BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF: LEVEL 3 COMMUNICATIONS LLC INC.'S PETITION FOR ENFORECEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	DOCKET NO. UT-053039 QWEST'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION

1 Qwest Corporation ("Qwest"), pursuant to WAC 480-07-380(2), hereby files its memorandum in support of its accompanying motion for summary determination in this matter. Qwest asks the Administrative Law Judge ("ALJ") to enter an order granting summary determination in favor of Qwest and denying the relief requested by Level 3 Communications LLC, Inc. ("Level 3"). If, in the summary determination the ALJ concludes that Level 3 is entitled to interconnection solely for purposes of the provision of information services and not telecommunications services, and rules that VNXX numbers are permissible, the ALJ should also rule that no intercarrier compensation is due for calls terminated to those numbers, and that they should be exchanged on a bill and keep basis.

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I. INTRODUCTION

2 The primary issue in this case concerns VNXX calls, and whether intercarrier compensation is due for this type of non-local ISP traffic. There is also the issue of VNXX traffic in general, and the extent to which the use of VNXX numbering schemes is permissible. Finally, there is the question of whether Level 3 may use local interconnection facilities to route VNXX traffic over Qwest's network to its own point of interconnection with Qwest.

3 It is Qwest's position in this case that VNXX numbers are a permissible use of numbering resources only when the customer has a "physical presence" in the local calling area where calls are originated. This physical presence may be established through a private line facility that Level 3 dedicates to an end-user, as with Qwest's FX service. However, VNXX calls to an ISP are not compensable. Calls to an ISP are only compensable under the *ISP Remand Order*[1] if the ISP's server or modem bank is in the same local calling area as the customers who originate calls to the ISP.

4 VNXX numbers are telephone numbers that have the same NXX (prefix) as the local calling area of an ISP's end-user customers. The term "virtual" is used to describe the fact that calls to the VNXX number are not local calls, though the dialing pattern makes them appear to be local. This is because each VNXX number is associated with a routing number that will route the seemingly local calls to the often distant location of the CLEC serving the ISP. This allows the CLEC and the ISP to force Qwest to transport calls from multiple local calling areas to a single distant physical location.

5 Level 3 seeks intercarrier compensation from Qwest for calls originated by Internet end-users who obtain dial-up internet access by calling ISP customers of Level 3. These ISP customers have obtained VNXX numbers (from Level 3) in order to make these calls look (to the end

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

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users) like local calls. In fact, as previously indicated, they are not local calls at all, and are not compensable as "ISP-bound traffic." The use of VNXX numbers establishes that the ISP's server is *not* located in the same local calling area as the end user who places the call, thereby making the call a non-local call, and not "ISP-bound" for purposes of intercarrier compensation.

6 The fact that the calls may be destined for an ISP server does not magically convert them into "ISP-bound traffic" compensable under the *ISP Remand Order*. That order addressed only traffic to an ISP server or modem *located in the same local calling area* as the end-user. The VNXX scheme, as discussed in more detail below, is just the next in a long list of improper toll-avoidance tactics attempted and employed over the years in Washington – all of them disallowed by the Commission. The ALJ, and the Commission, should send a clear signal to carriers that, as in the past, these types of toll-avoidance schemes will not be permitted.

7 Nor should the Commission accept Level 3's argument that VNXX is the same thing as the foreign exchange service that Qwest offers to its customers. This argument is the classic red herring – a diversion intended to distract attention from the main issue. In this case, the main issue is Level 3's attempt to receive compensation to which it is not entitled, and Level 3's use of the public switched telephone network ("PSTN") and the telephone numbering conventions in such a way as enable Level 3 and its ISP customers to avoid paying for access to the PSTN. Furthermore, any argument to this effect is simply wrong – Qwest's FX service is distinguishable from VNXX in several important ways, as will be explained more fully below.

8 Qwest's position in this case is set forth in some detail in its answer, filed with the Washington Utilities and Transportation Commission ("Commission") on June 28, 2005, and that position has not changed. However, since that time Qwest has had the opportunity to conduct discovery on Level 3, and is thus able to incorporate that information in this brief. In addition,

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Qwest is able, in this brief, to provide the ALJ and the Commission with additional applicable case law and analysis in support of its position.

II. BACKGROUND

9 Qwest believes that Level 3 customers are entirely Internet Service Providers ("ISPs") (*i.e.*, companies like AOL and EarthLink) that seek to generate inbound traffic as opposed to two-way local exchange traffic. Level 3's customers, whoever they are, simply do not make outgoing telephone calls, and the volume of traffic that flows to these ISP customers is very large.[2] This method of operation is well-explained in a recent description by the Ninth Circuit in a case involving Pac-West, where the Court characterized a group of companies seeking "to take advantage of the new competitive environment":

> When Congress drafted the Act, it did not foresee the dramatic increase in Internet usage and the subsequent increase in telecommunications traffic directed to Internet Service Providers ('ISPs') like America OnLine and EarthLink. Not long after Congress adopted the Act, newly formed CLECs began targeting ISPs to benefit from the reciprocal compensation provisions in interconnection agreements and the compensation they would receive from the one-way traffic that flows into ISP customers but does not flow in the opposite direction.[3]

10 That is also an accurate description of Level 3's method of operation. Through the facilities provided by Qwest, in combination with telephone numbers that are assigned by the North American Numbering Plan Administration ("NANPA"), Level 3 is able to obtain local telephone numbers throughout Washington. This allows Level 3 to assign local numbers from throughout Washington to their single point customers. But the calls to these numbers do not terminate in the local calling area where the calls originate; instead, at no additional charge to any of the customers involved in the calls, they are carried by Qwest from points throughout

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2 *See* Confidential Exhibit A-2, Level 3's responses to Qwest's Data Requests, request 7, showing the number of minutes billed for ISP traffic in Washington for 2005. No other "local" or "voice" minutes were billed by Level 3.

3 *Pacific Bell v. Pac West Telecomm, Inc*, 325 F3d 1114, 1118-19 (9th Cir 2003) ("*Pacific Bell").*

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Washington to Level 3's locations in either Seattle or Eastern Washington.[4]

11 The dispute in this case as framed by Level 3's Petition relates to whether intercarrier compensation principles should apply to the ISP VNXX traffic. However, after conducting discovery of Level 3, it now appears clear that Level 3 cannot establish the nature of the traffic. Level 3 claims that it is ISP-bound, and indeed 100% of the minutes appear to be destined for an ISP, and are billed as such by Level 3. Though Qwest believes the traffic to be VNXX traffic that is destined for an ISP, it is unknown at this time where the traffic is delivered.[5] Because it is Level 3 who bears the burden of establishing its right to compensation for this traffic, and Level 3 has not identified it as either local or ISP-bound, it seems clear that Level 3 cannot establish a right to recovery of compensation under any theory.

