the lack of "parity."[159] In other words, Level 3 has adopted a network structure that costs Qwest not a cent more and saves Level 3 the expense of unnecessary trunking, but this is somehow unfair simply because Level 3 operates efficiently. Staff keeps insisting that unnecessary economic inefficiencies should be mandated based on an alleged requirement that burdens be "symmetrical," but offers no support for this assertion. Nor can it, since there is nothing in the FCC's rulemaking decisions that bases the network interconnection rules on parity or some "symmetrical burden." In fact, the FCC has stated that "ILECs and CLECs alike are free to deploy new technologies that provide more efficient solutions to the delivery of certain types of traffic . . . ."[160] Obviously, "symmetry" and "parity" are just the latest addition to the lengthy list of euphemisms for "Qwest status quo" that Level 3

[156] Commission Staff's Opening Brief, ¶ 100.
[157] Commission Staff's Opening Brief, ¶ 23.
[158] Commission Staff's Opening Brief, ¶ 96.
[159] Commission Staff's Opening Brief, ¶ 95.
[160] *ISP Remand Order,* ¶ 93.

exposed in its Opening Brief.[161]

88. Staff's analysis of cost issues also appears to be colored by a mistaken impression that compensation for termination of ISP-bound calls constitutes an unfair windfall to the carrier providing service to the ISP. It claims that payment of reciprocal compensation "perpetuates the arbitrage the FCC identified in its ISP Remand Order" and suggests that the FCC should have imposed a bill and keep regime.[162] The $0.0007 rate established by the FCC for ISP-bound traffic is not a windfall to carriers that serve ISPs; rather it is a rate that reflects a "reasonable approximation of the additional costs of terminating such calls"[163] as required by federal law. The FCC recognized this in the *Core Forbearance Order* when it abandoned mandatory bill and keep for ISP-bound calls in favor of the $0.0007 rate. It is fair and reasonable for Level 3 to receive compensation for terminating calls originated by other carriers. To the extent Staff has a concern about equitable sharing of transport costs, it should address those directly (and based on facts instead of assumptions).

89. However, Staff would impose compulsory bill and keep on FX-like traffic. Staff does not explain why it would deny compensation to Level 3 in that situation, yet that is the result of its mandatory bill and keep regime. The best that can be said for Staff's proposal is that it seeks to offset one perceived inequity by creating a second inequity. Staff perceives that transport costs are an unfair burden on Qwest when FX-like arrangements are used, so Staff would create a remedy that denies the terminating carrier recovery of its costs for terminating that call. Staff makes no effort to quantify the economic cost of the alleged free transport obtained by the CLEC or to quantify the economic cost of the free termination that it would

161 Level 3's Opening Brief ¶ 86.

162 Commission Staff's Opening Brief, ¶ 103

163 47 U.S.C. § 252(d)(2).

require CLECs to give. Nor does Staff explain why giving Qwest free termination of its customers' calls is the right way to address the alleged problem of equitable sharing of transport costs.

90. Staff's mandatory bill and keep proposal is bad policy because it allows originating carriers (including Qwest) to avoid responsibility for the cost of terminating their customers' calls. Bill and keep is in-kind compensation in which each carrier allows the other to use its network; this is compensatory to carriers only when traffic is balanced between those carriers. The traffic is not balanced when carriers specialize in their offerings, such as Qwest's focus on residential customers and some CLEC's focus on service to ISPs. In those circumstances each carrier is required by Section 252(d)(2) of the Act to compensate the other for the costs of transport and termination of calls that originate on its network. The Commission has consistently allowed carriers to enter into bill and keep arrangements if they see fit, but it has never compelled a carrier to give up its right under 252(d)(2) to receive compensation. It should not do so now.

