BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, PAC-WEST TELECOMM, INC., NORTHWEST TELEPHONE, INC., TCG SEATTLE, ELECTRIC LIGHTWAVE, INC., ADVANCED TELECOM, 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

ANSWER TO PETITIONS FOR ADMINISTRATIVE REVIEW ON BEHALF OF COMMISSION STAFF

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I. INTRODUCTION

1 Commission Staff answers the Petitions for Administrative review of Pac-West Telecomm, Inc. (Pac-West); Level 3 Communications, LLC (Level 3); Broadwing Communications, LLC (Broadwing); Advanced TelCom, Inc. (ATI); Electric Lightwave, Inc. (ELI); and the Washington Independent Telephone Association (WITA).

2 The Commission should deny the petitions for administrative review and adopt the initial order, with some clarifications, as described below.

3 In this complaint proceeding, Qwest has sought relief against various named competitive local exchange carriers (CLECs). The relief Qwest seeks includes, *inter alia*, an order prohibiting the respondents from provisioning service to their customers using virtual NXX ("VNXX") arrangements, and for payment of access charges on VNXX traffic.

4 The initial order reasonably concludes that the respondent CLECs need not be prohibited from using VNXX arrangements, so long as Qwest is not required to pay the respondents reciprocal compensation on VNXX traffic, and so long as the CLEC is apportioned the percentage of the cost of local interconnection facilities that the CLEC uses to transport VNXX calls.

II. ARGUMENT

A. The Commission is authorized to decide by adjudicative order whether VNXX number assignment is unfair, and the conditions under which it is permissible.

5 In their petition for administrative review, Advanced TelCom, Inc. and Electric Lightwave, Inc. assert that the initial order impermissibly establishes a policy of general applicability on the issue of VNXX without following the rulemaking procedures of the

Administrative Procedure Act (APA).[1] This objection is not well-founded. The Commission has the discretion to address the VNXX number assignment practice by order after an adjudicative complaint proceeding.

6 Along with the Commission's authority under the federal Telecom Act to enforce interconnection agreements, Qwest's complaint invokes RCW 80.04.110. RCW 80.04.110 states, in relevant part:

> [W]hen two or more public service corporations . . . are engaged in competition in any locality or localities in the state, either *may make complaint* against the other or others that the . . . practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, . . . unfair or intending or tending to oppress the complainant, [or] to stifle competition, . . . and upon such complaint . . . the commission shall have power, after notice and hearing as in other cases, to, *by its order*, subject to appeal as in other cases, *correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations* in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair . . . or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state. [Emphasis added.]

On its face, RCW 80.04.110's process for remedying unfair practices of telecommunications companies may be initiated by a complaint and the commission may establish, "by its order," the "uniform . . . practices in lieu of those complained of, to be observed by all of such competing public service corportions."

7 Thus, although the Commission also has broad authority to develop telecommunications policy through the promulgation of rules, RCW 80.36.110 affords the Commission the discretion to establish uniform charges and practices through case-by-case

[1] ELI/ATI Petition at 2.

adjudication—in other words, through the development of a "common law" of agency decisions.

8 Allowing an administrative agency the discretion to develop its regulatory policy either in an *ad hoc* manner through adjudication, or through the promulgation of rules, is not novel or unusual. As the U.S. Supreme court stated long ago in a seminal administrative law case:

> Not every principle essential to the effective administration of a statute can or should be cast immediately in the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, and administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity."[2]

Consistent with this analysis, Washington courts hold that "[u]nder the Washington APA, unless a statute specifically requires adoption of a rule, agencies may develop policy either by rulemaking or adjudication."[3] Federal courts also recognize that "[a]dministrative agencies are generally free to announce new principles during adjudication."[4] The cases cited by ELI/ATI do not contradict this.