12 Furthermore, because Level 3's traffic is 100% ISP traffic, it is doubtful that Level 3 is even entitled to interconnection with Qwest at all, and thus may not properly seek to enforce its interconnection agreement as requested in the complaint. The FCC's regulations implementing the Telecommunications Act of 1996 make it very clear that carriers are not entitled to interconnection *solely* for the purpose of offering information services, as opposed to telecommunications services.[6] Thus, because Level 3 does not appear to provide telecommunications services to the public, but rather offers and provides only a "managed modem" type service, it may not seek to enforce its interconnection agreement for purposes of offering information services. Further, to the extent that there is a telecommunications component to the service, Qwest submits that this is more in the nature of private carrier

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[4] Under the current law, a CLEC needs to have at least one point of interconnection ("POI") per local access and transportation area ("LATA"). There are two main LATAs in Washington. Level 3 has chosen to have a single POI in the Seattle LATA and has several POIs in the Spokane LATA. However, it appears from available data that calls do not necessarily terminate at those points, but rather are transported further, perhaps even out of state, to an ISP.

[5] *See* Confidential Exhibit A-2 – Level 3's responses to Qwest's Data Requests, response 2.

[6] Under 47 C.F.R. 51.100(b) a carrier that has interconnected or gained access under section 251 (as Level 3 has) may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well. Level 3 does not appear to be offering or providing telecommunications services.

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service not telecommunications service to the public. [7]

13 To understand the issues presented by VNXX, it is first necessary to understand, generally, issues around intercarrier compensation, specifically intercarrier compensation for ISP-bound traffic; how the telephone numbering system works; what VNXX is; and how VNXX works. In addition, because the parties to this case are both telecommunications companies and operate under an interconnection agreement ("ICA"), it is necessary to have an understanding of whether the ICA offers any guidance on these issues.

A. Intercarrier Compensation/Numbering

14 There are two general traffic types to which intercarrier compensation applies. Interexchange (toll, or long distance) traffic is compensated according to switched access service tariffs, while local traffic is generally compensated according to interconnection agreements prescribing either a "bill and keep" or reciprocal compensation arrangement.

15 Local traffic is telecommunications traffic that originates and terminates within a geographically-defined area. These areas are called local calling areas or extended area service ("EAS") areas.[8] These geographically-defined areas allow an end-user customer to have unlimited calling within these areas for a flat rate. Qwest's local calling areas are defined by its exchange boundary maps and contained in its tariffs and price lists that are on file with the Commission.

16 The Telecommunications Act of 1996 mandated some form of intercarrier compensation for the exchange of local traffic between carriers. 47 U.S.C. §251(b)(5). The FCC promulgated rules, and state commissions arbitrated issues around the mandate for intercarrier

[7] *See* Confidential Exhibit A-2, responses 9 and 12, and ¶ 133 of the Triennial Review Order, which states that UNEs may not be obtained for the provision of private carrier services.

[8] This description of "local traffic" is consistent with the definitions of relevant related terms contained in Commission rules (see e.g., WAC 480-120-021), Qwest's tariffs, and the parties' ICA.

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compensation for the exchange of this local traffic. Reciprocal compensation for local traffic provides both incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") the opportunity to recover the costs associated with interconnection for the exchange of local traffic. Reciprocal compensation requires that the carrier whose retail customer originates a local call must pay the terminating carrier. "Bill and keep," is a form of reciprocal compensation that allows for each carrier to bill their end-user customer and keep the revenue, reducing the need to create a record of and bill for local traffic.

17 Local traffic bound for the internet (ISP-bound traffic) is not subject to reciprocal compensation under 47 U.S.C. §251(b)(5), but is subject to a different intercarrier compensation mechanism (under §251(g)) as set forth in the FCC's *ISP Remand Order* – details of this order are discussed below.

18 Interexchange (long distance, or toll) traffic is traffic that originates and terminates between exchanges located in *different local calling areas*. Toll traffic is measured in minutes of use, and is charged to the end-user customer by the end user customer's selected interexchange carrier ("IXC"). The IXC must pay originating access charges to the originating LEC for the use of its network to start the call, and terminating access charges to the terminating LEC for the use of its network to complete the call. Section 251(g) of the Telecom Act of 1996 preserves this regime.

19 Whether a call is local or long distance is determined by the geographic location of the end points of the calls. Based on these physical end points, the telecommunications industry has developed a method of determining the location (i.e., the local calling area) for intercarrier compensation purposes based on the telephone numbers of the originating and terminating end users. Telephone numbers are displayed in the NPA/NXX format (in which the NPA is the area code and the NXX is the central office code). These three digits (NXX) are assigned to

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and indicate a specific central office from which a particular customer is physically served. In other words, in the number (360) 753-XXXX, the "753" prefix is assigned to a specific rate center in the (360) area code and thus identifies that the geographic area where the customer is located is Olympia, Washington.

20 The central office code is followed by a four-digit number which together constitutes the telephone number of the end-user customer's telephone line. Based on this format and the known geographic local calling area/EAS boundaries, a call may be determined to be either local or long distance. The numbering guidelines are quite clear in terms of requiring a synchronization between the numbers assigned and the geographic territory associated with those numbers – to freely disregard this expected synchronization would be to completely gut the current system, which distinguishes between local and long distance calling based on customer location.

B. VNXX Service

21 Virtual NXX or VNXX refers to a situation where a CLEC, such as Level 3, has obtained an assigned block of local telephone numbers for a local calling area, but the CLEC does not have end-user customers located in that local calling area. The CLEC uses its numbers for its ISP customers, who also have no physical presence in the local calling areas associated with those telephone numbers. The traffic directed to those numbers is routed to one of the CLEC's points of interconnection with Qwest and is then delivered to the CLEC's ISP customer (at the ISP's "server" or, more accurately, its "modem bank") at a physical location in another local calling area (or even in another state). However, reciprocal compensation principles only apply when these calls are routed to a CLEC retail customer who is located in the same local calling area as where the call originated.

22 VNXX undercuts the principle of geographic synchronization between telephone numbers and

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customer location because it results in a carrier-assigned NXX associated with a particular central office, but where the carrier has no customers physically located. Instead, these telephone numbers are assigned to a customer physically located outside the local calling area associated with the particular NXX.

23 With VNXX, the physical location of the CLEC's customer is in most cases in a local calling area that would require a toll call from the local calling area which the telephone number is associated. This scheme requires the assignment of a "virtual" NXX. The NXX is labeled "virtual" because it is an assigned number that tells callers that it is in the *calling party's* local calling area, rather than the *called* party's local calling. In other words, a call to the "virtual" NXX does not result in a local call within the local calling area that the VNXX number appears to be assigned, but in reality the call is terminated in a different local calling area, and perhaps even in a different state. Exhibit B, attached hereto, illustrates how VNXX circumvents the proper numbering plan.

C. ISP-Bound Traffic

24 ISP traffic is traffic that is sent to an ISP over a dial-up internet connection. If the caller and the ISP are in the same local calling area, then the intercarrier compensation provisions of the FCC's *ISP Remand Order* apply. That Order establishes a default compensation rate of $0.0007 per minute for ISP-bound traffic (defined to be traffic that originates and terminates in the same local calling area), payable to the carrier who terminates the call unless the carriers are operating under a bill and keep arrangement.

25 Prior to the use of VNXX codes, the ISP had a modem bank or server located in the same local calling area as its customers. The ISP would obtain local numbers, and the customers seeking access to the internet would dial a local call – one that originated at the customer's home and terminated, for purposes of intercarrier compensation, at the ISP's local server.

