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 PETITION FOR ADMINISTRATIVE REVIEW OF LEVEL 3 COMMUNICATIONS, LLC

PETITION FOR ADMINISTRATIVE REVIEW OF LEVEL 3 COMMUNICATIONS, LLC

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I. INTRODUCTION

1. Pursuant to WAC 480-07-825, Level 3 petitions for administrative review of the *Initial Order* issued in the above-referenced proceeding.[1] Pursuant to WAC 480-07-825(6), Level 3 also requests that the Commission schedule oral arguments with respect to this Petition due to the complex nature of the relevant facts and law applicable to this proceeding.

2. The *Initial Order* effectively rejects every aspect of the original complaint, which sought not to establish a compensation structure for virtual NXX ("VNXX") traffic but to declare

[1] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order 05, Initial Order; *IMO MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corp. for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Docket No. UT-063055, Order 02, Initial Order (Oct. 5, 2007) ("*Initial Order*").

that traffic unlawful. Qwest's Complaint did not include intercarrier compensation issues. Nor did the Washington Utilities and Transportation Commission ("Commission") invite Qwest to file a complaint about intercarrier compensation issues. The Commission should therefore limit its decision in this docket to the issue that was presented in the Complaint—whether local exchange carriers ("LECs") may provide foreign exchange-like ("FX-like") services under federal and Washington state law. The *Initial Order* concludes that FX-like or VNXX arrangements are permissible under state law and the Commission should affirm that conclusion. The remaining conclusions in the *Initial Order* are beyond the scope of this docket and the Commission should reject them.

3. The Commission has reviewed Qwest Corporation's ("Qwest's") and other incumbent local exchange carrier ("ILEC") pleas to change the compensation *status quo* multiple times in the past and has rejected them time and again. Indeed, the Commission has said specifically that mandatory bill and keep does not result in adequate compensation where traffic is not in balance. Commission precedent requires Qwest to bear the cost of transporting its originating traffic to the point of interconnection ("POI"), and to compensate CLECs for terminating such traffic, including so-called VNXX.

4. The *Initial Order* provides no reasoned basis in fact, law, or changed circumstances to justify departing from this precedent. It simply ignores precedent and mistakenly relies on a vestigial distinction between local and long distance calls. Both the FCC and federal courts preclude such an analysis and require the Commission to apply Section 251(b)(5) and not a "local" distinction.

5. The *Initial Order* also fails to answer the question posed by the Magistrate Judge in the remand of the Commission Orders issued in Dockets UT-053039 and UT-053036 (the

"Core Forbearance Remand Decision"). Rather than explain what constitutes "within a local calling area" under the FCC's *ISP Remand Order*,[2] the Act, and Commission rules, the *Initial Order* appears to assume some kind of geographic-based definition. Yet, it contains no analysis to explain its departure from the Commission's prior reliance on the calling and called numbers to define traffic subject to compensation, a system that has been working in Washington for years. Further, there is no record evidence that shows how the *Initial Order*'s abrupt change in course could be implemented in practice.

6. The Commission should affirm the *Initial Order* with respect to the legality of FX-like and VNXX arrangements and refuse to adopt the intercarrier compensation recommendations in the *Initial Order*.

7. If the Commission nevertheless determines that it is appropriate to rule on Qwest's untimely intercarrier compensation claims, it should affirm prior Commission precedent regarding VNXX traffic compensation rather than rewarding Qwest's incessant litigation tactics and reversing course at this late stage. The *Initial Order* imposes remedies—on CLECs that were singled out unilaterally by Qwest—where there is no harm. The selective remedy would require certain CLECs to pay Qwest's transport costs and provide traffic termination services for free. Creating a new regime that punishes certain CLECs in two ways—reversing the status quo for both terminating compensation and originating transport—while finding that VNXX does not violate Washington law is illogical, unnecessary and inappropriate.

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[2] *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*").

8. Finally, adopting the new regime recommended in the *Initial Order* would be discriminatory under Sections 251 and 252. Qwest did not name all CLECs in Washington in its Complaint, nor provide evidence to show that it had named as defendants all CLECs that provide FX-like services in Washington. Because any new compensation regime adopted in this docket would not apply to all CLECs, it would permit Qwest to discriminate against the CLEC defendants in favor of other CLECs not parties to this docket.

II. PROCEDURAL HISTORY

9. Qwest filed a complaint against nine competitive local exchange carriers ("CLECs"), including Level 3 Communications, LLC ("Level 3") on May 23, 2006, as the result of Commission final orders in Dockets UT-053036 and UT-053039.[3] In those orders, the Commission dismissed Qwest's counterclaims alleging the illegal and improper use of VNXX arrangements. The Commission advised Qwest that if it wished to pursue claims concerning the legality of FX-like network architectures, it could file a complaint addressing specific carriers' use of such arrangements and related intercarrier compensation issues.[4] Qwest's Complaint includes claims that VNXX arrangements violate federal and state law and Qwest's access tariffs. Qwest's Complaint does not include any claims relating to, or request relief from, the status quo, which requires intercarrier compensation for VNXX traffic.

10. On April 9, 2007, the United States District Court for the Western District of Washington issued an order reversing and remanding two Commission orders concerning VNXX

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[3] *Pac-West v. Qwest Corporation,* Docket No. UT-053036, Order 05, Feb. 10, 2006), ("*PacWest Order*"); *see also Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order 05, (Feb. 10, 2006), ("*Level 3 Order*").

[4] *See PacWest Order*, ¶ 43; *Level 3 Order*, ¶ 40.

compensation arrangements. Although the issues addressed in the court's order may be ancillary to the issues presented in this proceeding, that court order arose from different Commission dockets, and is therefore not a part of this proceeding.

11. The Commission held an evidentiary hearing in this proceeding on April 23, 2007. The hearing concluded on April 27, 2007.

12. Prior to the evidentiary hearing, Qwest and MCI Metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services ("Verizon Access") filed a settlement agreement and interconnection agreement (the "Settlement Agreement") which provides that Qwest would support the dismissal of Verizon Access from this proceeding in return for Verizon Access's concurrence in an interconnection agreement amendment allowing for the exchange of VNXX traffic (both voice and traffic bound for Internet service providers or ISPs) between the parties at a compensation rate of zero, that is, subject to a "bill-and-keep" arrangement. Pursuant to the terms of the Settlement Agreement, on March 22, 2007, Qwest and Verizon Access filed with the Commission a request for approval of an amended interconnection agreement, in Docket UT-063055 (the "Interconnection Amendment"). Under WAC 480-07-904, the Commission's Executive Secretary issued a delegated order approving the Interconnection Amendment. Commission Staff filed a request for review of the delegated order. On May 8, 2007, the Commission granted review of the delegated order and consolidated its review with this complaint docket.[5]

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[5] *See* Docket No. UT-063038, Order 04, Order of Consolidation; Docket No. UT-063055, Order 01, Order Granting Review; Consolidating Dockets (May 8, 2007).

13. Qwest, Level 3, and the other parties to this proceeding filed contemporaneous briefs and reply briefs.[6]

14. On October 5, 2007, Administrative Law Judge ("ALJ") Mace entered the *Initial Order* in this proceeding. Pursuant to WAC 480-07-825, Level 3 petitions for administrative review of the *Initial Order.*

III. LEVEL 3'S CONTENTIONS CONCERNING THE *INITIAL ORDER*'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

15. As further described below, and as required by WAC 480-07-825(3), Level 3 asserts the following contentions:

Contention 1: The *Initial Order*'s fourth Finding of Fact was in error: "(4) VNXX calls are calls made using telephone numbers that appear to be local but are in reality non-local or interexchange calls."[7] Finding of Fact No. (4) is not a fact, but a conclusion of law for which there is insufficient analysis. It must be struck from the *Initial Order.*

Contention 2: The *Initial Order*'s fifth Finding of Fact was in error: "(5) Respondents use VNXX calling arrangements for their customers without paying compensation that reflects the non-local, or interexchange, characteristics of VNXX calls."[8] Finding of Fact No. (5) is based on assumptions that are unsupported by record evidence, is beyond the scope of Qwest's Complaint that initiated this docket, and should be struck from the *Initial Order.*

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[6] Level 3 notes that although the Briefs include a section labeled "Level 3/Broadwing Counterclaims," Level 3 did not file a counterclaim in this docket. Level 3 and Broadwing are separate corporate entities and operate under separate interconnection agreements. The Commission has already determined that Level 3 is entitled to compensation for VNXX traffic under its interconnection agreement with Qwest. On remand, the Commission need simply explain its legal rationale for ordering such compensation.