9 The court in *Washington Indep. Tel. Ass'n v. WUTC* noted that "[t]he provisions of the APA do not trump a specific state statute respecting an agency's authority."[5] Thus, ELI/ATI's petition is incorrect where it suggests that that court held that the Commission was *required* to follow the rulemaking procedures of the APA, because the Commission's terminating access charge methodology constituted a "rule" within the meaning of RCW 34.05.010(16). The court looked to the APA, and to cases decided under the APA, only to

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[2] *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).
[3] *Budget Rent A Car Corp. v. Washington State Dept. of Licensing*, 100 Wash.App. 381, 387, 997 P.2d 420 (2000).
[4] *Union Flights, Inc. v. Federal Aviation Administration,* 957 F.2d 685, 688 (9th Cir. 1992).
[5] 148 Wn.2d 887, 901 (2003)

show that the Commission's choice to proceed by rulemaking in that case comported not only "with the Commission's delegated authority under Title 80 RCW," but also "with the APA regarding rulemaking" and cases that have been decided where there was no agency-specific procedural statute to take precedence over the APA.[6] Moreover, the court did not say that rulemaking was required under the APA, but that it was "appropriate."[7]

10 The Commission has previously concluded that the VNXX problem is one that must be addressed through case-by-case, fact-specific adjudication.

11 VNXX came to this Commission's attention with the Washington Independent Telephone Association's (WITA's) petition for a declaratory ruling on the propriety of VNXX arrangements in Docket UT-020667. In that docket, Level 3 asserted that it was a "necessary party" whose rights would substantially be prejudiced by the declaratory order sought by WITA, and it indicated that it would not consent in writing to a determination by a declaratory order.[8]

12 After concluding that a declaratory ruling therefore was not possible in UT-020667, the Commission subsequently took up VNXX again in an informal process to develop a policy and interpretive statement in UT-021569. After the completion of a VNXX workshop attended by Staff and members of industry, and after reviewing written and oral comments of interested persons, the Commission concluded that "the complex issues and diverse interests represented in this docket cannot appropriately be addressed through the issuance of an interpretive or policy statement. The Commission believes that these issues are more appropriately pursued in fact-specific disputes."[9] Thus, the Commission set aside

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[6] *Id.* at 902.
[7] *Id.* at 901.
[2] Order Declining to Enter Declaratory Order, Docket No. UT-020667, pp. 4-5 (August 19, 2002).
[9] UT-021569, Notice of Docket Closure, July 21, 2003.

any industry-wide decision on VNXX for a more formal fact-finding proceeding—such as the complaint in this docket.

13 Most of the respondents in this case have very similar network configurations and use VNXX in very similar ways, with the identical result that interexchange traffic is directed over local interconnection facilities. Thus, it is appropriate that Qwest name these CLECs in a single complaint. Only ELI presents a factual variation of any possible significance because of its allegation that it, like Qwest, "uses common transport over its own fiber between Olympia and Seattle."[10] However, the initial order limits its transport remedy (as distinguished from its bill-and-keep requirement) to those respondents who rely on Qwest local interconnection service facilities for transport.[11]

14 The initial order's conditions on the use of VNXX would have to be observed prospectively, while its finding that VNXX is not presently authorized by interconnection agreements[12] addresses the retrospective compensation question.[13] Arguably, if VNXX was not authorized by existing interconnection agreements, then access charges would arguably apply to such traffic. However, the initial order reasonably concludes that neither access charges nor reciprocal compensation applies retrospectively.

15 The Commission has the authority to adopt the initial order's requirements with regard to VNXX in this complaint docket.

B. The initial order's remedy does not go beyond the scope of Qwest's complaint; the Commission has authority to fashion a remedy that is different than that sought in the complaint.

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[10] ELI/ATI Petition at 11.
[11] Initial Order at ¶ 98.
[12] *E.g., Id.* at ¶ 125.
[13] *E.g.,* Broadwing Petition at 13-19.

16 In their petitions for administrative review, the CLECs assert that, once the initial order concluded that VNXX is not illegal *per se,* it should have dismissed Qwest's complaint.[14] They argue that instead of simply dismissing Qwest's complaint, the initial order impermissibly expanded the scope of the complaint to an inquiry into the form and level of intercarrier compensation that should apply.[15] Pac-West argues that the remedy the initial order would grant to Qwest is different than, or goes beyond, the prohibition that Qwest sought in its complaint, and that the Commission lacks authority to order such relief.

17 These arguments are incorrect for two reasons. First, although the initial order's proposed remedy is different than the relief Qwest sought (prohibition on VNXX, or payment of access charges on VNXX traffic), it does not go beyond the scope of Qwest's complaint. Second, under the relevant statutory language, the Commission is not limited to granting only the specific remedy sought by the complainant.