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26 However, all ISP traffic is not necessarily local traffic – an ISP may offer its subscribers an 8XX number for dial up access, or a subscriber may dial a toll call to obtain such access. In the first case, the ISP would, in setting up an 8XX number, pay toll charges for the traffic that it draws from distant calling areas. Further, the IXC providing the 8XX service would pay access charges to the originating carrier. In the second case, the customers would generally pay on a per-minute basis for the long distance call. In the case of a long distance call, access charges would be due to the originating and terminating LECs from the IXC who carried the call.

27 Level 3's Petition seems to suggest that *all* ISP traffic is compensable at the ISP-Remand Order rate. However, in response to discovery questions, Level 3 has now agreed that not all ISP traffic is compensable at the $0.0007 rate established by the FCC for local ISP traffic. Level 3's responses confirm that Level 3 recognizes that not all traffic destined for an ISP is "ISP-bound traffic" under the *ISP Remand Order*. For example, Qwest asked Level 3 what intercarrier compensation mechanism should apply, in Level 3's view, if a Qwest customer were to place a 1+ call to an ISP served by Level 3. Level 3 responded that it should be paid terminating access charges by the IXC and Qwest should be paid originating access charges. Level 3 did *not* assert that Qwest would be liable to pay Level 3 under the ISP-Remand Order.[9] As will be seen below in the discussion of the *ISP Remand Order*, Level 3's position that the access regime still applies to toll calls is consistent with the FCC's statements that it did not intend to alter that regime. However, it undercuts Level 3's assertion that a VNXX ISP call must be compensated under the *ISP Remand Order*, because VNXX calls are nothing more than toll calls.

D. Applicable Legal Principles

28 There are a number of previously decided cases that provide guidance on this issue. Some of

[9] *See*, Exhibit A-1 – Level 3's responses to Qwest's Data Requests, requests 19 and 21.

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these will be discussed in more detail below, but are set forth here to provide context for the discussion to follow.

1. FCC Decisions

a) The ESP "Exemption"

29 The FCC has a long history of determining the appropriate treatment of traffic bound for enhanced service providers ("ESPs" – providers of communications that modify content). In 1983, the FCC issued an order creating the so-called ESP Exemption.[10] While referred to as the "ESP Exemption," it is not really an exemption, but rather a decision, based on a number of policy considerations, that enhanced service providers were entitled to connect their points of presence through tariffed local retail services (rather than through tariffed Feature Group access services that other carriers were required to purchase) even though the facilities were really being used for services classified as interstate.[11] The FCC assigned the same status to private systems (e.g., PBX systems) that accessed local exchange systems for connecting interstate calls.[12] In other words, the FCC treats the point of presence of an enhanced service provider as if that point of presence is the location of a retail customer.

30 The FCC applied the same approach under the Act when it dealt with traffic routed to the internet. The FCC determined that ISPs, one of the heirs to the old "enhanced service provider" designation, were entitled to the same treatment for compensation purposes. Thus, when an ISP is served by a CLEC, the same analysis applies under section 251(g) of the Act.

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[10] *See* Third Report and Order, *In the Matter of MTS and WATS Market Structure*, , 93 FCC 2d 241, 254-55 ¶ 39, and n. 15, 320, ¶ 269 (1983); *modified on recon.,* 97 FCC 2d 682 (1984) ("*First Order on Reconsideration*"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("*Order on Further Reconsideration*"), *aff'd in principal part and remanded in part sub nom., NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[11] *See, e.g.*, First Report and Order, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982, 16131-34 ¶¶ 341-48 (1997); *see also, generally*, Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988).

[12] *See* Memorandum Opinion and Order, *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 2 FCC Rcd 7424, 7425, ¶¶ 13-15 (1987).

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The ISP Server is treated as an end-user location for the purposes of compensation.

31 Level 3's's position is directly contrary to FCC precedent, which requires that an ISP be treated exactly the same as other end-user customers in determining whether a call to the ISP is a toll call or a local call. In other words, a call from one local calling area to an ISP Server located in another local calling area is treated as a toll call. Implicit in Level 3's position is that in the *ISP Remand Order*, the FCC, without analysis or even intent, has accidentally changed the entire landscape of access charges and issued a blanket exemption for all calls to and from all ISP servers, no matter where located (as long as they send the call to the Internet). However, there is no support for the proposition that the FCC has made such a major policy shift.

b) <u>The ISP Remand Order</u>

32 On April 19, 2001, the FCC issued what has come to be known as the "*ISP Remand Order*."[13] In the *ISP Remand Order*, the FCC affirmed its earlier decision[14] that "ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5)."[15] In reaching this conclusion for the second time, the FCC based its ruling on entirely different reasoning than it had in its 1999 Declaratory Order.[16] Despite this alternative reasoning, the issue was subsequently appealed to the D.C. Circuit for a second time, and the D.C. Circuit again questioned the FCC's reasoning and remanded the issue to the FCC.[17] However, on this second appeal, the D.C. Circuit only remanded the issue of ISP-bound traffic to the FCC, but

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13 See, fn. 1, supra.

14 *See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic,* 14 FCCR 3689, 3690 (1999) ("*ISP Declaratory Ruling*"). In *Bell Atlantic Telephone Companies v. F.C.C.*, 206 F3d 1 (DC Cir. 2000), the DC Circuit had vacated the *ISP Declaratory Ruling* and remanded the issue of ISP-bound traffic to the FCC for further consideration.

15 *ISP Remand Order*, ¶ 3.

16 *Id.¶ 1.*

17 *See WorldCom, Inc. v. F.C.C.*, 288 F3d 429 (DC Cir 2002).

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did not vacate the FCC's order or its interim implementation scheme.[18] Instead, the court expressly left the *ISP Remand Order* in effect, along with its conclusion that ISP-bound traffic is not subject to reciprocal compensation under section 251(b)(5) of the Act.[19]

(1) The underlying policy basis of the *ISP Remand Order*.

33 In concluding that ISP-bound traffic should not be subject to reciprocal compensation and initiating a phase-out of compensation for Internet traffic, the FCC focused on the language of the Act and FCC rules, but also on the underlying policy and fairness of requiring the payment of reciprocal compensation for such traffic. The FCC found that the payment of reciprocal compensation for Internet traffic creates uneconomical subsidies and improper incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.[20] The FCC concluded that these uneconomical incentives arise because reciprocal compensation permits carriers to recover their costs "not only from their end-user customers, but also from *other carriers*."[21] The FCC explained:

> Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of

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[18] Rather than immediately order all local exchange carriers to immediately exclude ISP-bound traffic from reciprocal-computation calculations, the FCC instituted an interim recovery scheme to gradually implement the *ISP Remand Order*. *See ISP Remand Order*, ¶ 7 ("Because the record indicates a need for immediate action with respect to ISP-bound traffic, * * * in this Order we will implement an interim recovery scheme that * * * initiates a 36-month transition towards a complete bill and keep recovery mechanism * * * [and] adopt a gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic."); *see also WorldCom*, 288 F3d at 430 ("Because there may well be other legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs, we neither vacate the order nor address petitioners' attacks on various interim provisions devised by the Commission.").