[7] *Initial Order*, ¶ 146.

[8] *Initial Order*, ¶ 147.

Contention 3: The *Initial Order*'s sixth Finding of Fact was in error: "(6) Bill and keep, or zero compensation, is the appropriate, fair, just and reasonable compensation system between CLECs and Qwest for VNXX calls."[9] Finding of Fact No. (6) is based on assumptions that are unsupported by record evidence, is beyond the scope of Qwest's Complaint that initiated this docket, and should be struck from the *Initial Order*.

Contention 4: The *Initial Order*'s seventh Finding of Fact was in error: "(7) VNXX traffic makes use of Qwest's local interconnection service (LIS) trunks without compensating Qwest for the use of those trunks."[10] Finding of Fact No. (7) is based on assumptions that are unsupported by record evidence, is beyond the scope of Qwest's Complaint that initiated this docket, and should be struck from the *Initial Order*.

Contention 5: The *Initial Order*'s eighth Finding of Fact was in error: "(8) The appropriate compensation for transport of VNXX calls over Qwest's LIS trunks is the TELRIC trunking rate."[11] Finding of Fact No. (8) is based on assumptions that are unsupported by record evidence, is beyond the scope of Qwest's Complaint that initiated this docket, and should be struck from the *Initial Order*.

Contention 6: The *Initial Order*'s ninth Finding of Fact was in error: "(9) The terms of the settlement agreement and interconnection agreement amendment between Qwest and Verizon Access allow for the use of VNXX arrangements under a bill and keep compensation system and require Verizon Access to pay Qwest for transport of VNXX calls."[12] Finding of Fact No.

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9 *Initial Order*, ¶ 148.
10 *Initial Order*, ¶ 149.
11 *Initial Order*, ¶ 150.
12 *Initial Order*, ¶ 151.

(9) is based on assumptions that are unsupported by record evidence and should be struck from the *Initial Order*.

Contention 7: The *Initial Order*'s third Conclusion of Law was in error: "(3) VNXX calls have the characteristics of interexchange, non-local calls and are permissible only if bill and keep intercarrier compensation is applied to such calls and only if CLECs compensate Qwest for transport of such calls at TELRIC rates."[13] Conclusion of Law No. (3) is without sufficient analysis, is beyond the scope of Qwest's Complaint that initiated this docket, and should be struck from the *Initial Order*.

Contention 8: The *Initial Order*'s fourth Conclusion of Law was in error: "(4) The Commission should approve the settlement agreement between Qwest and Verizon Access because the settlement terms are lawful, supported by the record and consistent with the public interest."[14] Conclusion of Law No. (4) is without sufficient analysis and should be struck from the *Initial Order*.

Contention 9: The *Initial Order*'s fifth Conclusion of Law was in error: "(5) The inter-connection agreement amendment between Qwest and Verizon Access should be approved because it does not discriminate against any non-party to the agreement and is consistent with the public interest, convenience and necessity."[15] Conclusion of Law No. (5) is without sufficient analysis and should be struck from the *Initial Order*.

Contention 10: The *Initial Order*'s sixth Conclusion of Law was in error: "(6) Broadwing and Global Crossing failed to carry their burden of proof to support their counterclaims for

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[13] *Initial Order*, ¶ 156.

[14] *Initial Order*, ¶ 157.

[15] *Initial Order*, ¶ 158.

billing charges against Qwest, except for Broadwing's claim for access charges billed to Qwest."[16] Conclusion of Law No. (6) is without sufficient analysis and should be struck from the *Initial Order*.

16. The above-listed Findings of Fact and Conclusions of Law should be replaced with the following Conclusion of Law:

> (1) The issue of what intercarrier compensation mechanism should apply to the exchange of VNXX traffic is beyond the scope of Qwest's Complaint. If Qwest seeks to change the current intercarrier compensation mechanism for the exchange of VNXX traffic, it should file a petition for rulemaking to seek new rules.

17. Alternatively, if the Commission determines that intercarrier compensation issues are within the scope of this docket, it should adopt the following Conclusions of Law:

> (1) "Qwest has failed to meet its burden of proof that it incurs any additional costs in VNXX calling arrangements."
>
> (2) "FCC and Commission precedent have established that CLECs incur costs in terminating VNXX traffic."
>
> (3) "FCC and Commission precedent have established that carriers are wholly responsible for the costs of delivering traffic to another carrier's Point of Interconnection."
>
> (4) "The ISP-Bound rate of $0.0007 is the appropriate, fair, just and reasonable compensation system for CLECs and Qwest for VNXX calls to ISPs."

18. In support of these Contentions, and pursuant to WAC 480-07-825(3), Level 3 describes the nature of each challenge to the *Initial Order*, the evidence, law, rule or other authority that Level 3 relies upon to support the challenge, and the remedy that Level 3 seeks:

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[16] *Initial Order*, ¶ 159.

IV. SECTION 251(B)(5), NOT THE "ILEC-DEFINED LOCAL CALLING AREA," SETS THE DEFAULT INTERCARRIER COMPENSATION SYSTEM FOR ALL TELECOMMUNICATIONS TRAFFIC

19. By failing to apply the terms of the Act to VNXX traffic, the *Initial Order* commits the same error that federal courts have repeatedly faulted regulators for committing. The Act establishes the rules that govern intercarrier compensation. Regulators must apply the terms of the Act and the FCC's implementing rules to determine what form of intercarrier compensation applies to a particular type of traffic.

20. The U.S. Court of Appeals for the Ninth Circuit has found that the FCC's rules are not clear with respect to the issue of what intercarrier compensation applies to the exchange of VNXX traffic. Therefore, state commissions have jurisdiction to answer that question. As the *Initial Order* recognizes, state commissions have reached different conclusions. However, the only intercarrier compensation mechanism that has been upheld by the Ninth Circuit is the one adopted by the California Commission. That mechanism provides that the CLEC is entitled to terminating compensation from the ILEC so long as the CLEC establishes a POI within the local calling area or pays the ILEC Total Element Long Run Incremental Cost ("TERLRIC") transport charges for transporting the traffic from the local calling area to a POI outside of that local calling area. As explained below, requiring such terminating compensation is the only mechanism that is consistent with the Act.

A. ISP-Bound And FX-Like Traffic Fall Within the Default Compensation Regime of Section 251(b)(5) And Not Section 251(g) Because There Were No Pre-Act Rules Governing Such Traffic

21. Level 3 agrees with the conclusion in the *Initial Order* that even though Qwest framed the issues in its Complaint as whether FX-like arrangements are permissible, "the heart of the dispute is really" about the intercarrier compensation due for FX-like traffic.[17] Qwest and Staff effectively abandoned their arguments about legality and propriety after they were refuted by respondents. Thus, the fundamental debate is the same as in the *CenturyTel Case* (UT-023043), *Level 3/Qwest 2003 Arbitration* (UT-023042), *Level 3 Complaint Order* (UT-053039), *PacWest Complaint Order* (UT-053036), and many other prior cases, namely *the financial obligations* associated with the exchange of FX-like traffic.[18] In short, this case is about the exact same *compensation* issues Qwest and other ILECs have raised again and again. The *Initial Order* cites no basis in Qwest's Complaint to address these untimely raised intercarrier compensation issues. Nor does the *Initial Order* cite changed facts or law to justify a departure from the Commission's compensation precedents. To the contrary, the *Initial Order* ignores the law, misinterprets federal court precedent, and fails to answer the fundamental question posed by the Magistrate Judge in the Core Forbearance Remand Decision.