18 In order to address the assertion that the initial order's remedy goes beyond the relief requested, it is necessary to consider the nature of the VNXX problem. Qwest claimed that VNXX traffic is interexchange rather than local traffic and that, by assigning customers telephone numbers associated with the local calling areas where Qwest customers were originating calls, rather than the local calling area where the CLEC customer is located, the respondents cause interexchange traffic to be routed over local interconnection trunks, where it does not belong. The result—and the whole point of the VNXX practice—is that the traffic appears to be local traffic and Qwest ends up being billed for reciprocal compensation for termination of the call, rather than receiving access charges for originating the call.

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[14] Pac-West Petition at 3, 4.
[15] *Id.* at 5.

19 Prohibiting the CLEC respondents' VNXX number assignment practice would have required the CLECs' customers (primarily ISPs) to find a different way of providing their own customers (users of dial-up ISP service) with a toll free interexchange call to the ISP's Internet gateway (such as an 800-number service or a local number presence service offered by Qwest's affiliate under a foreign exchange arrangement). Instead of prohibiting VNXX number assignment by the respondents or requiring the respondents to pay Qwest access charges on VNXX traffic, the initial order would allow the VNXX practice to continue, but would provide a remedy designed to lessen the harm to Qwest—that harm being the loss of access charge revenue, the misuse of local interconnection transport facilities provided at Qwest's expense, and wrongful billing for reciprocal compensation. The initial order allows CLECs to use the VNXX number assignment practice only on the condition that Qwest not be required to pay the CLECs reciprocal compensation, and that the CLECs pay for their use of the local interconnection facilities for "foreign exchange-like" service. The initial order would not, however, require CLECs to pay Qwest access charges on what is really a kind of interexchange traffic. The remedy is thus within the scope of the relief sought.

20 In order to address Pac-West's assertion that the Commission is limited to granting only the specific relief or remedy requested, it is necessary to look at the source of the Commission's delegated authority. Qwest's complaint seeks a prohibition of a particular practice by the Respondents pursuant to RCW 80.04.110. RCW 80.04.110 does not state that when the Commission finds that a practice is unreasonable or unfair that the Commission's choice is limited to prohibiting the practice. Rather, the statute states that "the commission shall have power, . . . to, by its order, . . .correct the abuse complained of

by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of . . . as shall be found reasonable . . .." Thus, the Commission should deny Pac-West's request to dismiss Qwest's complaint and should modify the initial order's first ordering clause[16] that purports to "dismiss" Qwest's complaint that VNXX service is illegal. The initial order did not dismiss Qwest's complaint, but instead granted Qwest partial relief by allowing VNXX, subject to protective conditions.

21 The Commission's authority to "correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of" under RCW 80.04.110 is similar to a court's "considerable discretion to fashion appropriate injunctive relief, particularly where the public interest is involved."[17]

22 The initial order did not go beyond the scope of the issue raised by Qwest's complaint. Although the order does propose a remedy that is *different* than that set out in Qwest's complaint, the Commission has authority to grant a remedy, or to "establish a practice," that is different than what the complainant requests.

C. The initial order correctly concludes that VNXX traffic is interexchange traffic that is not subject to the FCC's reciprocal compensation rules, but is instead subject to the commission's own determination of fair policy.

23 State law determines whether a call is "local" and, therefore, subject to § 251(b)(5) and the FCC's reciprocal compensation rules, or "interexchange," and, therefore, subject to the Commission's own determination of fair compensation policy.[18] Federal law does not *require* the Commission to define VNXX as "local" traffic subject to § 251(b)(5).

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[16] ¶ 160.
[17] *See United States v. Akers,* 785 F.2d 814, 823 (9th Cir. 1986); see also Fed. R. Civ. P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."); *Z Channel Ltd. v. Home Box Office, Inc.,* 931 F.2d 1338, 1341 (9th Cir. 1991)(district court's remedy not limited to relief sought in complaint).
[18] *Global NAPs, Inc. v. Verizon New England, Inc.,* 444 F.3d 59, 63 (1st Cir. 2006).