[19] *See Pacific Bell*, 325 F3d at 1122-23 ("[S]ignificantly, the court did not vacate the *Remand Order*, reasoning that 'many of the petitioners themselves favor bill-and-keep, and there is plainly a nontrivial likelihood that the Commission has authority to elect such a system.' As a result, the *FCC Remand Order* remains in effect pending the FCC's proceedings on remand." (emphasis in original; citation omitted)).

[20] *ISP Remand Order*, ¶¶ 67-76.

[21] *Id.*, ¶ 68 (emphasis in original).

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> incoming traffic that will generate high reciprocal compensation payments.[22]

34 The FCC further found that the market distortions caused by reciprocal compensation payments "are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act".[23] Thus, by targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs reap a "reciprocal compensation windfall."[24] The FCC recognized in the *ISP Remand Order* that business plans like Level 3's shift all the costs of interconnection to other carriers instead of to the CLEC's own customers:

> Finally, and most important, the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier's opportunity to recover costs from its ISP customers.[25]

35 Based on this concern, the FCC criticized CLEC proposals relating to compensation for Internet traffic, because they "do not address carriers' ability to shift costs from their own customers onto other carriers and their customers."[26]

(2) The ISP remand order requires compensation only for certain ISP traffic.

36 Level 3's fundamental argument is that the FCC, in the *ISP Remand Order*, read in combination with the *Core Forbearance Order*,[27] has preemptively required that intercarrier compensation must be paid on *all* ISP traffic, including VNXX ISP traffic. However, these

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22 *Id.*

23 *Id*, ¶ 69

24 *Id*, ¶ 70

25 *Id*, ¶ 76. In fact, this problem is manifest in this case, where Level 3 charges its customers nothing to obtain VNXX services. See discussion below at paragraphs 58-59.

26 *Id.*

27 Order, *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241 WC Docket No. 03-171 (rel. October 18, 2004) ("*Core Forbearance Order*").

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orders address compensation only for local ISP traffic,[28] where the ISP is physically located in the same local calling area as the customer placing the call. There was no discussion in either order of the expected treatment of VNXX traffic.

37 In order to understand these issues, and the FCC's ruling, it is important to place the *ISP Remand Order* in its proper context. In the late 1990s, when the FCC's ISP traffic docket was initiated, ISP traffic was generally handled in one of two ways. If the ISP was located outside the caller's local calling area, the caller would need to dial a 1+ toll call or an 8XX call to access the modem of the ISP. Such traffic was appropriately characterized as interexchange traffic subject to access or long distance charges. The other situation involved two LECs competing in the same local calling area. In this second situation, an end-user customer of one LEC dialed a local number that allowed it to access an ISP customer of the second LEC, where both customers were physically located in the same local calling area. This was the situation the FCC addressed in its 1999 *ISP Declaratory Order* and in its 2001 *ISP Remand Order*. The FCC concluded that, because of the one-way nature of such traffic, requiring reciprocal compensation payments on local ISP traffic was distorting the development of competition in the local markets.[29]

38 In defining ISP-bound traffic in the *ISP Remand Order*, the FCC stated that "an ISP's end-user customers typically access the Internet through an ISP Server *located in the same local calling area*, and that the end users pay the local exchange carrier for connections to the local ISP."[30] The FCC specifically identified the issue it was addressing as "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to

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[28] The FCC has repeatedly ruled that ISP-bound traffic is interstate in nature because the ultimate end points of the calls are at websites across the country or in many cases in other parts of the world. *ISP Declaratory Order*, ¶¶ 1, 10-20; *ISP Remand Order*, ¶¶ 14, 58-62. Nonetheless, for intercarrier compensation purposes, the relevant end points are the physical location of the calling party and the physical location of the ISP's servers or modem banks.

[29] *ISP Remand Order*, ¶¶ 67-76.

[30] *ISP Remand Order*, ¶10. (Emphasis added.)

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an ISP in the same local calling area that is served by a competing LEC."[31]

39 That the FCC recognized that it was dealing only with "local" traffic is also clear from paragraph 12:

> The 1996 Act set standards for the introduction of competition into the market *for local telephone service*, including requirements for interconnection of competing telecommunications carriers. As a result of interconnection and *growing local competition*, more than one LEC may be involved in the delivery of telecommunications *within a local service* area. Section 251(b)(5) of the Act addresses the need for LECs to agree to terms for the mutual exchange of traffic over their interconnecting networks. It specifically provides that LECs have the duty to "establish reciprocal compensation arrangement for the transport and termination of telecommunications." The FCC also determined, in the *Local Competition Order*, that section 251(b)(5) reciprocal compensation obligations "apply only to traffic that originates and terminates *within a local area*," as defined by the state commissions.[32]

40 Thus, the *ISP Remand Order* did not address the situation where a CLEC's ISP-customers servers or modems are located outside of the local calling area of the calling party. In another portion of the *ISP Remand Order*, the FCC specifically recognized that a separate category of ISP traffic continued to exist that was, and would remain, subject to access charges:

> *Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g).* These services thus remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in *Comptel* or reciprocal compensation. *This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic.*[33]

41 In recognizing the existence of such non-local ISP traffic, and providing that it did not fall

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31 *Id.*, ¶ 13. (Emphasis added.)

32 *ISP Remand Order*, ¶ 12. (Emphasis added.)

33 *ISP Remand Order*, ¶39. (Emphasis added; footnote omitted.)

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under its interim regime, it is clear that the FCC did not intend its order to address anything other than local ISP traffic. As noted above, Level 3 agrees that access charges apply to toll calls to an ISP. The Commission here should not allow Level 3 to avoid proper treatment of VNXX calls as toll simply by virtue of a false dialing pattern that hides the true nature of the call.

2. Washington Commission Decisions

a) AT&T Arbitration

42 Less than two years ago, Qwest and AT&T conducted a series of contested arbitrations in several states, including Washington. Those dockets addressed a fundamental issue related to VNXX. Qwest proposed that "local exchange traffic" be defined as "traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission." AT&T proposed language by which local calling would be determined by "the calling and called NPA-NXXs," regardless of the actual origination and termination points. AT&T's proposed language was rejected in each of those arbitrations.

43 In the AT&T/Qwest arbitration proceeding in Washington[34] dealing with the definition of a "local" call, the Commission ruled that the definition of local exchange service would remain traffic that originates and terminates within the *same* Commission-determined local calling area. The Commission rejected AT&T's request for a definition based on "the calling and called NPA/NXXs" – a proposal essentially identical to Level 3's position in this case. The Commission noted with approval the Arbitrator's concern that AT&T's definition "is too sweeping in its potential effect and has *potentially unacceptable consequences in terms of intercarrier compensation.*"[35] The Arbitrator in that proceeding had also ruled that reciprocal

[34] *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b),* Docket No. UT-033035, Order No. 05.

[35] *Id* ¶¶ 14-15 (emphasis added).

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compensation for calls that terminate outside the local calling area in which they originate is inappropriate, and thus that such traffic should be compensated on a bill and keep basis, and the Commission adopted the Arbitrator's Report.[36] Arbitrations in Oregon,[37] Colorado,[38] and Arizona[39] produced similar results.