91. For its part, WITA adopts a sensational approach, rather then engaging in a reasoned discussion of the economics of how FX-like traffic affects ILEC cost structures. It pronounces FX-like traffic to be "devastating"[164] and then careens off on a tangent discussing "IP-in-the-middle" traffic, which is nothing like FX-like traffic and is irrelevant to this proceeding.[165] Staff also joins WITA by trying to cloud the issue by referring to "IP-in-the-middle" cases[166] and toll-bridging.[167] Staff and WITA loudly proclaim a threat to the ILEC status quo of access charge windfalls, but they have not proven their case on the record or in

[164] WITA's Opening Brief, ¶ 18.

[165] WITA's Opening Brief, ¶¶ 19-22.

[166] Commission Staff's Opening Brief, ¶¶ 115-116.

[167] Commission Staff's Opening Brief, ¶ 114.

their Opening Briefs.

B. Impact on Access Regime/Impact on Competition

92. Qwest argues that it "should be compensated for its local exchange network" through "originating access charges or some other reasonable origination charge."[168] Similarly, Staff maintains that "[w]ith VNXX, the customer makes no contribution to the *cost* of the local exchange" network.[169] Although Qwest and Staff have attempted to frame the issues in this proceeding as the recovery of "reasonable origination charges" or "costs," this proceeding has nothing to do with recovery of ILEC "costs" by any reasonable measure of such costs. Rather, Qwest and WITA seek to prohibit altogether or impose per minute access charges on CLEC FX-like services but not their own functionally equivalent, competing FX and FX-like services.[170] They seek not their incremental costs, but a windfall in access charges that typically exceed incremental costs by a factor of ten or more. They also seek to impose special access transport charges which the GAO has determined are not effectively constrained by competition[171] and on which ILECs obtain excessive rates of return.[172] Moreover, adoption of a prohibition on VNXX or imposition of access charges will ensure ILECs achieve a monopoly on services to ISPs and

[168] Qwest's Opening Brief, ¶ 93.

[169] Commission Staff's Opening Brief, ¶ 81 (emphasis supplied).

[170] Global Crossing *et al.* Opening Brief, ¶¶ 26-31; Level 3 Opening Brief, ¶¶ 64-69.

[171] *See, e.g.,* GAO Report 07-80, Report to the Chairman, Committee on Government Reform, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,* at 13, 19-21 (Nov. 2006) ("granting of Phase II pricing flexibility, generally shows that prices and average revenues are higher, on average, in Phase II MSAs - where competition is theoretically more vigorous- than they are in Phase I MSAs or in areas where prices are still constrained by the price cap."); Letter of FCC Commissioner Michael J. Copps to Congressman Edward Markey, at 1 (June 11, 2007) (As indicated by the GAO Report, "a non-competitive, monopolistic special access market represents an economically inefficient tax on every American who uses a cell phone or a wireless device and on every small, medium, or large business or government agency that purchase raw network access.").

[172] *See, e.g.,Special Access Rates for Price Cap Local Exchange Carriers, AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593, WC Docket No. 05-25, Comments of CompTel/ALTS, Global Crossing North America, Inc. *et al.*, at 4 (June 13, 2005) ("Rates of return for RBOCs in 2004 were as follows: Verizon 31.5%, SBC 76.2 %, Qwest 76.8%, and BellSouth 81.9%. The average for the four BOCs was 53.7%."); *Special Access NPRM*, ¶ 35 ("the BOCs have earned special access accounting rates of return substantially in excess of the prescribed 11.25 rate of return that applies to rate of return LECs.").

ESPs because customers will not pay access charges to connect to ISP and ESP services. Qwest's position is blatantly anti-competitive and if accepted, would reduce or eliminate alternatives for dial-up Internet access, third party VoIP services (e.g., Vonage and Skype) and other ESP services outside the major metropolitan areas in Washington.