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[17] *Initial Order*, at ¶¶ 43, 45 ("The CLECs are correct that Qwest's statutory arguments are actually claims that the CLECs are using Qwest's network without making proper compensation to cover Qwest's costs. The CLECs are also correct that there is little if any concrete 'cost' evidence on the record in this docket.").

[18] *See, e.g., Level 3 Order No. 5; Pac-West Order No. 5*; CenturyTel-Level 3 Arbitration, Docket No. UT-023043, Seventh Supplemental Order, ¶¶ 1, 35 (Feb. 28, 2003) ("ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for the purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."); *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.*, WUTC Docket No. UT-023042, Final Order at 10 (Feb. 5, 2003) ("when calculating the use of the facility, even ISP-bound traffic is to be included as part of the originating carrier's usage").

22. The Commission has considered variations of these same Qwest arguments many times and repeatedly has determined that intercarrier compensation is due for the transport and termination of ISP-bound traffic and FX-like traffic.[19] In addition, as the *Initial Order* recognizes, the Commission has explicitly or implicitly approved and enforced interconnection agreements that provide for intercarrier compensation for FX-like traffic.[20]

23. Notwithstanding this long standing precedent, and the fact that Qwest's Complaint was directed solely to the legality of VNXX, the *Initial Order* reverses course without any explanation of the changed facts, law, or arguments that would justify such a reversal. Instead, the *Initial Order* is predicated on two erroneous conclusions: (1) "*the Act* [*i.e.*, the Telecommunications Act of 1996] established a distinction between local and long distance calls that is the present day basis for intercarrier compensation,"[21] and (2) the *ISP Remand Order's* conclusions are limited to ISP-bound traffic exchanged within an ILEC-defined local calling area.[22]

24. This view is foreclosed by the unambiguous text of the Act that establishes *Section 251(b)(5) reciprocal compensation as the default intercarrier compensation* absent a temporary transitional exemption pursuant to Section 251(g). Notably, the term "local" is not used to define or modify any category of traffic or service in the Act.[23] Although the "local"

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[19] *See, e.g., Level 3 Order No. 5; Pac-West Order No. 5*; CenturyTel-Level 3 Arbitration, Docket No. UT-023043, Seventh Supplemental Order, ¶¶ 1, 35 (Feb. 28, 2003).

[20] *Initial Order*, ¶ 22 (The Commission "found that all ISP-bound VNXX traffic is compensable") ¶ 50 ("More recently, the Commission has actually approved the use of VNXX for ISP-bound traffic in various interconnection agreement arbitrations and enforcement cases."), ¶ 53 ("they contain no language banning VNXX, and several actually allow for the flow of VNXX traffic").

[21] *Initial Order*, ¶ 46 (emphasis added), ¶ 54 ("The CLECs cannot escape the fact that VNXX calls, even though locally dialed, are not terminated locally."), ¶¶ 21, 64, 147, 156.

[22] *Initial Order*, ¶ 96.

[23] *See, e.g.*, 47 U.S.C. §§ 251(b)(5), 251(g).

distinction on which the *Initial Order* is based was originally embraced by the FCC, it was squarely rejected by the D.C. Circuit in its *Worldcom* decision,[24] and then was repudiated by the FCC in its *ISP Remand* Order and removed from its rules.[25]

25. The *Initial Order* also discusses the "long distance" distinction, but fails to recognize that this distinction continues to have vitality only to the extent it is preserved by Section 251(g) of the Act. Moreover, under the historical "long distance" distinction, to the extent it was preserved, only "*interexchange carriers* that use local exchange facilities" were required to pay carrier access charges on forms of traffic that existed prior to the enactment of the Act.[26] Such access charges never applied to traffic exchanged by two LECs or FX-like traffic which are the subject of the present dispute.

26. Contrary to the conclusions in the *Initial Order*, Section 251(b)(5) applies *on its face* to all telecommunications traffic, not just "local" telecommunications traffic. In fact, the Act mandates that traffic is subject to Section 251(b)(5) unless it was temporarily exempted prior to 1996 from this default regime by operation of Section 251(g). Section 251(b)(5) provides that all LECs have the "duty to establish reciprocal compensation arrangement for the transport and termination of *telecommunications*."[27] The locally dialed traffic at the heart of this dispute meets this definition, as it involves transmission between points specified by the user without a net change in the form or content of the traffic. Congress deliberately chose the broad statutory term

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

[25] *See ISP Remand Order.*

[26] 47 C.F.R. § 69.5 (emphasis added).

[27] 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).

"telecommunications" and *not* "local traffic" or the much narrower term "telephone exchange service" to describe the scope of LECs' 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 – but it chose not to.

27. While Section 251(g) preserves the application of access charges on traffic to which such charges applied prior to the 1996 Act such as long distance traffic, and the Act retains a distinction between telephone exchange and toll service, the D.C. Circuit found in *WorldCom* that ISP-bound traffic cannot be excluded from Section 251(b)(5) through the operation of Section 251(g).[28] Thus, while access charges are preserved, they do not, and have never, applied to ISP-bound traffic, or VNXX or other FX-like traffic. Rather, access charges apply to long distance traffic exchanged with an IXC, and have never applied to locally dialed traffic exchanged between two LECs such as the FX-like traffic that is at issue here.[29]

28. The *WorldCom* decision underscores that Section 251(b)(5) means precisely what it says. *WorldCom* involved a challenge to the FCC's claim that it could make new rules governing intercarrier compensation for ISP-bound traffic because such traffic purportedly fell within the term "information access" in Section 251(g), and therefore was excluded from Section 251(b). In reversing, the D.C. Circuit held that Section 251(g) authorized only "continued enforcement" of pre-1996 Act requirements, and pointed out that there *is no such pre-1996*

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[28] *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

[29] *See, e.g.*, 47 C.F.R. § 69.5.

requirement as to intercarrier compensation for ISP-bound calls including FX-like calls.[30] In its *Declaratory Ruling*, the FCC stated unambiguously that "[t]he Commission *has no rule* governing intercarrier compensation for ISP-bound traffic."[31] The D.C. Circuit also noted that "it seems uncontested - and the [FCC] declared in the [*ISP Declaratory Ruling*] - that there had been *no* pre-[1996] Act obligation relating to intercarrier compensation for ISP-bound traffic."[32] The Court then emphasized that the FCC did not "point to any pre-[1996] Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."[33] 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.

29. Staff acknowledged that in *Peevey,*[34] the Ninth Circuit held that state commissions retain jurisdiction to decide the compensation for locally dialed calls to ISPs.[35] However, any state commission decision on the issue must be consistent with Section 251(b)(5) and *WorldCom*.

30. Instead of applying the language of the statute, the *Initial Order* misinterprets the

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[30] *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002); *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, ¶¶ 266, 288 (2002) ("*VA Arbitration Order*").

[31] *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*").

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

[33] *Id.*

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

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

Remand Order by the Magistrate Judge to hold that the *ISP Remand Order* applies only to ISP-bound traffic exchanged within an *ILEC-defined* local calling area.[36] The Magistrate Judge made no such finding. Rather, the Magistrate Judge directed the Commission to: "reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion."[37] The *Initial Order* does not answer this fundamental question.

31. Moreover, the Commission must engage in at least some analysis of the facts and law relating to the fundamental question posed by the Magistrate Judge or it will be reversed again just as the FCC has been reversed twice by the Court of Appeals for the D.C. Circuit.[38]

A. In the *ISP Remand Order*, the FCC Repudiated the "Local" Distinction That the *Initial Order* Relies Upon

32. The *Initial Order* asserts that "CLECs cannot escape the fact that VNXX calls, even though locally dialed, are not terminated locally," and concludes that "compensation for VNXX services must reflect that fact."[39] Thus, the decision to impose bill-and-keep on FX-like traffic is predicated on a "local" distinction that does not appear in the Act, and has been expressly repudiated by the FCC and removed from its rules in the *ISP Remand Order*.