44 Precisely like the rejected AT&T proposal, Level 3's proposal in this docket would abandon the distinction between local and interexchange traffic for intercarrier compensation and would profoundly change the methods used to determine such compensation.

b) CenturyTel/Level 3 Arbitration

45 This Commission did address the VNXX issue in the CenturyTel/Level 3 arbitration.

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[36] Level 3's interconnection agreement has a similar definition of "Exchange Service" as that which is in the AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0) is as follows: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Commission." The definition in Level 3's agreement (§ 4.24 A) is as follows: "'Extended Area Service (EAS)/Local Traffic' (Exchange Service) means traffic that is originated and terminated *within the local calling area* determined by the Commission (emphasis added).

[37] The Oregon Commission rejected AT&T's proposal in favor of Qwest's proposed definition. The Commission also decided that "[u]sing Qwest's definition maintains the status quo until the Commission can reach a carefully considered decision" in a separate and on-going proceeding regarding the treatment of VNXX traffic and that any resulting changes to the law can be integrated into the agreement using the change of law provision. OPUC Order 04-262, Docket ARB 527. The Oregon Commission later concluded that any carrier engaging in VNXX schemes would clearly be in violation of certain conditions in their certificates of authority, including adherence to the Commission's local exchange boundaries and EAS routes, and the limitation of a carrier's NXX codes to a single local exchange or rate center. *In the Matter of Oregon Telecommunications Association Investigation into Virtual NPA/NXX Calling Patterns*, OPUC Order No. 04-504 (Sept. 7, 2004), Docket UM 1058, p. 5.

[38] In the arbitration in Colorado, the Commission found that "*any service* . . . regardless of what the service is called, that does not meet our approved definition of exchange service is an interexchange toll service. The calling party and the called party must both be physically located in the same local calling area for the call to be a local call for reciprocal compensation purposes. Calls originating from and terminating to customers that are physically located in different calling areas are interexchange." Initial Commission Decision, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado*, Docket No. 03B-287T, Decision No. C03-1189, ¶ 52 (Colo. PUC, October 17, 2003). (Emphasis added.)

[39] The Arizona Commission rejected AT&T's proposal, adopted Qwest's proposed language, and found that "Qwest's proposed definition of 'Exchange Service' comports with the existing laws and rules, and should be adopted. AT&T's proposed definition represents a departure from the establishment of local calling areas and may have unintended affect beyond the issues discussed herein and be subject to abuse. . . .We do not believe that it would be good public policy to alter long-standing rules or practice without broader industry participation."

Opinion and Order, *In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, Inc. for Arbitration with Qwest Corporation, Inc. Pursuant to 47 U.S.C. § 252(b),* Docket Nos. T-02428A-03-0553, T-01051B-03-0553, Decision No. 66888 at 13 (Ariz. Corp. Comm'n, December 17, 2003).

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However, the Commission ruled only that such traffic was subject to *bill and keep* compensation. It did not rule that Level 3 was entitled to the *ISP Remand Order* rate of $0.0007 per minute, or any other type of intercarrier compensation, nor did it conclude that VNXX calls were "local".[40]

46 Furthermore, the Level 3/CenturyTel decision was issued prior to the issues that Qwest raised in the AT&T arbitration. The issues have clearly evolved, and the Commission has more recently clearly defined what constitutes local traffic in the context of a CLEC seeking intercarrier compensation for terminating VNXX traffic.

c) Toll Bridging Cases

47 There is a long history in Washington of carriers and companies who, like Level 3, have attempted to avoid the payment of toll and access charges though various schemes designed to make long distance calls look like local calls. The most common of these schemes has been "toll bridging", where a company takes advantage of overlapping local calling areas or EAS areas by using a "bridging" device that allows customers to avoid payment for what is otherwise a toll call.

48 The Commission has consistently seen through these schemes and ordered the participants to pay their fair share of the costs associated with accessing the telephone network.[41] These cases are discussed in more detail in section III.F. below, paragraphs 77-81. VNXX traffic is much the same as toll bridging, and the same legal principles that guided the Commission's decisions in cases involving toll bridgers should apply in this case as well. The overarching

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[40] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Seventh Supplemental Order: Affirming Arbitrator's Report and Decision,* Docket No. UT-023043 (February 28, 2003), ¶¶ 7-10.

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

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principle in those cases was that companies should not be permitted to avoid toll and access charges by virtue of technological or legal loopholes that might allow such avoidance.

3. Universal

49 The VNXX issue was also addressed in a recent decision by the United States District Court for the District of Oregon. In that case, Universal Telecom argued that Qwest should pay reciprocal compensation on VNXX traffic. The Court first discussed the definition of "local traffic" as contained in Qwest's Oregon tariff and the parties' ICA, which is consistent with the definition of local traffic in this case. The Court then stated:

> [F]or a call to be local and subject to reciprocal compensation, it must originate at some physical location within a LCA [local calling area] or EAS and terminated [sic] at a physical location within the same LCA or EAS. Specifically here, for an ISP bound call to be subject to reciprocal compensation it must originate in a LCA or EAS and terminate in that same LCA or EAS by delivery of the call to the SAP. VNXX traffic does not meet the definition of local traffic because it does not originate and terminate in the same LCA or EAS; it instead crosses LCAs and EASs. Therefore, VNXX traffic, whether ISP bound or not, is not subject to reciprocal compensation.[42]

4. Other State Commissions

50 Many state commissions and boards have addressed the VNXX issue, and have almost uniformly held that VNXX traffic is not local and is not subject to reciprocal compensation or intercarrier compensation. A summary of these decisions can be found in Exhibit C to this brief.

III. ARGUMENT

51 VNXX is an arrangement that provides the functionality of toll or 8XX service, but at no extra charge to either party to the call. VNXX has become an issue because CLECs obtain local numbers that are actually assigned to its customers (*i.e.*, ISPs) with no physical presence in the

[42] Opinion and Order, USDC for the District Court of Oregon at Eugene, Civil Case No. 04-6047-AA (December 15, 2004), page 24.

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local calling area from which the numbers were allocated.

52 Thus, the traffic directed to those numbers is, instead of being routed to customer in the same local calling area as the calling party, routed to a central point of interconnection of the CLEC and is then delivered to the CLEC's ISP customer at a physical location in another local calling area or even in another state.

53 These calls are non-local calls, really nothing more than toll calls. No reciprocal compensation is due to the CLEC for terminating these calls, and they are not compensable as "ISP-bound traffic", as the intercarrier compensation mechanism in place for ISP-bound traffic is limited to local ISP-bound traffic. Level 3's arguments to the contrary are not well taken.

A. VNXX Traffic is not FX

54 Level 3 will likely argue that VNXX service is the same as Qwest's FX service. This is untrue for a number of reasons. The services are distinguishable on at least three different bases. First, FX customers are required to purchase a local connection in the distant central office; VNXX customers do not. Second, FX customers are required to pay for the dedicated transport from the distant central office to their physical location in the home local calling area; VNXX customers do not. Third, the number of customers and volume of traffic associated with each service are widely disparate. Of the over 2 million access lines Qwest serves in Washington, less than 5,000 of them are FX lines – less than one half of one percent. Level 3 serves all of Washington, and uses VNXX codes throughout the state. FX is clearly a minor exception to the way calls are routed and rated, but Level 3 seeks to take the exception and turn it into the rule.