93. One of Qwest's and Staff's attempts to justify Qwest's discriminatory proposal (imposing access charges on CLEC FX-like but not Qwest's own competing services) is to claim that the use of VNXX for ISP and ESP-bound traffic undermines universal service by "creating a hole in the access charge regime."[173] This argument is a red herring because the universal service system never contemplated revenues from data traffic to ISP and ESPs in the first instance. In fact, Staff acknowledges that "dial-up Internet traffic did not exist at the time access charges were devised."[174] Moreover, *terminating* access charges on voice services support universal service in Washington, not originating access charges on data services.[175]

94. Theoretically, ILEC per-minute access rates are established so that interexchange costs are recovered from the total revenue generated by the charges on the expected minutes of use. It is one thing for Qwest to accuse Level 3 of "avoiding" access charges on FX-like traffic, but these charges are only avoided if those FX-like minutes were included in the expected amount of usage on which the rates were based so that Qwest is not recovering its costs. To the extent that FX-like minutes are in excess of expected access minutes, then Qwest is not being deprived of cost recovery. This is the most likely situation, since Qwest has not demonstrated that FX-like traffic would be generated but for the existence of dial-up ISPs, who even Staff

[173] Commission Staff's Opening Brief, ¶ 82.

[174] Commission Staff's Opening Brief, ¶ 19.

[175] Commission Staff's Opening Brief, ¶ 109.

admits are not likely to be accessed via interexchange calls,[176] nor has it ever accounted for revenues from this traffic in the cost studies justifying its access rates.

95. Because its originating access rates are in fact *not* cost-based, as theory would dictate (and Qwest implies), but are totally unregulated and ungrounded in any cost recovery methodology Qwest could not demonstrate that alleged lost originating access revenue from FX-like architectures somehow disallows them fair cost recovery. Qwest's Opening Brief demonstrates a decided lack of candor by casting its issue as a matter of cost recovery. "The principle of cost causation" it says, "would have the CLEC . . . pay compensation to Qwest for the *origination costs* Qwest incurs . . . ."[177] It is remarkable to note, though, that to the extent that FX-like minutes are in excess of expected access minutes, Qwest is only being deprived of *windfall profits*, not cost recovery. If for no other reason than this, any of Qwest's arguments regarding "cost causation" should be viewed with a jaundiced eye.

96. WITA raises the specter of lost access revenues that support universal service,[178] as does Staff,[179] but they have provided no evidence at all that FX-like traffic has siphoned off interexchange minutes of use that are needed for cost recovery, or that USF recovery has diminished. Moreover, while WITA decries the loss of the hypothetical USF assessment, it conveniently omits discussion of the windfall profits that additional originating access charges would generate.

97. Staff's opening brief acknowledges that there is no argument, based on preserving ILEC access revenues, that supports applying access charges to ISP-bound calls.[180] However,

[176] Commission Staff's Opening Brief, ¶ 117.
[177] Qwest's Opening Brief, ¶ 104.
[178] WITA's Opening Brief, ¶ 24.
[179] Commission Staff's Opening Brief, ¶ 19.
[180] Commission Staff's Opening Brief, ¶ 113.

Staff continues to press for application of access charges to voice traffic that is terminated over FX-like arrangements.[181] While Staff's opening brief extensively recounts the origin and purposes of the access charge regime, there is no discussion of competitive impacts. As Level 3 addressed in its opening brief, the proposals to either prohibit FX-like arrangements or deny compensation via mandatory bill and keep will harm competition. Staff appears to believe that competition is appropriate only if it occurs on the ILECs' terms, using their network designs and their pricing structures. This is hardly consistent with the state policy that encourages diversity of supply in telecommunications services and efficiency in the provision of telecommunications services.[182] If entrants are required the charge the same prices and use the same methods as incumbents, it is hard to imagine what the purpose of competition would be in the first place.