33. In light of the FCC's explicit decision to abandon the "local" distinction in the

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[36] *See Initial Order*, ¶ 24.

[37] *See Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, 1177 (W.D. Wash. 2007).

[38] *See id.* at 1176-1177; *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[39] *Initial Order*, ¶ 54; *see also Initial Order*, ¶¶ 41, 64.

ISP Remand Order and remove the term "local" from its rules, it is illogical to interpret the *ISP Remand Order* and the Act as retaining a "local" requirement for ISP-bound traffic and FX-like traffic. Instead, the Commission must apply Section 251(b)(5) and not the "local" distinction in determining the appropriate compensation for such traffic. Moreover, because *Worldcom* holds that Section 251(g) cannot exclude any ISP-bound traffic from the scope of Section 251(b)(5), such traffic is subject to the FCC's interim compensation regime.

34. The "local" distinction that is the foundation of the *Initial Order* has long since been repudiated by the FCC and is inapposite.[40] 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.[41] The FCC concluded that the "use of the phrase 'local traffic' created unnecessary ambiguities" because "the statute does not define the term 'local call,' and thus that term could be interpreted as traffic subject to local rates" or subject to other interpretations.[42] The FCC determined to "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category is particularly susceptible to varying meanings and, significantly is not a term used in section 251(b)(5) or section 251(g)."[43]

35. Moreover, in the *ISP Remand Order,* the FCC corrected its mistaken reliance on the local distinction by removing all references to the term "local" from the intercarrier compen-

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40 *ISP Remand Order*, ¶¶ 26, 34, 45-46, Appendix B.

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

42 *ISP Remand Order*, ¶¶ 45-46.

43 *ISP Remand Order*, ¶ 34.

sation rules that implement Sections 251(b) and 251(g) of the Act.[44] Specifically, the FCC removed the term "local" from rules 51.701(a), 51.701(c) through (e), 51.703, 51.705, 51.707, 51.709, 51.711, 51.713, 51.715, and 51.717. The D.C. Circuit in *WorldCom* did not disturb the FCC's determination to eliminate the term "local" from its intercarrier compensation rules. In light of the FCC's explicit decision to abandon the "local" distinction in the *ISP Remand Order* and remove the term "local" from its rules, it is illogical to interpret the order as retaining a "local" requirement for ISP-bound traffic.

36. Incredibly, the *Initial Order* not only ignores the FCC's rejection of the local distinction but even asserts that the "Act established a distinction between local" and other calls, and characterizes this distinction as "the present day basis for intercarrier compensation."[45] The Act did not establish the local/non-local distinction. In fact, as the FCC noted, the term "local" is not statutorily defined, "is particularly susceptible to varying meanings," and most importantly "is not a term used in section 251(b)(5) or section 251(g)."[46] Rather, the Act establishes a default intercarrier compensation regime pursuant to Section 251(b)(5) subject to only limited historical exceptions under Section 251(g) that pre-date the Act. Accordingly, 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," and impose the FCC's $0.007 per minute of use ("mou") interim compensation rate

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[44] *ISP Remand Order*, ¶¶ 45-46, Appendix B (page 60) ("Sections 51.701(a), 51.701(c) through (e), 51.703, 51.705, 51.707, 51.709, 51.711, 51.713, 51.715, and 51.717 are each amended by striking 'local' before 'telecommunications traffic' each place where such work appears.").

[45] *Initial Order*, ¶ 46.

[46] *ISP Remand Order*, ¶ 34.

and the state reciprocal compensation rate on FX-like ISP-bound and FX-like voice traffic, respectively.[47]

37. The *ISP Remand Order* not only repudiated the "local" distinction for determining the scope of Section 251(b)(5) intercarrier compensation obligations,[48] it also reconciled Sections 251(b)(5) and 251(g): traffic that does not fall within Section 251(g) is governed by Section 251(b)(5). *WorldCom* clarified that ISP-bound traffic does not fall within Section 251(g), because there are no relevant pre-Act rules that Section 251(g) could possibly preserve. The *Initial Order* acknowledges that these services were "not available when the access charge system was established" in 1984.[49] As such, under *WorldCom*, they cannot qualify for an exclusion under Section 251(g) and must be subject to compensation under section 251(b)(5). Rather than applying the plain terms of the statute as interpreted by the FCC and *WorldCom*, the *Initial Order* erroneously concludes that "compensation must reflect" that VNXX calls are "not locally terminated."[50] In sum, the *Initial Order* ignores the plain text of the Act, the fact that the FCC removed the term "local" from its rules, and this Commission's own precedent. The Commission should dismiss the *Initial Order*'s illogical analysis and continue to apply the FCC's interim compensation rate of $0.007 mou to FX-like traffic.[51]

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

[48] *ISP Remand Order*, ¶¶ 34, 45-46. The FCC stated it was "mistaken to have characterized the issue in that manner [i.e., "local"], rather than properly (and more naturally) interpreting the scope of 'telecommunications' within section 251(b)(5)."

[49] *Initial Order*, ¶ 72.

[50] *Initial Order*, ¶ 54.

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

V. THE *INITIAL ORDER'S* RECOMMENDATION THAT CLECS PAY FOR QWEST'S ORIGINATING TRANSPORT VIOLATES FEDERAL AND WASHINGTON PRECEDENT

A. The *Initial Order* Violates Settled FCC Rules and Commission Precedent

38. The *Initial Order* concludes that the use of VNXX does not now, and has not in the past, violated state or federal law.[52] Nevertheless, the *Initial Order* illogically and inappropriately reverses the Commission's prior course and status quo. It also punishes CLECs by requiring them both to pay Qwest's transport costs and to provide traffic termination services for free.[53] Having determined that VNXX is not illegal, it is illogical for the Commission to reverse its prior precedent while at the same time permitting Verizon to benefit from an arrangement that is not as a practical matter available to other CLECs. Under the Qwest/Verizon settlement, Verizon gets credit for its network presence in local calling areas even though Verizon's services are essentially the same as those offered by competing CLECs and, in many cases, CLECs also have established a presence in the local calling area by deploying or leasing transport to that area.

39. The *Initial Order* violates settled FCC rules and Commission precedent that prohibits Qwest from charging CLECs for transporting to the POI ISP-bound calls originated by Qwest's customers. It accepts Staff's proposal that Qwest be allowed "to recover from the CLEC the costs of the proportion of trunk capacity that is used by the CLEC ... for VNXX (interexchange) traffic."[54] It thus concludes that VNXX is permissible "only if CLECs compen-

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[52] *Initial Order*, ¶¶ 139, 155.

[53] *Initial Order*, ¶¶ 104, 147-150, 156.

[54] *Initial Order*, ¶ 87.

sate Qwest for transport of such calls at TELRIC rates."[55] As will be shown in subsection V.B below, this conclusion is unsupported by any evidence in the record. Furthermore, notwithstanding the *Initial Order's* determination of what is "fair and reasonable," this option contravenes settled federal and Washington precedent.

40. As Level 3 explained in its Reply to WITA Response to Staff Response, FCC rules prohibit imposing transport costs on terminating LECs. "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[56] This prohibition is also manifested in rules related to shared interconnection trunks. "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[57] Moreover, when the FCC was asked to create an exception for FX-like traffic, it declined to do so.[58]

41. Any contrary finding in this proceeding will violate these FCC rules and Commission precedent. The Commission has affirmed the FCC rule in the Level 3 - Qwest arbitration, holding that FCC rules "apportion[] the cost of interconnection trunking based on the amount of traffic *originated* by the interconnecting carrier."[59] The single issue in that arbitration involved

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[55] *Initial Order*, ¶ 156.

[56] 47 C.F.R. § 51.703(b).