1. Qwest's FX service is different from VNXX.

55 As noted above, Qwest's FX service is very different from VNXX. VNXX uses the PSTN to route and terminate calls to end users connected to the public network in another local calling

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area. In all respects except the number assignment, the call is routed and terminated as any other toll call. Qwest's FX product, on the other hand, delivers the FX-bound calls to the local calling area where the number is actually associated. A Qwest FX customer purchases a dedicated local service connection in the local calling area associated with the telephone number. That local service connection is purchased by the FX customer out of the local exchange tariffs that apply to that local calling area. The calls are then transported on a private line, paid for by the FX subscriber, to another location. In other words, after purchasing the local connection in the local calling area, the FX customer bears full financial responsibility to transport calls from the originating local calling area to the location where the call is actually answered. It does this at tariffed private network rates. Qwest, and other telephone companies, have been selling such private line services to PBX owners and other customers for decades. Calls are delivered to the customer's PBX and any call delivery behind the PBX is, for purposes of transport to the customer's actual location, carried on the owner's private network.

56 VNXX is fundamentally distinct from FX service. Under FX, the customer who desires a presence in another local calling area is fully responsible to transport the traffic to the location where it wants the call answered. Level 3 wants the call routed over the PSTN, but wants no responsibility for providing the transport to the distant location. Level 3 wants to enable toll calls to ride free over Qwest's transport facilities. Calls over the public network between communities that use the toll network are toll calls no matter how the numbers are assigned. Calls delivered to end users within a local calling area and transported over private networks are more than a mere technical distinction. It is consistent with the way Commissions have been distinguishing between toll and local calls since access charges were established.

57 If Level 3 were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each local calling area and the traffic was transported to the

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ISP's server in that manner, Qwest would have no objection to that type of service.[43] However, Level 3 does not provide this service for the VNXX calls to ISPs – it routes the traffic over Qwest's local interconnection network using LIS (local interconnection service) trunks. This is improper both because the calls are not local and because the parties have not agreed to exchange this type of traffic over LIS trunks.

2. Level 3 charges its ISP customers nothing for its VNXX service.

58 In order to determine if Level 3's VNXX offering is really the same service as FX, Qwest asked Level 3 to identify where its VNXX service offering was contained in its price list. Level 3 had not provided a full answer as of the date of filing this memorandum, but the answer appears to be that VNXX service is not separately identified or rated in its price list or contracts.[44] From this answer it is clear that Level 3 does not charge its ISP customers for this service, nor do they obtain or pay for a separate dedicated connection to the PSTN, nor pay for interexchange transport, hallmarks of FX service.

59 Thus, VNXX is simply an arbitrage to shift the cost recovery form from the ISP to Qwest. Originally, consumers had to dial 1+ if they were outside the calling area of the ISP modem banks or server, or the ISP had to offer an 8XX or true FX service. Under those circumstances, either the ISP or the consumer paid for the transport between calling areas – either via private line transport, access charges, or toll charges. CLECs have now attempted to alter this cost recovery by using VNXX. Their ISP customers enjoy the benefit of not having to pay for 8XX or FX service. At the same time, by not providing Qwest calling records of the appropriate NXX of the calling area in which the ISP server is physically located, Qwest is denied the

[43] While this would address the issue of misassignment of numbers, it would not entitle Level 3 to receive intercarrier compensation for these calls. Intercarrier compensation would not be due on these calls for the same reason as discussed above – ISP-bound traffic is only compensable if it is true local traffic, originating and terminating to the ISP's server in the same local calling area. Even true FX traffic does not meet that definition and the *ISP Remand Order* does not apply to that type of traffic.

[44] See, Exhibit A-1 – Level 3's responses to Qwest's Data Requests, requests 13 and 14.

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opportunity to recover transport costs. Worse still, these CLECs are also demanding intercarrier compensation from Qwest, as if the traffic were local.

3. End-User Perception of the Call Does Not Alter the Nature of Intercarrier Compensation.

60 Level 3 may argue that VNXX calls and FX calls are identical from the perspective of the party who is calling the VNXX or FX subscriber. While it is true that the end-user perceives a "local" call in both cases, the fact is that the end-user's perception of the call is irrelevant to determining the appropriate intercarrier compensation mechanism. Furthermore, if the calling party knew that the ISP was located outside of the local calling area, the calling party would certainly perceive that toll charges were avoided by use of the VNXX number. Once again, the important distinction between FX and VNXX is that with FX, the FX subscriber has already paid for the seemingly local calls to be transported to a distant local calling area by virtue of paying private line transport charges. This is clearly not the case with VNXX, which inappropriately loads the transport costs on Qwest with no opportunity for recovery of them.

61 One example that illustrates that end-user perception of the call does not control the nature of the call is here in Washington where carriers allow end-users to dial any 10-digit call as a 1+ call – also called "permissive 11-digit dialing"[45]. Under permissive 11-digit dialing, carriers are required to complete a 1+ 11-digit call regardless of whether the call is a local call or a long distance call to which toll charges apply. Thus, a caller in Seattle in the 206 area code can dial a local call to Bellevue as either 425-455-XXXX, or as 1-425-455-XXXX, and the call will go through either way. The end-user is charged in accordance with the true nature of the call, without regard to the dialing pattern. Intercarrier compensation is also based on the true nature of the call as either local or long distance, based on the NPA/NXX of the calling

[45] *In the Matter of Permissive 11-Digit Dialing for Local Calls to Become Effective by October 2001, Implementing in the Seattle Local Calling Area by January 1, 2001, Order Directing Implementation of Permissive 11-Digit Dialing for Local Calls,* Docket No. UT-001275 (2000).

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and called parties, and based on their geographic locations. Rating is not based on the dialing pattern or on the customer perception of whether the call might be a toll call because the subscriber dialed it using a 1+.

62 As described above, VNXX is certainly distinguishable from FX from the point of view of both the subscriber to the service and Qwest. With VNXX, the subscriber avoids charges it would pay with FX, and Qwest is forced to transport what would otherwise be toll traffic over its local trunks for no compensation.

B. Level 3's Position on VNXX is Contrary to its Own Price List in Washington

63 Though Level 3 claims that it is entitled to compensation on VNXX calls as if they were non-VNXX ISP-bound calls, its own price-list in Washington properly recognizes the definition of local calls, and sets forth end-user charges for both local and toll calls. Section 12.1 of Level 3's Local Exchange Price List, WN U-3, states that "Local services are provided (pursuant to Section 9.2) in the following *geographic* areas. [list of exchanges] The Company will *match* Local Calling Areas for the above exchanges as defined in Qwest Corporation's Network and Exchange Services Tariff WN U-40. . . ." (Emphasis added). It goes on to state, at Section 12.2, that "Geographically defined Local Calling Areas are associated with each local service provided in Section 9.2. Local services shall have the following local calling areas: [list of Qwest and other incumbent carriers' local calling areas]".[46] Nor has Qwest been able to locate anything to the contrary in Level 3's Price List regarding dedicated services. Under Level 3's own price lists then, Level 3 agrees that the nature of the call is determined by its physical end points.