98. Furthermore, Staff has mischaracterized and/or fabricated the FCC's findings in the Computer Inquiry proceedings to bend them to its arguments. For example, it falsely asserts that "[t]he 'ESP exemption' requires the ESP to purchase local business lines in each local calling area where it seeks to receive 'local' calls and then to bear the cost of transporting the call over private lines to its distant computer facilities," and cites to a number of authorities, none of which is remotely on point.[183] Section 12.6.2 of Huber and Kellog makes no note of such a requirement, and paragraph 27 of the ISP Remand Order actually emphasizes that ESPs "have the *option* of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs . . . ."[184] Paragraph 78 of the 1983 MTS and WATS Market Structure Order discusses leaky PBXs, and not the ESP exemption at all; neither does page 16133 of the Access Reform Order, which actually supports Level 3's arguments when it states that "[t]he

---

181 Commission Staff's Opening Brief. ¶ 114.

182 RCW 80.36.300.

183 Commission Staff's Opening Brief, ¶ 110 n.55.

184 *ISP Remand Order* ¶ 27. (emphasis original).

access charge system contains non-cost-based rates and inefficient rate structures"[185] and that "[w]e are also not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs."[186] In short, the authority Staff cites does not support its position. Consequently, the Commission must disregard any Staff discussion related to the ESP exemption or supposed "requirements" for local presence.

C. Consumer Impact

99. Qwest asserts that the elimination of "VNXX" would produce no demonstrable negative consumer impact, because ISPs could place modems within the LCAs.[187] In making this claim Qwest conveniently ignores the fact that the only way ISPs could place modems within each LCA would be to purchase services from Qwest and other ILECs—because they are the only providers of ubiquitous facilities in each LCA. Qwest's position is also another example of mandating significant additional cost and risk of failure by requiring the deployment of equipment that would add nothing to the functionality of the service. Even WITA admits that the loss of competitive FX-like services would bolster the dial-up business of their rural carrier members.[188] The net result would be that: (1) ISPs would have fewer telecommunications partner choices, driving up prices for such services, which would be passed on to ISP consumers); (2) ISPs would be required to spend a significant amount of money to install modem banks in each LCA (which, again, would be passed on to consumers); and (3) numerous ISPs could end up exiting the market in certain LCAs (again, driving up consumer prices). In short, Qwest is wrong. Requiring ISPs to place modems in each LCA would have a negative impact on Washington consumers—fewer choices and higher prices.

185 *Access Charge Reform Order,* ¶ 345.

186 *Id.* ¶ 346.

187 *See* Qwest's Opening Brief, ¶ 107.

188 WITA's Opening Brief, ¶ 26 ("Every rural carrier provides dial-up ISP access to their customers.").

100. WITA reaches the same erroneous conclusion, albeit through different means. WITA argues that there is no evidence that customers use VNXX for dial-up Internet service.[189] Staff testimony contradicts WITA's assumption and the conclusion that consumers would not suffer if FX-like services were eliminated. Staff has recognized that "it appears that a large portion of dial-up Internet traffic is now provisioned through the use of VNXX," and that the loss of VNXX would have "very serious consequences for the CLECs, their ISP customers, and the ISP's end user customers (that is, people who use AOL or other dial-up Internet access services)."[190]

101. Staff further claims, however, that FX-like arrangements are not used for voice calls but provides no support for this claim. To the contrary, FX-like arrangements are being used for services other than dial-up Internet calls, including enhanced fax and messaging services and VOIP services.[191] In sum, Staff would deny customers the benefits of these services, at least to the extent that they are provisioned today, with an unsupported assertion that the services are not widely used. In reality, consumers will be harmed if the Commission prohibits carriers from using efficient network architectures in order to provide these services.[192]

102. Level 3 has deployed an efficient network architecture that allows ISPs to receive dial-up calls from around the state through a centralized location, rather than having to deploy redundant equipment in numerous dispersed facilities. Consumers, especially those that cannot afford or have no access to broadband Internet access services, benefit from lower dial-up ISP operating costs. If the Commission required CLECs to implement an unnecessary triple

---

[189] WITA's Opening Brief, ¶ 26.