24 A persistent argument by Level 3 and Pac-West, not only in their petitions for administrative review, but also in their arguments before the District Court, has been that VNXX traffic is traffic to which Section 251(b)(5) of the Act applies *as a matter of federal law*, and as such, reciprocal compensation is owed from the originating to the terminating carrier.[19]

25 This argument is false and is contrary to the District Court's decision to which both Level 3 and Pac-West were party, the 9th Circuit's *Peevey* decision, and the decisions of other federal circuit courts of appeal.[20]

26 The initial order, in places, comes close to agreeing with this incorrect theory. To the extent that it does, it should be corrected. Specifically, the initial order suggests that the Act may *require* that VNXX service be permitted as the competitive functional equivalent of FX service, and that the Commission must consider whether prohibiting VNXX service would constitute an impermissible barrier to competition under the Act.[21] These same arguments have been rejected by the courts and the Commission should not rely on them as theories for allowing VNXX.[22]

27 On the other hand, WITA's argument that VNXX is *prohibited* as a matter of state law is also incorrect.[23] Although the statutes cited by WITA plainly authorize the Commission to determine, consistent with the public interest, whether VNXX should be prohibited or allowed subject to conditions, they neither mandate a particular form of compensation for interexchange traffic, nor do they expressly address VNXX. WITA's interest in receiving revenue through access charges is an interest to be considered by the

[19] Pac-West Petition at 7, 8; Level 3 Petition at 20-22.
[20] *See* Staff Opening Brief at ¶¶ 66, 67.
[21] Initial order ¶ 77, 84.
[22] *See, e.g., Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102 (2nd Cir. July, 2006).
[23] WITA Petition at ¶¶ 39-44.

Commission, but it is not dispositive. The Commission may reasonably conclude that that interest is outweighed by considerations of fair competition policy.

28 A number of additional arguments advanced by Pac-West and Level 3 rely on the incorrect legal assertion that VNXX traffic is 251(b)(5) traffic as a matter of federal law. Because the underlying legal assertion is wrong, the follow-on arguments also are wrong. One example is the argument that the initial order really sets a reciprocal compensation rate for VNXX traffic, something that may only be undertaken in an interconnection agreement arbitration or a cost docket, and must be based on the terminating carrier's cost to terminate calls.[24]

29 The initial order should be clarified to state that the Commission is *not* setting a reciprocal compensation rate *(i.e.*, a rate of zero) pursuant to the Act. The Commission should unequivocally state that VNXX is interexchange traffic to which reciprocal compensation *does not apply* pursuant to federal law. Even though the initial order would not prohibit the use of local interconnection facilities to transport VNXX traffic, the traffic is fundamentally intrastate interexchange traffic subject to state regulation.

30 In *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (2006), Pac-West challenged, on many of the same grounds that it and Level 3 advance here, the California commission's approach to VNXX. The California commission required Pac-West to pay incumbent LEC Verizon a "carrier origination charge" to compensate Verizon for it transport facilities, despite requiring Verizon to pay "reciprocal compensation" (under state, not federal law) on VNXX traffic.[25] The reason the 9th Circuit upheld the California Commission's approach to VNXX traffic against Pac-West's arguments—basically identical to those advanced by Pac-

[24] Pac-West Petition and 8-9.
[25] 462 F.3d at 1157.

West and Level 3 here—is that "the CPUC found that VNXX calls are interexchange traffic that is not subject to the FCC's reciprocal compensation rules."[26] The court stated that

> the CPUC applied its own balancing test in determining as a matter of fair compensation policy that VNXX traffic is subject to reciprocal compensation as "local" traffic; it did not make that determination under the *Telecommunication Act* or the *FCC's* rules for reciprocal compensation. Rather, the CPUC determined that VNXX traffic is interexchange traffic that is *not* subject to the FCC's reciprocal compensation rules.[27]

This Commission also should state clearly that VNXX traffic is interexchange and not local. (Pac-West's explanation of the California approach to VNXX is wrong where it suggests that California considers VNXX traffic to be Section 251(b)(5) traffic.[28])

31 Pac-West faults the Commission for not characterizing VNXX traffic as either "within *or* outside a local calling area" (referring to the District Court's decision) but instead imposing its remedy based on the "hybrid" nature of the traffic.[29] Indeed, the initial order in parts is not decisive on this question, suggesting in places that VNXX calls "bear characteristics of long distance calls" or that VNXX "has long distance calling as one of its characteristics,"[30] or that VNXX calls "have both local, and more importantly, long distance characteristics."[31] Again, the Commission should unequivocally find that VNXX traffic is interexchange traffic because it is not within a local calling area.