64 Qwest's local calling areas, as evidenced by the exchange boundary maps on file with the Commission, are geographically defined. Qwest's tariff is absolutely clear that "local service"

[46] Level 3's Washington Price List http://www.level3.com/3826.html

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is service that is furnished between customers' premises "located within the same local service area".[47] A "local service area" is the area within which exchange service is furnished at specific rates without the application of toll charges.[48] "Premises" is defined as the physical location of the customer, i.e., the space in a building occupied by the customer.[49] These requirements make it clear that the customers' physical locations control whether a call is a local call or a toll call, not whatever artificial dialing convention a creative carrier has been able to employ to avoid toll charges.

C. VNXX Traffic is Improper under Industry Guidelines

65 Level 3's assignment of telephone numbers is not consistent with the telecommunications industry's numbering resource guidelines.

1. Industry guidelines exist to govern the proper use of numbering resources, and Level 3 is required to adhere to those guidelines.

66 In 1995, prior to the passage of the 1996 Act, the FCC created the North American Numbering Council ("NANC"), which would make recommendations to the FCC on numbering issues and oversee the North American Numbering Plan ("NANP"). At the same time, the FCC also created the North American Numbering Plan Administrator ("NANPA"), an impartial entity that would be responsible for assigning and administering telecommunications numbering resources in an efficient and non-discriminatory manner. NANPA is thus responsible for allocating NPA and NXX codes. Under FCC rules, NANPA is directed to administer numbering resources in an efficient and non-discriminatory manner, *and* in accordance with the guidelines developed by INC (the North American Industry Numbering Committee). 47 C.F.R. § 52.13(b) and (d).

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47 *See*, Qwest's Exchange and Network Services Tariff, WN U-40 §2.1.

48 *Id.*

49 *Id.*

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67 Thus, to the extent INC guidelines exist, they are really more than just guidelines – adherence to those guidelines is an FCC mandate. And guidelines do exist. The Alliance for Telecommunications Industry Solutions (ATIS) has published a set of INC guidelines entitled "Central Office Code (NXX) Assignment Guidelines (COCAG)."

2. Level 3's use of VNXX is in violation of industry guidelines which designate NPA-NXX codes as geographically-specific.

68 Section 2.14 of the COCAG states that "CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise *physically located* in the same rate center that the CO codes/blocks are assigned. (Emphasis added.) Exceptions exist, such as for tariffed services like foreign exchange services." VNXX is not identified as an exception, and is certainly not an "exception" as it is employed by Level 3.

69 In addition, section 4.2.6 of the COCAG provides that "[t]he numbers assigned to the facilities identified must serve subscribers in the *geographic area corresponding with the rate center requested*." (Emphasis added.)

70 Finally, "Geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP" while "Non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries, the common examples [of which] are NPAs in the N00 format, e.g., 800." COCAG, § 13.0.

71 The numbers that Level 3 uses in Washington are all Geographic NPA numbers – in other words, they are numbers that should, according to guidelines, correspond to discrete geographic areas. But under Level 3's misassignment of these numbers, they no longer do. Callers in Olympia who dial a Level 3 360 "local" number do not reach anyone in the Olympia

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local calling area – rather, they are transported over Qwest's LIS network to Level 3's switches in Seattle or California, and then on to an ISP server that may be in Washington state, or may be in another state entirely. This use of numbers is in violation of the industry guidelines.

D. Intercarrier Compensation is not Appropriate for VNXX Traffic under the ISP Remand Order

72 The discussion above about the *ISP Remand Order* (paragraphs 29-41) establishes that the compensation scheme established by that Order is limited to local ISP-bound traffic, where the calling party and the ISP's server are located in the same local calling area.

73 Furthermore, sound public policy counsels against permitting Level 3 to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is a customer of the ISP on Level 3's network. If Level 3 is allowed to collect intercarrier compensation for traffic that is properly thought of as Level 3's own toll traffic, the end result is regulatory arbitrage in which Level 3 profits at Qwest's expense. Level 3 will collect revenue primarily from other carriers rather than its own customers. Such a result creates incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended in the Act. Moreover, the large one-way flows of cash make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. In short, intercarrier payments for ISP traffic create severe market distortions.[50]

74 Further, Level 3's argument that the *ISP Remand Order* applies to *all* ISP traffic is inconsistent with the position it has taken in discovery responses, as discussed above. Having agreed that the access regime still applies to toll calls to the Internet, Level 3 cannot now be heard to say that VNXX calls are not toll. They are toll calls under Level 3's price list, Qwest's tariffs, and

[50] *ISP Remand Order*, ¶¶ 70-71, 74-76.

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prior Commission orders regarding toll avoidance.

E. The Parties' ICA does not Contemplate Exchange of VNXX Traffic

75 Further still, Level 3's conduct violates the parties' ICA. The ICA describes "ISP-Bound traffic" "as that term is used in the FCC ISP [Remand] Order." ICA, § 7.3.4.3. As discussed above, the *ISP Remand Order* did not accidentally include traffic destined for an ISP Server physically located in a different local calling area than the originating caller as part of the "ISP-Bound traffic" addressed in the order. Thus, the traffic is not "ISP-Bound" as discussed or defined in the ICA.

76 Level 3, however, seeks to sweep aside these definitions by assuming that traffic destined for the Internet automatically falls within the definition of "ISP-bound traffic," regardless of where the traffic physically originates and terminates. Indeed, Level 3 ignores the FCC history of defining traffic destined for an ISP as traffic that travels solely *within* a local calling area prior to being delivered to the ISP's server. Level 3 also ignores long-standing industry practice of treating calls dialed as 1+ calls to the Internet as being toll calls.

F. Washington has a Long Regulatory History of Disallowing Schemes like VNXX that Avoid Payment for Access to the Network

77 Schemes to avoid the payment of toll and access charges are not new. The most common toll-avoidance scheme has been something known as "EAS bridging", or "toll bridging". This service allows customers to "bridge" overlapping EAS areas, thus avoiding toll charges. The bridging was accomplished by a device that received calls and allowed them to be transmitted to the next local calling area. Thus, a caller in Bellevue could dial a Renton number associated with the device, (a true local call) and that device would answer, generate a second dial tone, and allow a true local call from Renton to Auburn. However, a direct call from Bellevue to Auburn is a toll call. While VNXX is admittedly a bit more sophisticated and complex than toll bridging, it is functionally no different – end users are permitted to make calls to distant

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local calling areas without incurring toll charges.

1. MetroLink

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

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

79 The Commission goes on say that "MetroLink has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network."[51]

2. U & I CAN

80 The Commission was no more sympathetic to the next toll-bridger – a company called U&I CAN. Citing the MetroLink case with approval, the Commission noted that it had previously held that EAS bridging is contrary to the public interest.[52] The Commission also agreed with the Public Utilities Commission of Utah in a case where it set forth the policy reasons against EAS bridging:

> This is not a case of small, virtuous Davids being set upon by a powerful, evil Goliath out to crush legitimate competition. These respondents are offering no innovation in service or technology. ****

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[51] *MetroLink* at p. 7.

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

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> For their own profit, they are enabling some USWC customers to realize savings to which they are not entitled. In the process, these respondents are depriving USWC of revenues which it would collect otherwise, and they are competing unfairly with authorized resellers of MTS [message toll service or long distance] service who abide by the applicable USWC tariffs.[53]

81 As in *MetroLink* and *U & I CAN*, Level 3 offers no innovation in service or technology, merely a subterfuge under which it avoids paying access charges, and end-users avoid paying toll charges. VNXX should similarly be found to be contrary to the public interest.