[190] Commission Staff's Opening Brief, ¶ 117.

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

[192] Apparently, Staff proposes to prohibit FX-like services for voice traffic, but allow it for ISP-bound traffic, It is not clear, however, how Staff proposes to treat other uses of FX-like service arrangements such as enhanced fax and voice messaging services.

transport architecture, CLECs would be forced to either increase their rates to ISPs or abandon this line of business altogether. As CLECs become unable to provide economical, competitive services to ISPs, they, in turn, will be unable to provide rural customers a telephone number to use in order to access the ISP. This will result in limiting consumers to ILEC-affiliated ISPs (including Qwest's dial-up Internet services[193]) in many rural areas. The Commission should not be misled by Qwest's and WITA's arguments and should continue its policy of encouraging competition by permitting CLECs to provide competitive alternatives to ILEC FX services.

D. Impact on Independent ILECs

103. WITA does not and cannot substantiate its claim that ILEC access charge "losses" are substantial."[194]

E. Other Public Policy Considerations

104. In addition to the those arguments set forth in its Opening Brief, Level 3 contends that the Commission must bring closure to Qwest's repetitive debate of whether the CLEC's FX-like services are lawful. Qwest has contested these issues again and again despite its previous regulatory losses. By continually disputing the legality of the CLEC's services and denying their claims for compensation, Qwest leverages its much deeper pockets and forces CLECs to engage in repetitive litigation. This in turn requires the Commission to devote limited resources on issues previously decided. Accordingly, Level 3 implores the Commission to declare again and finally that the CLEC's FX-like services are lawful and that additional disputes on the same issues will be summarily dismissed.

V. STAFF PROPOSAL

105. Staff continues to misinterpret, selectively quote, and misapply the FCC's *ISP*

---

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

[194] WITA Opening Brief, ¶ 28.

Remand Order and this Commission's *AT&T Order* to support its discriminatory proposal. As Level 3 explained, FX-like services for ISPs existed prior to the FCC's order, and the FCC's so-called preference for bill-and-keep has long since been repudiated by subsequent events, including lifting of the cap and new markets rule.[195] Adopting bill-and-keep for FX-like, ISP-bound traffic terminated by CLECs (but not ILECs) violates federal law and this Commission's precedent that requires compensating CLECs for the costs they incur to terminate traffic.

106. While Staff acknowledges the "severe consequences" that prohibiting FX-like services would impose on CLECs and their ISP customers, it ignores the severe consequences that adopting its proposal would have on CLECs and their voice FX-like customers. Staff also cannot explain why, if FX-like number assignment by CLECs is illegal, it should be permitted for ISPs but prohibited for voice customers. In the end, Staff's proposal has no basis in law or logic and should be rejected.

107. Staff is the only party in this proceeding that supports its proposal. For all the reasons specified in Level 3's Opening Brief, the Commission should continue its policy of requiring all LECs to compensate other LECs (whether CLEC or ILEC) for the termination functions they provide for FX-like traffic.

VI. QWEST/MCI VERIZON ACCESS SETTLEMENT

A. Standards for Approval of Negotiated ICA

108. The arbitrator in Level 3's arbitration with Qwest has referred the FX-like issues to this docket. Because of the close relationship between the generic docket, Level 3's arbitration, and the Qwest/Verizon settlement, the Commission must expand its inquiry beyond the standard in Section 252(e).