32 Another argument made by Pac-West and Level 3 is that the initial order lacks "analysis" for its conclusion that VNXX traffic is interexchange traffic.[32] This is incorrect. There is extensive analysis in the record and ample commission precedent to support the

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[26] *Id.* at 1158.
[27] *Id.* at 1157, 1158.
[28] Pac-West Petition at ¶ 45.
[29] Pac-West Petition at p. 26.
[30] Initial Order ¶ 47.
[31] Id. at ¶ 55; also, ¶ 156—conclusion of law # 3.
[32] Level 3 Petition at pp. 39, 40.

conclusion that Washington law distinguishes local traffic from interexchange traffic on the basis of the geographic endpoints of the call.[33] (Level 3 is simply wrong when it asserts that the initial order changes a pre-existing commission policy or "status quo" of "relying on calling and called numbers to define traffic subject to compensation."[34]) The one key exception is foreign exchange service, but foreign exchange service has been limited to a particular network architecture.[35] The initial order reasonably concludes, as a matter of fair competition policy that VNXX may be allowed as a CLEC substitute for Qwest's foreign exchange service, but only under certain conditions. (The CLECs are correct that the initial order incorrectly suggests that the CLEC respondent's local calling areas are different than, or larger than Qwest's local calling areas.[36] In fact, all carriers that interconnect with Qwest purport to use the same local calling areas.[37])

D. The initial order reasonably concludes that VNXX is a permissible practice on the condition, *inter alia*, that Qwest is not required to pay the respondents reciprocal compensation on VNXX traffic.

33 The reason for applying bill-and-keep to VNXX traffic is not because of any assumption about the costs carriers incur in completing VNXX calls. Rather, the reason for applying bill-and-keep is that VNXX traffic is almost exclusively ISP-bound traffic, and the best policy for ISP-bound traffic, as articulated by the FCC in its *ISP Remand Order*, is to require that carriers recover their costs from their customers rather than from other carriers.[38] In the *ISP Remand Order*, the FCC concluded that ISP-bound traffic creates arbitrage opportunities, and the FCC set out to eliminate reciprocal compensation in ISP-

[33] See Opening Brief of Commission Staff at ¶¶ 25-30, 32-33, 44-58.
[34] Level 3 Petition at 3, 4, 11-13.
[35] Staff Opening Brief at ¶¶ 78-85, Staff Reply Brief at ¶¶ 35-45.
[36] Initial order at, e.g., ¶¶ 41, 54.
[37] Staff Opening Brief at ¶ 51.
[38] *Id.* at ¶¶ 61-63, 103;

bound traffic by gradually reducing it to zero.[39] Although the FCC was referring to *local* ISP-bound traffic, the case for bill-and-keep is all the more compelling with regard to interexchange VNXX traffic because VNXX raises the additional problem of access charge avoidance, and saves CLECs and their ISP customers the expense (assumed in the *ISP Remand Order*) of placing Internet access equipment in each local calling area.[40]

34 By applying bill-and-keep to VNXX traffic, the Commission would not be setting a rate—a process that certainly would require cost evidence. Rather, it would be directing the CLECs to recover their costs—whatever they may be—from the CLECs' customers rather than from Qwest. As such, requiring that bill-and-keep apply to VNXX traffic does not require evidence or even "assumptions" about the costs carriers incur when connecting VNXX calls. The initial order should be clarified where it suggests that it bases its approval of part of Staff's proposal on "assumptions" about Qwest and CLEC costs for originating and terminating VNXX calls.[41] Likewise the Commission should omit, as irrelevant, the statement that there is no evidence about how much local exchange service customers may be contributing, through local rates, to support dial-up ISP service.[42] The important point, as articulated by the FCC, is that where ISP-bound traffic is concerned (with its one-directional nature and long hold times) the incentives in the competitive marketplace will be distorted as long as carriers are able to recover their costs from each other rather than from their customers.

35 Pac-West and Level 3 argue that traffic imbalance and arbitrage do not justify bill-and-keep, pointing to the FCC's *Core Forbearance Order* as a retreat by the FCC from its

[39] Order on Remand and Report and Order, FCC 01-131, ¶ 73 (April 27, 2001).
[40] Staff's Reply Brief at ¶ 53.
[41] Initial order at ¶ 65.
[42] *Id.* ¶ 71.

analysis in the *ISP Remand Order*, upon which Staff's proposal relies.[43] The *Core Forebearance Order* did not repudiate bill-and-keep for ISP Bound traffic. Rather, the Order merely removed the new market restrictions and growth caps that had been announced in the *ISP Remand Order*.[44] Moreover, while the FCC did state a preference for uniform compensation for ISP-bound traffic, the ISP-bound traffic to which it is referring must be interpreted as *local* ISP-bound traffic only.[45] As numerous courts have now concluded, the FCC did not intend for its $.0007 compensation scheme to override the intrastate access charge regime that applies to ISP-bound calls between local calling areas.[46]

E. The initial order reasonably concludes that VNXX is a permissible practice on the condition, *inter alia*, that the respondents pay for that portion of local interconnection facilities that they use to transport VNXX calls.