IV. QWEST'S COUNTERCLAIMS

82 Qwest has presented four counterclaims in this matter. Based on the information and argument herein, the Commission should grant Qwest's counterclaims and find that Level 3 is in violation of the *ISP Remand Order* by charging intercarrier compensation for non-local ISP-VNXX traffic (Count 1); that Level 3 is in violation of state law regarding the proper definitions of local service by virtue of its use of VNXX numbering (Count 2); and, that Level 3 is in violation of the ICA by virtue of its use of VNXX numbering (Count 3).

83 With regard to Count 4, the Commission should also find in Qwest's favor and order Level 3 to cease using LIS trunks to route VNXX traffic. Level 3 has argued that the parties have agreed to exchange VNXX traffic over LIS trunks. Qwest disagrees. Section 7.2 of the parties' ICA specifically delineates the types of traffic that are to be exchanged under the ICA. With respect to the traffic and disputes at issue in this matter, there are four relevant types of traffic which are appropriately exchanged under the agreement: (1) EAS/Local Exchange Service (EAS/Local) traffic, (2) IntraLATA Toll Exchange Access (IntraLATA Toll) traffic, (3) ISP-bound traffic and (4) Meet-Point-Billing or Jointly Provided Switched Access traffic. (See e.g., ICA, § 7.2.1.2.)

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[53] Id. at pp. 9-10.

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84 The ICA defines those categories of traffic as follows:

- "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated *within the local calling area determined* by the Commission. (ICA, § 4.24 (emphasis added).)

- "Exchange Access (IntraLATA Toll)" is defined in accordance with Qwest's current IntraLATA toll serving areas, as determined by Qwest's state and interstate Tariffs and excludes toll provided using Switched Access purchased by an IXC. (*Id*., § 4.22.)

- "ISP-bound traffic" is defined "as that term is used in the FCC ISP [Remand] Order." (ICA, § 7.3.4.3.)

- "Meet-Point Billing" or "MPB" or "Jointly Provided Switched Access" refers to an arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as defined by their effective access Tariffs. (*Id*., § 4.44.)

85 As stated, the term "ISP-bound traffic" is defined by the ICA (§ 7.3.4.3) "as that term is used in the FCC ISP [Remand] Order." As already discussed above, Level 3's contention that the traffic at issue is entitled to treatment and compensation according to the *ISP Remand Order* is incorrect and not an appropriate reading of that order. ISP-bound traffic, as that term is used in the ISP Remand Order, is limited to ISP-bound calls that originate and terminate in the same local calling area. Level 3's position also conflicts with the definition of local traffic in its own ICA and as interpreted by the Commission in Docket No. UT-033035.

86 Nor does this traffic fit within any of the other defined categories of traffic under the ICA. This traffic is not "Exchange Service" traffic, commonly referred to as "EAS/Local traffic." EAS/Local traffic is defined in section 4.24 of the ICA as "traffic that is originated and terminated *within the local calling area* which has been defined by the Commission and documented in applicable tariffs." (Emphasis added.) Even a cursory examination of the traffic at issue, however, shows that it does not meet this definition. Level 3 does not deny

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that it forces Qwest to exchange traffic that is not terminated at the ISP Server in the same local calling area as the originating caller (identical to VNXX traffic), but Level 3 has nevertheless claimed that it is "ISP-bound" traffic. Thus, there should be no contention as to whether the VNXX traffic at issue is "Exchange Service" traffic.

87 A traffic type that *may superficially appear* to functionally apply to the VNXX traffic at issue is under the definition of "Exchange Access" traffic, which is defined in section 4.22 of Level 3's ICA as being "in accordance with the Act and Qwest's current intraLATA toll serving areas, as determined by Qwest's state and interstate tariffs and excludes toll provided using Switched Access purchased by an IXC." While this may appear functionally appropriate, upon closer examination the traffic does not meet this definition either.

88 As a threshold matter, only Level 3 knows the exact location of the end-user ISP Server or modem bank for this traffic. Thus, Qwest cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area. Qwest only knows how far it carried the call before handoff to the interconnected carrier, where that carrier's serving switch is located, and whether traffic is one-way or two-way. In addition, even for that traffic which may functionally appear to match the definition, Level 3's purposeful misuse and misassignment of telephone numbers makes it difficult to track such traffic. Level 3 clearly does not intend for the traffic to be treated as "Exchange Access" traffic under the ICA, as evidenced by its misuse of telephone numbers. Thus, it is apparent this definition does not match the traffic either.

89 For the reasons set forth here, the term "ISP-bound traffic" does not apply to the VNXX traffic at issue here because that is not traffic that is "ISP-bound traffic" "as that term is used in the ISP [Remand] Order."

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90 Finally, the last possible traffic type, "Meet-Point Billing" or "Jointly Provided Switched Access," does not match up at all to the VNXX traffic at issue either. This is so because no IXC is involved, as only Level 3 and Qwest are involved in the carriage of the traffic, which is contrary to the definition of the traffic in section 4.44 of the ICA.

91 Therefore, in reviewing the ICA's plain language and the VNXX traffic that Level 3 delivers to Qwest, none of the traffic types that the parties specifically agreed to exchange matches this VNXX traffic. Since Level 3 can easily remedy the situation by properly assigning telephone numbers based on the actual location of its end-user customers, it is incumbent upon Level 3 to ensure that the exchange of traffic under the ICA follows the terms and conditions of that agreement. In the end, Level 3 is simply attempting to exchange traffic that the parties never agreed to exchange under the terms of the ICA.

V. CONCLUSION

92 For the reasons stated herein, the Commission should deny Level 3's complaint. The amount in dispute in this proceeding represents only the amounts Qwest has disputed as improperly billed intercarrier compensation. That amount does not include the revenues Qwest has lost by virtue of avoided toll and access charges. The Commission should not condone a scheme that exploits the telephone numbering system to enable customers to avoid toll charges and Level 3 to avoid responsibility for the costs it imposes on the PSTN. Level 3 clearly has no right under the ICA or applicable law to bill Qwest for VNXX calls to Level 3's ISP customers. In addition, the Commission should grant Qwest's counterclaims and require Level 3 to enter into an ICA amendment to implement the terms of this order, including an amendment that prohibits the use of LIS trunks for routing VNXX traffic.

VI. RELIEF REQUESTED

93 Qwest respectfully requests the Commission provide the following relief:

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A. Deny all of the relief requested by Level 3 in its Petition;

B. Issue an order (1) prohibiting Level 3 from assigning NPA/NXXs in local calling areas other than the local calling area where Level 3's customer has a physical presence, (2) requiring that Level 3 cease its misuse of such telephone numbering resources, and (3) requiring that Level 3 properly assign telephone numbers based on the location where its customer has a physical presence;

C. Issue an order that the parties' ICA does not require any compensation for Level 3's VNXX traffic;

D. Direct Level 3 to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*;

E. Invalidate all Level 3 bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of $0.0007 per minute for any of the VNXX traffic described above;

F. Issue an order prohibiting Level 3 from routing VNXX traffic utilizing LIS facilities; and

G. Any and all other relief that the Commission deems appropriate.

DATED this 15th day of August, 2005.

QWEST

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