109. Comparing and contrasting Qwest's position on FX-like traffic in its settlement

[195] *See* Level 3's Opening Brief, ¶¶ 53, 102.

with Verizon versus its arbitration with Level 3 shows that Qwest is discriminating against Level 3. Qwest's agreement with Verizon and its arguments in the Level 3 arbitration are diametrically opposed and discriminate against Level 3 in at least the following ways: (1) Qwest allows Verizon to treat all locally dialed calls the same for purposes of compensation, including "VNXX", ISP-bound and VoIP calls, regardless of customer location and regardless of whether Verizon or its customer has an established point of presence in the local calling area where the call terminates, despite refusing to do so in its agreement with Level 3; (2) Qwest allows Verizon to carry all types of calls over interconnection trunks, while it attempts to force Level 3 to treat all ISP-bound traffic as interstate and carry such traffic over Feature Group D trunks; (3) Qwest agrees to forego access charges for such calls, while seeking to require Level 3 to pay originating access; and (4) Qwest argues VNXX should be banned in its entirety, but allows Verizon to provide it under favorable terms and conditions. There is simply no legitimate or legal basis for such blatant discrimination.

110. 47 U.S.C. § 252(c)(2) requires that the Commission uphold the requirements of both sections 251 and 252(d) of the Federal Act in resolving an arbitration. 252(c)(2) and 252(d)(1) require that "*any rate for interconnection*" must be "*nondiscriminatory.*" There is no flexibility in this standard, and Qwest's agreement with Verizon as compared to its offer to Level 3 fails the test. As the FCC noted in implementing the Federal Act:

> The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.[196]

In that vein, FCC Rule 51.305 requires that a LEC provide interconnection on:

[196] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, ¶ 217 (rel. Aug. 8, 1996) ("*First Report and Order*").

> "terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of *any agreement*, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, *offering such terms and conditions equally to all requesting telecommunications carriers*, and offering such terms and conditions that are no less favorable than the terms and conditions the incumbent LEC provides such interconnection to itself…" (emphasis supplied).

111. Second, the non-discrimination obligations in 251, and incorporated into 252(c)(2), are equally unequivocal. Section 251(c)(1) requires interconnection that is "at least equal in quality to that provided by the LEC to itself or to any other party to which the carrier provides interconnection" on "rates, terms and conditions that are just, reasonable and *nondiscriminatory.*" In short, Qwest cannot offer Verizon interconnection for the exchange of FX-like traffic but deny the same interconnection to Level 3.

B. <u>Terms and Conditions</u>

112. After arguing (for more than 40 pages) that CLEC FX-like services violate state and federal law, Qwest characterizes the FX-like service and compensation issues as a "dispute between the parties" when it discusses its amendment with Verizon. Qwest cannot have it both ways. Qwest and Verizon cannot mutually agree to violate the law. Qwest cannot argue first that "VNXX" should be prohibited, then that "VNXX" is okay but only at a rate that Qwest is willing to agree upon. This starkly exposes Qwest's ulterior motive in this proceeding—CLECs may only provide FX-like services in competition with Qwest if Qwest can dictate intercarrier compensation terms that disadvantage its competitor. If Qwest concedes that "VNXX" is compensable, and the parties cannot agree on the termination rate, then it is reasonable for the Commission to establish a rate. The Commission should continue its policy of compensating CLECs for terminating FX-like traffic at the applicable rate (state or ISP-bound rate).

113. The law provides that an incumbent carrier may not discriminate among competitors with respect to the rates, terms and conditions governing interconnection. Period.

The inquiry ends there. There is no middle ground. Discrimination is simply not allowed. Qwest argues that the Agreement is acceptable because Qwest will offer the same terms and conditions and utilize the same *methodology* to generate a region-wide, CLEC-specific rate. Under the Qwest / Verizon Agreement, the parties have agreed to compensate each other for the exchange of all "Total Local Dialed Traffic" at an agreed upon Unitary Rate. The Unitary Rate is a weighted average of TELRIC end office and tandem rates by state and the FCC's ISP rate of $0.0007 (Hearing Exh. 571C, ¶1.0). The initial rate for the exchange of all of this traffic is $0.00078651, and includes both local termination and transport from the terminating carrier's tandem. (Hearing Exh. 571C, ¶ 2). The initial "Unitary Rate" of compensation is established for the exchange of *all* traffic, including VoIP, ISP-bound traffic, and other locally dialed traffic. (Hearing Exh. 571C, ¶ 2).