[57] 47 C.F.R. § 51.709(b).

[58] *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 Commission*, Memorandum Opinion and Order, Wireline Comp. Bur., 17 F.C.C. Rcd 27039 ¶ 54 (2002).

[59] *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.*, WUTC Docket No. UT-023042, Final Order at 10 (Feb. 5, 2003) (emphasis original). It also

the apportionment of costs of interconnection trunking between the parties when exchanging ISP-bound traffic. The Commission held that "[t]he originating carrier ... is obligated to carry the call to the POI between the carriers' networks."[60] Where the parties are sharing a facility provided by one of them, the providing carrier may only charge the other for the costs of the portion of the facilities used by the interconnecting carrier to send traffic that will terminate on the providing carrier's network.[61] The Commission emphasized that when calculating the relative use of the facility, all originating traffic, including ISP-bound traffic, is to be included as part of an originating carrier's usage,[62] and that it mattered not whether the traffic was "local" or "interstate." To accept Staff's proposal, as the *Initial Order* does, would essentially "charge Level 3 for calls originating with Qwest's customers and terminating on Level 3's network,"[63] in violation of FCC rules and Commission precedent.

B. The *Initial Order* Is Based on Factual Assumptions With No Basis in the Record

42. The *Initial Order* ignores the law and relies instead on incorrect assumptions about additional costs purportedly incurred by Qwest, even while acknowledging the lack of *any* record evidence on Qwest's originating transport costs. Accepting the arguments of Qwest and Staff, the *Initial Order* states that "it is reasonable to assume that Qwest incurs some additional costs for transporting VNXX calls to CLEC points of interconnection over Qwest's Local

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affirmed this in the arbitration between Level 3 and CenturyTel. *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc.*, WUTC Docket No. UT-023043, Order Affirming Arbitrator's Report and Decision at 7-8 (Feb. 28, 2003).

[60] *Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and Qwest Corp.*, WUTC Docket No. UT-023042, Final Order at 9 (Feb. 5, 2003).

[61] *Id.* at 9-10.

[62] *Id.* at 11.

[63] *Id.*

Interconnection System (LIS) trunks ... ."[64] Accordingly, the *Initial Order* finds that "VNXX traffic makes use of Qwest's local interconnection service (LIS) trunks without compensating Qwest for the use of those trunks."[65] Based on these findings (which in turn are based solely on assumptions, not record evidence), it concludes as a matter of law that VNXX is permissible "only if bill and keep intercarrier compensation is applied to such calls and only if CLECs compensate Qwest for transport of such calls at TELRIC rates."[66]

43. It is *neither* reasonable *nor* lawful to merely "assume" that the ILEC bears additional costs that must be recouped, because there is no record evidence to support this assumption. In fact, other aspects of the *Initial Order* are clear on this point. The *Initial Order* acknowledges that there is "little if any concrete 'cost' evidence on the record in this docket,"[67] "little hard evidence about the actual costs attributable to carrying VNXX ISP-bound calls,"[68] and that "Qwest's reliance on the theory of cost causation, rather than on any actual evidence of costs incurred, underlying its claim that VNXX improperly deprives it of revenues is unconvincing."[69] Astonishingly, however, in the very same breath it "assumes," despite this lack of evidence, that Qwest incurs some additional costs for transporting VNXX calls.[70]

44. By these unsubstantiated conclusions, it appears that the standards of adjudication have been relaxed in the *Initial Order*. Level 3 can only guess that this is out of an urge to split

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[64] *Initial Order*, ¶ 65.
[65] *Initial Order*, ¶ 149
[66] *Initial Order*, ¶ 156.
[67] *Initial Order*, ¶ 45.
[68] *Initial Order*, ¶ 64
[69] *Initial Order*, ¶ 64.
[70] *Initial Order*, ¶ 65.

the difference between Qwest's claim for originating compensation and the respondents' claim for terminating compensation, as well as an inordinate devotion to a vaguely articulated difference between "local" and "long distance" traffic. The *Initial Order* states that there is "a distinction between local and long distance calls" and that "even though the ILEC transports the call to the long distance carrier's point of interconnection over the ILEC's network, which is the same ILEC network used to complete a purely local call, the compensation system works differently. The interexchange carrier pays the ILEC for access to the ILEC's network. This system remains in place and cannot be ignored *regardless of any cost evidence or lack thereof.*"[71]

45. Out of this professed respect for the local/non-local distinction, the *Initial Order* establishes originating TELRIC transport charges and a Bill and Keep termination rate structure to balance the costs between the CLECs and Qwest,[72] but this directly conflicts with the finding that there is no evidence of any costs to Qwest that need to be balanced. The *Initial Order* acknowledges that the interexchange traffic (and its costs) would not exist but for VNXX,[73] and that any additional revenue there from is not crucial to Qwest's business plan.[74] At bottom, there is no evidence to contradict the fact that Qwest's intrastate access costs are fully recovered in non-VNXX traffic exchanged with IXCs and, as the *Initial Order* acknowledges, there is no

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[71] *Initial Order*, ¶ 46 (emphasis supplied). Contrary to the conclusions reached in the *Initial Order*, Level 3 does have a local presence within Qwest's local calling areas. Exh. 451-T, 15:1-3. Level 3 interconnects with local access tandems in Qwest's local calling areas within Washington. See generally Exh. 451-T, 14:1-17:2. Level 3 orders those interconnection trunks from Qwest and compensates Qwest based on the RUF as established by the Commission and incorporated into the Level 3/Qwest interconnection agreement. As discussed within, this compensation regime comports with sections 51.703(b) and 52.709(b) of the FCC's rules.

[72] *Initial Order*, ¶ 97.

[73] *Initial Order*, ¶ 99.

[74] *Initial Order*, ¶ 70.

evidence that Qwest incurs any marginal cost at all.[75] In its Initial Brief, Level 3 presented a number of cases in which other states had found the same.[76] In addition, access charges preserved by Section 251(g) apply to traffic exchanged with an IXC and not to locally-dialed traffic exchanged by two LECs, such as the FX-like traffic which is the subject of the present dispute.[77]

46. Even if one were to accept the *Initial Order*'s "reasoned assumptions" in lieu of record evidence about cost, these assumptions do not support the conclusion that CLECs should be forced to pay for transport on Qwest's side of the POI or the conclusion that CLECs should be required to terminate Qwest's Internet-bound traffic for free. The *Initial Order* observes that "CLECs did not seriously dispute Qwest's evidence of the traffic imbalances related to VNXX calling,"[78] but it fails to analyze the implication of this imbalance. If most VNXX calls are being placed by Qwest's customers, then Qwest is properly held responsible for the cost of transporting and terminating those calls. The requirement that Qwest pay for transport to the POI does not depend on traffic being in balance, and the need for proper compensation is greater when carriers are originating and terminating different volumes of traffic on each other's network. Rather, Qwest's responsibility arises from its role as the originating carrier of the Internet-bound call.

47. The *Initial Order* provides no reasoned basis in fact, law or changed circumstances to justify departing from Commission precedent. Nor does the *Initial Order* include any analysis to support a finding that imposing Qwest's originating transport obligations on CLECs is consistent with federal law. The Commission should therefore reverse this finding.

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[75] *Initial Order*, ¶¶ 45, 64, 70.

[76] Level 3 Initial Brief, ¶ 87.

[77] *See, e.g.*, 47 C.F.R. § 69.5.

[78] *Initial Order*, ¶ 64.