36 VNXX is a way of avoiding access charges on calls between local calling areas and it perpetuates arbitrage as long as reciprocal compensation applies. Nonetheless, there is a compelling reason to allow VNXX: it is an efficient way for CLECs to offer a service that is functionally equivalent to Qwest's foreign exchange service. That said, unless the Commission requires CLECs to pay for local interconnection facilities in proportion to the CLECs' use of the facilities for transporting VNXX calls, the CLECs will gain an unfair competitive advantage in the provision of "foreign exchange-like" service.[47]

37 When a customer orders foreign exchange service from Qwest, the customer must purchase (and Qwest must provision) a private line to transport calls from the foreign exchange where the customer wishes to receive local service to the customer's premises.[48]

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[43] Pac-West Petition at 14; Level 3 Petition at 29, 30.
[44] *See* Staff Opening Br. at 25.
[45] *See Qwest v. WUTC*, 2007 WL 1071957, p. 11, 12.
[46] Staff Opening Brief at 26.
[47] *Id.* at ¶¶ 78, 79, 84, 96-102; Staff Reply Brief at ¶¶ 35-38, 44, 45.
[48] Staff Opening Brief at ¶ 80.

Under VNXX arrangements, CLECs obtain analogous transport on behalf of their VNXX customers by assigning the customer a number in the foreign exchange and thereby forcing Qwest to route the call to the CLEC over local interconnection facilities (often pursuant to a "single point of presence" arrangement that is intended to benefit CLECs). Under FCC rules applicable to the exchange of local traffic,[49] Qwest would have to bear the cost of that local interconnection facility in proportion to amount the facility is used to terminate calls to the CLEC. Where ISP-bound VNXX calls are concerned, calls from Qwest customers to the CLEC's ISP customer are one-directional. As a result, Qwest bears the cost of the facility to the extent that it is used to transport "FX-like" calls on behalf of the CLEC and its ISP customer.[50]

38 Again, by contrast, when providing its allegedly competing FX service, Qwest must provision a private line between local calling areas to its FX customer at its own expense and the customer must pay the retail rate for that private line. It would be plainly unfair to allow CLECs to use VNXX arrangements on the theory that CLECs need VNXX to be able to compete with Qwest's FX service, but then to require Qwest to provide CLECs the transport piece of the FX service at its own expense. This is why Staff recommended that the respondents pay for that portion of local interconnection facilities that the respondents use to transport VNXX calls. It is also why the California commission requires a carrier origination charge on VNXX traffic.[51]

39 Pac-West attacks the initial order's requirement that it pay transport for VNXX calls, arguing that the initial order confuses retail foreign exchange service with wholesale

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[49] 47 CFR § 51.709(b).
[50] Staff Response to Bench Request No. 2.
[51] 2003 WL 21212003, at * 3, 4 (Cal. P.U.C. May 8, 2003).

interconnection service.[52] Pac-West's argument mischaracterizes the reasoning behind Staff's recommendation and is also inconsistent with Pac-West's stated approval of the California commission's approach to VNXX.

F. The record shows that it is possible to identify interexchange VNXX traffic that is being carrier over local interconnection facilities.

40 The ELI/ATI petition argues that the initial order fails to acknowledge that it will be difficult to distinguish VNXX calls from true local calls and that doing so will require traffic studies which the initial order at one point describes as "highly contentious."[53] Pac-West similarly argues that the bill and keep scheme in the initial order is "mind-numbingly complex" apparently because it includes no findings on how to determine when traffic is VNXX.[54] Level 3 makes similar arguments.[55]

41 It is true that the approach to VNXX traffic proposed by the initial order would likely require carriers to use traffic studies to determine what amount of traffic is being transported via local connection facilities is VNXX, as opposed to local traffic. That these studies can be contentious is not a sufficient reason to reject the initial order's remedy, because the only alternatives are to either allow VNXX without restriction—which is unfair to Qwest—or to ban VNXX altogether—which is unfair to CLECs.