114. But the law does not require Qwest to offer all CLECs the same formula, it requires Qwest to offer the same rate.[197] Utilizing a region-wide rate based on some formula known and understood solely by Qwest does not amount to giving Level 3 the same rates, terms and conditions as those offered to Verizon. The "formula" involves some historical and region-wide analysis of traffic mixes and network configurations.[198] So even if the formula is possible to determine in theory, it can never reasonably be applied. What results from this "historical" analysis across a 14-state region, is that Qwest will always treat Verizon the same, which is wonderful for the Verizons of the world, but no defense to federal prohibitions on discriminatory treatment of interconnecting facilities-based carriers.

115. Tellingly, Qwest cites no authority to support this 14-state formulaic approach as an appropriate methodology for testing discrimination. Nor does Qwest explain how the

[197] *See, e.g.*, 47 U.S.C. §§ 202(a), 203, & 252(e)(2)(A).
[198] Qwest's Opening Brief, ¶ 120.

Commission is to satisfy its legal obligation to ensure the Agreement is non-discriminatory and in the public interest in Washington if no direct comparison can be made between this agreement and other terms and conditions offered in agreements existing only in Washington. This Commission and regulators across the country have long determined whether agreements satisfy non-discrimination obligations by looking at whether all carriers are offered identical rates and charges. Hence, the state-wide and carrier-wide cost cases to determine wholesale rates in agreements with Qwest regardless of a CLEC's size, footprint, mix of traffic etc. Obviously, if this Commission truly had to determine whether this Agreement, dependent on each carrier's unique network and traffic configuration across Qwest's entire region, was discriminatory, it would take years to analyze and approve each agreement. Instead, there must be some objective way for this Commission to determine if the agreement is discriminatory to carriers operating in Washington. The only objective standard is to require Qwest to offer all CLECs the same rate.

116. Qwest also claims that the agreement is consistent with public policy because it enables "the continued use of VNXX dialing, to the extent that such use enables Internet access."[199] Qwest tries to, but cannot, hide the fact that this agreement permits VNXX dialing for both voice and ISP-bound calls, once again undermining its position that state and federal law prohibit these services (but only when provided by CLECs). Under the Qwest / Verizon Agreement, "Local Voice Traffic" is defined to include all voice traffic "dialed with a Local Dialing Pattern" where "Local Dialing Pattern" is defined as any call for which the originating and terminating NPA-NXX are assigned in the LERG to the same rate centers within the same mandatory local calling area "regardless of the actual geographic end points of the call." (Attachment 1, ¶ 1.0)

[199] Qwest's Opening Brief, ¶ 118.

117. Through this Verizon amendment, Qwest has conceded that the location of equipment is irrelevant to the determination of whether traffic is "local" or "long distance," and therefore, impliedly conceded to Level 3's position that locally-dialed ISP-bound and VoIP traffic should be exchanged and compensated without regard to the physical geographic location of the end users. In so doing, Qwest acknowledges the reality that ISPs centralize their operations – *e.g.*, AOL in Virginia – and do not locate expensive equipment in every local calling area.[200] If Level and Verizon were both serving AOL's centralized operations in Virginia, Qwest's position is that Verizon could provide terminating service to AOL without having to pay Qwest originating access charges, but Level 3 could not. That is the essence of discrimination and this Commission should not tolerate nor permit it.

VII. CARRIER-SPECIFIC ISSUES

A. Level 3/Broadwing Counterclaim

118. Level 3 supports the positions of Broadwing concerning these issues, as set forth in Broadwing's Initial and Reply Briefs in this proceeding.