VI. THE *INITIAL ORDER*'S REQUIREMENT OF "BILL AND KEEP" IS UNREASONABLE, DENIES CLECS PROPER COMPENSATION FOR THE TERMINATION OF CALLS ORIGINATED ON QWEST'S NETWORK, AND VIOLATES WASHINGTON STATUTES

48. The *Initial Order* makes another "reasoned assumption" regarding costs incurred by CLECs. Without any explanation, however, it reaches the exact opposite conclusion—that CLECs are not entitled to recover those costs from Qwest. The *Initial Order* states that "it is reasonable to assume that CLECs may incur some costs related to terminating VNXX calls" and that this is one fact that "constitutes the basis" for bill and keep.[79]

49. In stark contrast, the FCC has determined that CLECs incur costs in terminating ISP-bound traffic, *and* concluded that they are entitled to some form of terminating compensation.[80] This Commission has also concluded that ISP-bound traffic is a cost-causer, stating that "regardless of one's views on the jurisdictional nature of Internet-bound calls, the fact remains that terminating these calls has a cost."[81] Further it stated that:

> one reason for [the Commission's] success has been that we follow a simple rule: Set the prices for interconnection and unbundled elements based on costs. Mandatory bill and keep would be a dramatic departure from this policy. It would require that companies terminate Internet-bound calls at no charge even though these calls indisputably have costs associated with them.[82]

50. Even Staff concurred in this analysis. Staff witness Williamson admitted that there is a cost associated with transporting and terminating traffic to ISP customers of FX-like

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[79] *Initial Order*, ¶ 65.

[80] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶¶ 92 and accompanying n.189 (2001).

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

[82] *Id.*

services[83] and that traffic is one-way, or out of balance.[84] When traffic is out of balance, bill and keep does not provide for the mutual recovery of these costs. As the Commission has long recognized, "[m]andatory bill and keep does not result in adequate compensation where traffic is not in balance."[85]

51. Thus, under the *Initial Order*, CLECs are forgoing recovery of *real* terminating costs, while Qwest is only forgoing windfall access revenues to which it has never been entitled. This is not "proper compensation" and is inequitable.[86]

52. Requiring the originating LEC to bear the costs of delivering its originating traffic to the POI selected by the terminating carrier, and to compensate the terminating carrier for the transport and termination functions it performs, is a function of the long-standing calling-party's-network-pays ("CPNP") regime.[87] As the FCC has found, a LEC's costs of delivering its origi-

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

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

[85] *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, WUTC Letter to Chairman William Kennard, at 1 (Dec. 14, 2000) ("WUTC Dec. 14, 2000 Letter"), available at http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512258320. [Initial ¶ 107]

[86] Currently, Level 3 purchases circuits under Qwest's special access tariffs to carry traffic between Level 3's POI near Seattle and access tandems located in Qwest's local exchanges throughout Washington. Greene, TR 550:22-552:1. As has been well documented in many FCC proceedings, rates for special access services exceed TELRIC rates. *See, e.g., In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, AT&T Corp. Petition for Ruling to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interexchange Special Access, Comments of ATX Communications, Bridgecom International, Broadview Networks, Cavalier Telephone, DeltaCom, Integra Telecom, Lightyear, McLeod Telecommunications Services, Penn Telecom, RCN Telecom Services, Savvis, U.S. TelePacific Corp d/b/a TelePacific Communications, Federal Communication Commission, WC Docket No. 05-25 (Aug. 8, 2007). Level 3 notes that should the Commission adopt the *Initial Order* and reverse its precedent, and therefore, require Level 3 and Qwest to exchange traffic on a modified "bill and keep" basis where Level 3 bears the cost of transporting VNXX calls, Level 3 requests that the Commission modify the rates under which Level 3 is obtaining services from Qwest.

[87] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶ 9 (2001) ("*NPRM*").

nating traffic to the network of a co-carrier are recovered in the LEC's end users' rates. The FCC has explained its rationale as follows:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and *is responsible for paying the cost of delivering the call to the network of the co-carrier* who will then terminate the call. Under the Commission's regulations, *the cost of the facilities used to deliver this traffic is the originating carrier's responsibility*, because these facilities are part of the originating carrier's network. *The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.* This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[88]

53. As Level 3 explained in its Initial Brief,[89] the Commission should continue to apply accepted principles of cost responsibility that hold the originator of the call responsible for the cost of the call. The cost of origination, transport, and termination of calls originated by Qwest's customers is a matter for Qwest to address with its own retail and wholesale customers. If Qwest truly believes its rates are not sufficient to cover these costs – a fact certainly not demonstrated so far and inappropriate for this docket – then it should focus its efforts on revising its rate structure to correct that problem rather than continuously litigating in an effort to shift its costs to its competitors (and their customers).[90]

54. As with transport costs discussed above, the *Initial Order* errs in its analysis of the implications of traffic imbalance. An imbalance of traffic – where Qwest is delivering more calls to Level 3's network than vice versa – does not justify mandatory free termination services.

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[88] *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), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001) ("*TSR Wireless*") (emphasis supplied).

[89] Level 3 Initial Brief, ¶ 84.

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

To the contrary, an imbalance makes it imperative, both legally and economically, that the originating carrier compensate the terminating carrier for the additional costs caused by that traffic.

55. The *Initial Order* provides no reasoned basis in fact, law, or changed circumstances to justify departing from Commission precedent. Nor does the *Initial Order* include any analysis to support a finding that requiring CLECs to forego compensation where they incur costs to terminate a call is consistent with federal law. The Commission should therefore reverse this finding.

VII. OTHER ERRORS IN THE *INITIAL DECISION*

A. Overblown Arbitrage Concerns

56. The *Initial Order* concludes that "significant opportunity for arbitrage exists under the current intercarrier compensation system related to ISP-bound calls."[91] However, Qwest's siren song that CLEC ISP-bound traffic and use of VNXX create "inappropriate arbitrage opportunities and market distortions" has already been rejected by the FCC as it moves toward a unified compensation system. On October 18, 2004, the FCC stated 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.[92]

57. In that Order, the FCC actually *expanded* the ISP-bound traffic subject to intercar-

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[91] *Initial Order*, ¶¶ 64, 96.

[92] *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, ¶¶ 1, 7, 9, 15, 20-21 (Oct. 18, 2004) ("*Core Forbearance Order*") (quotation from ¶¶ 20-21, emphasis supplied).

rier compensation by forbearing from applying the growth caps and new markets rules of the *ISP Remand Order*.[93] The FCC determined that both the growth caps and the new markets rule were no longer necessary and were no longer in the public interest because "arbitrage concerns have decreased" and "are now outweighed by the public interest in creating a uniform compensation regime."[94] Further, the FCC took these actions while fully apprised of the advanced network architectures deployed to carry ISP-bound traffic that incorporated technically advanced equipment that no longer relied upon traditional circuit switched technology and its geographic limitations.[95]

58. By rejecting the growth caps and new markets rules, the FCC rejected bill-and-keep for this ISP traffic and imposed new compensation obligations on it. This Commission similarly should dismiss these arbitrage arguments and continue its long-standing practice of requiring the payment of reciprocal compensation for *all* telecommunications, including FX-like traffic, as required by the Act, FCC Orders, and its own prior precedent.

B. There Is No Practical Way to Distinguish FX-like Traffic From Other Locally-Dialed Calls In Order To Implement Bill-and-Keep

59. The *Initial Order* permits the use of VNXX traffic for both voice and ISP-bound traffic, in part, because of the "technical" consideration that there is no practical method to

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[93] 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. 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 Forbearance Order*, ¶¶ 7-8.

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

[95] Level 3 Initial Brief, ¶¶ 51-2.

"distinguish a VNXX voice call from a VNXX ISP-bound call."[96] The *Initial Order* rejects the "only method the parties have advanced" to distinguish such calls, the use of traffic studies, as "highly contentious."[97] Yet the *Initial Order* fails to recognize that the implementation problems are equally present in Staff's proposal, which the *Initial Order* adopts, to apply bill and keep to VNXX calls but an explicit compensation rate to other locally-dialed traffic. The Staff proposal, which first appeared in its rebuttal case, lacks any explanation of how interconnecting carriers will determine when a particular configuration of switches, trunks, and interconnection points will qualify for compensatory termination rates and when some other configuration will force an interconnecting carrier to terminate another carrier's traffic for free.