42 The fact that traffic studies can work for the purpose of arriving at a workable estimate of VNXX traffic on local interconnection trunks is evidenced by the fact that two Washington CLECs, including the Qwest and Verizon Access in the settlement agreement

[52] Pac-West Petition at 14, 15.
[53] ELI/ATI Petition at 16.
[54] Pac-West Petition at 23
[55] Level 3 Petition at 30, 31.

approved in this docket, have negotiated agreements with Qwest that provide for the very approach adopted by the initial order.[56]

43 Pac-West's petition is incorrect when it argues that California's approach is simpler than the bill-and-keep remedy set forth in the initial order. Pac-West overlooks the fact that California requires carrier origination charges on VNXX traffic. As such, it is clearly necessary in California to identify VNXX traffic traveling on local interconnection facilities. Once the VNXX traffic is identified or estimated—presumably by a traffic study—it is then possible to apply bill-and-keep compensation to that traffic, just as it is possible to derive a ratio of VNXX traffic to true local traffic for purposes of apportioning the cost of the local interconnection facilities. Pac-West made the same argument it makes here in challenging the California approach before the Ninth Circuit Court of Appeals. The court rejected it, stating that "[t]he record indicates that traffic studies are common in the industry and that Pac-West could conduct such studies to separate the calls that are not subject to reciprocal compensation but are subject to access charges. Other state commissions have reached similar conclusions [citing various decisions]."[57]

44 The Initial Order should not have said that the reason for not prohibiting voice VNXX, as proposed by Staff, was the difficulty of identifying it through cost studies.[58] Cost studies will be necessary to comply with the initial order. Moreover, if the commission were to prohibit the use of VNXX for voice, there would be no reason to "identify" such traffic as distinguished from ISP-bound VNXX traffic. VNXX voice traffic would not be permitted, period. The CLECs would have to comply with this restriction by providing VNXX local

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[56] TCG Post-Hearing Brief at 9; Amendment to Interconnection Agreement between Qwest and MCI Metro (Verizon Access), Attachment 1, Sec. 3 (filed 3/22/2007).
[57] 462 F.3d at 1159.
[58] *See* initial order at ¶ 107.

number presence service only to ISPs, and only to ISPs who agreed to use the service for the purpose of receiving dial-up internet access calls.

45 The record shows that it is possible to identify VNXX traffic.

G. The remedy chosen by the initial order is not discriminatory.

46 Pac-West asserts that the initial order's remedy is discriminatory because it recognizes FX and VNXX as functional equivalents, yet relieves Qwest of paying reciprocal compensation on VNXX calls without relieving CLECs of paying reciprocal compensation on FX calls made by CLEC customers to Qwest FX customers.[59] The chief reason for bill-and-keep is that CLECs including Pac-West use VNXX extensively for ISP-bound traffic. As described above, the FCC has concluded that reciprocal compensation creates arbitrage opportunities where ISP-bound traffic is concerned. It is not clear the extent to which Qwest uses FX-type arrangements for ISP-bound traffic, though there is certainly some evidence that Qwest and its affiliate do so. Pac-West could pursue a complaint against Qwest if it believes that its payment of reciprocal compensation to Qwest for "FX traffic" is resulting in arbitrage problems. Pac-West could also advocate for a provision in its interconnection agreement with Qwest that relieves Pac-West of payment of reciprocal compensation on calls from Pac-West customers to Qwest FX customers.

47 Pac-West argues that the Commission should consider all of what it deems "FX-like services" before deciding on the treatment of VNXX.[60] The record clearly establishes, however, that only FX service bears a direct resemblance to VNXX; the other services

[59] Pac-West Petition at 10, 16.
[60] Pac-West Petition at 12.

mentioned in Pac-West's petition are significantly different from VNXX for various reasons described in Staffs' brief.[61]

48 Level 3 argues that the initial order's remedy would be discriminatory because Qwest did not name all CLECs in Washington in its complaint.[62] Qwest filed a complaint against all CLECs that it believed to be engaging in VNXX practices in its interconnection arrangements with Qwest. If there are other CLECs that would attempt to use VNXX in a manner that does not comport with the conditions imposed by the initial order, they would risk a complaint from Qwest. The Commission can deal with a claim of preferential treatment if it arises.

III. CONCLUSION

49 For the foregoing reasons, the Commission should deny the petitions for administrative review and adopt the initial order, with the clarifications described above.

DATED this 14th day of November, 2007.

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[61] Staff Opening Brief at ¶¶ 86-89, Staff Reply Brief at ¶¶ 46-49.
[62] Level 3 Petition at 38.