B. Global Crossing Counterclaim

119. Level 3 has no response with respect to this topic.

C. Other Carriers (Listed Individually)

120. Level 3 has no response with respect to this topic.

VIII. CONCLUSION/RECOMMENDATIONS

121. For the reasons stated herein, Level 3 contends that Qwest's complaint regarding

[200] The 8th Circuit Court of Appeals has just confirmed that in a "VoIP-to-landline or landline-to-VoIP communications, known as "interconnected VoIP service," the geographic location of the landline part of the call can be determined, but the *geographic location of the VoIP part of the call could be anywhere in the universe* the VoIP customer obtains broadband access to the Internet, not necessarily confined to the geographic location associated with the customer's billing address or assigned telephone number." *Minnesota Public Utilities Commission, et al. v. the FCC, et al.* Case Nos. 05-1069, 05-1122, 05-3114, and 05-3118, slip op. at 8 (8th Cir. 2007) (emphasis supplied).

FX-like traffic is without merit, and respectfully requests that the Commission dismiss the instant matter accordingly.

Respectfully submitted,

____

Greg Rogers
Gregg Stumberger
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

Tamar E. Finn
Edward W. Kirsch
Frank G. Lamancusa
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006

Rogelio E. Peña
Peña & Associates, LLC
4845 Pearl East Circle, Suite 101
Boulder, CO 80301

Counsel for Respondent Level 3 Communications, LLC

Dated: June 29, 2007

CERTIFICATE OF SERVICE

I, Jennifer Powers, hereby certify that on the day of June 29, 2007, true and correct copies of **Level 3 Communications, LLC's Reply Brief** were served on all parties of record in this proceeding listed below via United States first class mail, postage prepaid and electronic mail. In addition, the original plus three (3) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Mace.

Lisa A. Anderl, Associate General Counsel
Adam L. Sherr , Senior Counsel
Qwest
1600 7th Avenue, Room 3206
Seattle, WA 98191
lisa.anderl@qwest.com
adam.sherr@qwest.com

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
gregkopta@dwt.com

Ethan Sprague
Director Regulatory Affairs
Pac-West Telecomm, Inc.
1776 W. March Lane, Suite 250
Stockton, CA 95207
esprague@pacwest.com

Andrew Metcalfe
President & CEO
Northwest Telephone Inc.
250 East Penny Road
Wenatchee, WA 98801
ametcalfe@nti.us

Gregory L. Castle
AT&T Services, Inc.
525 Market Street, Room 2022
San Francisco, CA 94105
gregory.castle@att.com

Dan Foley, General Attorney & Asst. Gen. Counsel
AT&T Services, Inc.
P.O. Box 11010
645 E. Plumb Lane, B132
Reno, NV 89520
dan.foley@att.com

Charles L. Best
Dennis Robins
Electric Lightwave, LLC
4400 NE 77th Avenue
Vancouver, WA 98662
charles_best@eli.net
dennis_robins@eli.net

Dennis D. Ahlers
Associate General Counsel
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 900
Minneapolis, MN 55402-2456
ddahlers@eschelon.com

Michael J. Shortley, III
VP & General Counsel – N. America
Global Crossing Local Services, Inc.
1080 Pittsford-Victor Road
Pittsford, NY 14534
michael.shortley@globalcrossing.com

Gregory M. Romano
General Counsel – Northwest Region
MCI Worldcom Communications, Inc.
1800 41st Street
Everett, WA 98201
gregory.m.romano@verizon.com

Calvin Simshaw
Vice President, Associate General Counsel
CenturyTel
805 Broadway, VH1065
Vancouver, WA 98660-3277
calvin.sirnshaw@centurytel.com

Richard A. Finnigan
Law Office of Richard Finnigan
2112 Black Lake Blvd. SW
Olympia, WA 98512
rickfinn@localaccess.com

Jonathan Thompson
Assistant Attorney General
1400 S. Evergreen Pk. Drive, SW
P.O. Box 40128
Olympia, WA 98504-0128
jthompso@wutc.wa.gov

____

Jennifer Powers

Dated this 29th day of June, 2007