60. The FCC's Wireline Bureau faced the same issue and determined that the practical impossibility of distinguishing VNXX traffic from other locally-dialed traffic was decisive. Standing in the shoes of the Virginia commission, the Bureau rejected Verizon's arguments in favor of imposing access charges or bill-and-keep on FX-like traffic, which were based on the same arguments raised by Qwest in the present case.[98] The Bureau stated:

> We agree with the petitioners that *Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes.* We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographi-

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[96] *Initial Order*, ¶ 107.

[97] *Initial Order*, ¶ 107.

[98] The Virginia State Corporation Commission failed to act on three Section 252(b) petitions for arbitration against Verizon presented by AT&T Communications of Virginia, Inc., WorldCom, Inc. and Cox Virginia Telcom, Inc. Thus, pursuant to Section 252(e)(5), the Wireline Bureau resolved the arbitration issues arising in these arbitrations, including VNXX compensation issues. *VA Arbitration Order*, at ¶¶ 1-2, 288, 301. The *VA Arbitration Order* is a decision of the Wireline Bureau rendered pursuant to a delegation of authority by the FCC under Section 155(c) and has the same force and effect as a decision by the FCC commissioners. 47 U.S.C. § 155(c)(1)-(3).

> cal 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.[99]

61. In addition, the FCC concluded in *Starpower* 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.[100] It rejected Verizon's arguments that VNXX traffic was not subject to reciprocal compensation based on the geographic termination point, and ordered Verizon to pay $12,059,149 in reciprocal compensation for VNXX and other ISP-bound traffic.[101] Moreover, the Ninth Circuit reached 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.*"[102]

62. Consistent with the FCC's decisions, 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.[103] The Commission should affirm, as did the FCC, 9th Circuit and the Wireline Bureau, that FX-like calls should

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[99] *VA Arbitration Order*, at ¶ 301 (emphasis added).

[100] *Starpower Communications, LLC v. Verizon South, Inc.*, FCC No. 03-278, 18 FCC Rcd 23625, Memorandum Opinion and Order, ¶¶ 16-17, 22 (2003) ("*Starpower*") ("Indeed, Verizon South apparently lacks the technical capability to identify Virtual NXX calls as non-local based on the physical end points of the call.").

[101] *Starpower*, ¶¶ 6, 22.

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

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

continue to be subject to intercarrier compensation under Section 251(b)(5) and the FCC's interim regime for ISP traffic at the $0.007 per mou rate, in part because there is no viable means to distinguish FX-like from other locally dialed traffic.

C. The FCC's *Amicus Brief* Is Not an FCC Order And Should Be Afforded Scant Deference

63. Instead of focusing on the governing statute, the *Initial Order* places undue emphasis on an *amicus curiae* brief filed by the FCC's General Counsel in another case.[104] In its *amicus* brief, the FCC's self-described "litigation staff" (*i.e.*, the General Counsel's Office) highlighted the ambiguity of the *ISP Remand Order* and acknowledged that the "*ISP Remand Order* does not provide a clear answer to the question" as to whether the order preempts the states from establishing a compensation regime for FX-like traffic."[105] Further, the FCC's litigation staff stated that it "is unable to advise the court how the [full] Commission would answer the question."[106] Nonetheless, the staff stated its view that the order was likely focused on ISP-bound calls placed by dial-up users to ISPs in the local calling area.[107] The *Initial Order* relies on the *amicus* brief to conclude that the *ISP Remand Order* "did not address whether reciprocal compensation was required" for VNXX calls, in order to justify continued reliance on the repudiated local/non-local distinction.[108] This position is illogical. The FCC could not logically in the same order remove the term "local" from its compensation rules to correct its

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[104] *Initial Order*, ¶¶ 24, 96.

[105] FCC General Counsel's Brief for Amicus Curiae, 2006 WL 2415737, at *10-11 (March 13, 2006) ("FCC Brief for *Amicus Curiae*"), *filed in, Global NAP, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006).

[106] FCC Brief for *Amicus Curiae*, at * 10-12.

[107] FCC Brief for *Amicus Curiae*, at * 12.

[108] *Initial Order*, ¶¶ 24, 96.

earlier "mistake" and yet continue to rely on this same local distinction in determining the appropriate compensation due for ISP-bound traffic under Section 251(b)(5) of the Act.

64. The *Initial Order's* reliance on the *amicus* brief is misplaced. First, the *amicus* brief merely represents the post-hoc views of the FCC's General Counsel.[109] The *amicus* brief was never voted on by the five FCC commissioners as a body and merely reflects the opinion of agency litigation counsel. Accordingly, the brief should be afforded no deference. In fact, given that the issue of intercarrier compensation for VNXX traffic is being revisited in the FCC's ongoing unified compensation NPRM, the *amicus* brief represents the current litigation position of agency counsel and at most one of the five FCC commissioners.[110] Moreover, that counsel admits that the "*ISP Remand Order* does not provide a clear answer to the [VNXX compensation] question" and that it does not know "how the Commission would answer the question."[111] These admissions further argue against affording the staff's brief any deference. Accordingly, consistent with the U.S. Supreme Court, the Commission should determine that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."[112]

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[109] At most, the *amicus* brief represents the views of the current FCC Chairman Martin to whom the General Counsel reports.

[110] *See, e.g., In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685, ¶¶ 3, n.8, 17, 20, 22 (March 3, 2005); *see also NPRM*, ¶ 6.

[111] FCC Brief for Amicus Curiae, at * 10-11.

[112] *Bowen v. Georgetown University Hospital et al.*, 488 U.S. 204, 212-213 (1988); *Ashoff v. City of Ukiah*, 130 F.3d 409, (9th Cir. 1997) ("deference, however, does not extend to 'agency litigating positions' ...").

D. The *Initial Order*'s Bill And Keep Regime Is Unlawful Because It Imposes Uncompensated Termination Costs on CLECs

65. The FCC has determined that bill and keep is an appropriate intercarrier compensation regime when the traffic exchanged between carriers is approximately equal.[113] However, in the present case, the *Initial Order* acknowledges that the traffic exchanged between CLECs and Qwest is imbalanced.[114] Thus, the *Initial Order* acknowledges that the proposed "bill and keep" solution imposes uncompensated termination costs on CLECs resulting from traffic that originates on Qwest's network.[115] Together with the imposition of originating transport costs, the *Initial Order* creates a completely new regime that punishes CLECs in two ways. Not only does the *Initial Order* reverse the status quo of terminating compensation in favor of bill and keep, it also reverses the status quo to shift originating transport costs currently borne by Qwest to CLECs.

66. The *Initial Order* attempts to rationalize the imposition of uncompensated termination costs on CLECs for FX-like traffic by asserting the tired shibboleth that concerns about "regulatory arbitrage relating to ISP-bound traffic ... have not been repudiated."[116] However, as noted above, the FCC was well aware of these arbitrage concerns when it significantly expanded the ISP-bound traffic subject to the interim compensation rate of $0.007 per mou to new markets and removed the growth caps in the *Core Forbearance Order*.[117] Moreover, the FCC has never imposed bill-and-keep for ISP-bound traffic. To the contrary, the FCC has repeatedly recognized

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[113] 47 C.F.R. § 51.713(b).

[114] *Initial Order*, ¶¶ 55, 58, 64, 97.

[115] *Initial Order*, ¶ 65 ("CLECs may incur some costs related to terminating VNXX calls.").

[116] *Initial Order*, ¶¶ 89, 96.

[117] *Core Forbearance Order*, at ¶¶ 1, 7, 9, 20-21.

that CLECs incur a cost to transport and terminate traffic that originates on ILEC networks.[118] Further, this Commission has also heard these very same "arbitrage" arguments on multiple occasions and rejected them time and again. There is no legal or policy rationale that justifies such a dramatic reversal of course, particularly in light of the overwhelming objective evidence in the marketplace which indicates that incumbent providers are successfully building and leveraging their financial and network dominance over much smaller start ups more and more all the time.[119]

VIII. QWEST MAY NOT DISCRIMINATE AGAINST CLECS BASED ON THEIR NETWORK ARCHITECTURES

67. The *Initial Order* approves the March 7, 2007, Qwest and Verizon Access Settlement Agreement and Interconnection Amendment.[120] The Commission may only approve a settlement agreement when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest.[121] Further, the Commission must review the Interconnection Amendment, as part of the Settlement Agreement, under

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[118] *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*, ¶ 34 (rel. June 21, 2000); *Starpower*, at ¶¶ 16-17, 22; *VA Arbitration Order*, at ¶¶ 288, 301.

[119] *See generally AT&T and SBC Communications Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of AT&T Corp. to SBC Communications Inc.*, Comments of the National Association of State Utility Consumer Advocates, Attachment A, ETI White Paper "Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition," WC Docket No. 05-65 (filed Apr. 5, 2005) ("What started out as seven Regional Bell Operating Companies (RBOCs) following the MFJ has today become four massive, vertically-integrated mega-companies each controlling vast amounts of the nation's wireline, wireless, and broadband infrastructure. . . . These market shares and the resulting market concentration will only grow as competitive providers, unable to gain or maintain a foothold against the RBOCs' overwhelming dominance, are forced out of business."), available at: http://www.nasuca.org/FINAL%20NASUCA%20Paper%20April%202005.pdf.

[120] *See Initial Order*, ¶ 115.

[121] *See* WAC 480-07-750(1).

section 252(e)(2)(A) of the Telecommunications Act. 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.[122]

Similarly, 47 C.F.R. § 51.305 requires that a LEC provide interconnection on:

> "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).

Therefore, the Commission must reject the amendment if it discriminates against a telecommunications carrier not a party to the agreement, or it is not consistent with the public interest, convenience and necessity.

68. Level 3 does not object to voluntarily negotiated settlements that resolve intercarrier compensation and interconnection disputes. However, given Verizon Access' very low percentage of FX-like traffic and high percentage of compensable traffic in Washington, the rate calculation discriminates against other Washington CLECs.[123] Clearly, the settlement rate is skewed in favor of carriers with network characteristics unlike those of typical Washington CLECs (Verizon's network in Washington is more like an incumbent architecture which leads to

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[122] *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*").

[123] *See* Level 3 Initial Brief, ¶¶ 115-118; Level 3 Reply Brief, ¶¶ 108-117.

the much higher percentage of traffic that qualifies for compensation (82%) than it does in other Qwest states (0-10%)).[124]

69. Finally, adopting the new regime recommended in the *Initial Order* would be discriminatory because Qwest did not name all CLECs in Washington in its Complaint. Nor did Qwest provide evidence that it had named as defendants all CLECs that provide FX-like services in Washington. Because any new compensation regime adopted in this docket would not apply to all CLECs, it would permit Qwest to discriminate against the CLEC defendants in favor of other CLECs not parties to this docket.

70. The Commission can remedy this discrimination by adopting the *Peevey* regime for VNXX traffic. That regime recognizes that where CLECs have invested to extend their networks beyond a single POI per LATA, they are entitled to the same terminating compensation for VNXX traffic that Qwest receives for the termination of FX traffic. Recognizing this CLEC investment as providing a basis for compensation would ensure that Qwest does not discriminate, either in favor of its own network or the network of an ILEC-affiliated CLEC. In it briefs, Staff appears to have endorsed this option as well. It acknowledged that in *Peevey,* the Ninth Circuit had held that reciprocal compensation for ISP-bound VNXX traffic in certain circumstances, *i.e.* if the CLEC has a presence in the local calling area, and that this Commission could "reach the same result."[125]

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[124] *See* Verizon Business Global LLC, et al. and Qwest Corporation Confidential Settlement Agreement and Release, Exhibit C, p. 1, WUTC Docket No. UT-063038 (filed March 7, 2007).

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

IX. THE *INITIAL ORDER* CONTAINS NO ANALYSIS TO SUPPORT ADOPTING A GEOGRAPHIC TEST FOR DETERMINING THE JURISDICTIONAL NATURE OF CALLS

71. Without any supporting analysis, the *Initial Order* concluded that local calls continue to be defined based on the incumbent LEC's geographic local calling areas.[126] The *Initial Order*, however, failed to consider the treatment afforded VNXX and ISP-bound traffic by the parties' interconnection agreements that lack a distinction between "local" and "long distance" calls. As explained herein, it also failed to apply the governing statutory framework. Instead, the *Initial Order* stated that the distinction between local and long distance calls had not been abolished.[127] Without further analysis, the *Initial Order* concluded that the incumbent's local calling areas govern the jurisdictional definition of a call. The lack of analysis is a fatal flaw and the *Initial Order* must be rejected.

72. Furthermore, while the *Initial Order* was not drafted in direct response to the Core Forbearance Remand Decision, the Court's order in that matter is instructive as to the analysis required to jurisdictionalize VNXX calls.[128] Specifically, the Court remanded and directed the WUTC "to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within or outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion."[129] The *Initial Order* does not analyze whether the assigned telephone numbers or the physical end points of the

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[126] *Initial Order*, ¶¶ 41, 46, 125, 129 .

[127] *Initial Order*, ¶ 41.

[128] *See Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, 1177 (W.D. Wash. 2007).

[129] *Id.*

calls matter in its analysis or even that another option, such as Broadwing's *Amended Agreement*, is a justifiable method to jurisdictionalize the traffic. Instead, the *Initial Order* is merely a pronouncement. It would, therefore, be inequitable for the Commission to adopt the *Initial Order* without the adequate and called-for analysis of how and why to classify VNXX traffic.

73. Level 3 also supports Broadwing's Petition for Administrative Review that shows that the *Initial Order* cannot be applied retroactively to the ISP-Bound traffic terminated by Broadwing.[130] Level 3 agrees that any new rule regarding compensation for VNXX and ISP-bound traffic cannot override the plain terms of a contract and cannot be applied retroactively where it would result in manifest injustice. Assuming *arguendo* that the Commission disagrees with Level 3 and adopts the new compensation regime recommended by the *Initial Order,* the Commission should review in the instant proceeding whether the new regime can be applied retroactively to Broadwing's counterclaims. However, the proper forum for the overall analysis of the retroactive applicability of any Commission decision on compensation for VNXX traffic is in the remanded *Qwest v. WUTC* proceedings. Accordingly, Level 3 reserves its right to address the question of retroactivity in that proceeding.

X. CONCLUSION AND RECOMMENDATIONS

74. For the reasons stated herein, Level 3 respectfully requests that the Commission review the *Initial Order*, and reverse those Findings of Fact and Conclusions of Law set forth herein. Pursuant to WAC 480-07-825(6), Level 3 also requests that the Commission schedule oral arguments with respect to this Petition due to the complex nature of the relevant facts and law applicable to this proceeding.

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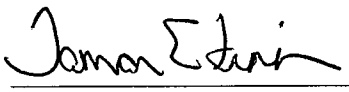
[130] *See generally* Broadwing's Petition for Administrative Review.

Respectfully submitted,



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Dated: October 24, 2007

CERTIFICATE OF SERVICE

I, Jeffrey R. Strenkowski, hereby certify that on the day of October 24, 2007, true and correct copies of Level 3 Communications, LLC's Petition for Administrative Review were served on all parties of record in this proceeding listed below via overnight delivery. In addition, the original plus three (3) copies were submitted to the Executive Secretary of the Commission and a courtesy copy was provided to the Honorable Judge Mace.

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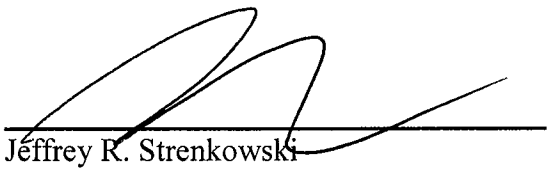

Jeffrey R. Strenkowski

Dated this 24th day of October, 2007