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 LEVEL 3'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW OF THE WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

LEVEL 3 COMMUNICATIONS, LLC'S ANSWER TO THE PETITION FOR ADMINISTRATIVE REVIEW OF THE WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

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LEVEL 3 COMMUNICATIONS, LLC'S ANSWER TO THE PETITION FOR ADMINISTRATIVE REVIEW OF THE WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

I. INTRODUCTION

1. Pursuant to WAC 480-07-825(4) and Order No. 6,[1] Level 3 Communications LLC ("Level 3") answers the Washington Independent Telephone Association's ("WITA") Petition for Administrative Review of the *Initial Order*[2] filed in the above-referenced proceeding ("*WITA Petition*").[3]

[1] Order No. 6 extended the filing date for Answers to Petitions to Nov. 14, 2007 and authorizes electronic filing of the Answers. *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 06 (Oct. 31, 2007).

[2] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Order No. 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 No. 02, Initial Order (Oct. 5, 2007) ("*Initial Order*").

[3] *See Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Washington Independent Telephone Association Petition for Administrative Review (filed Oct. 25, 2007) ("*WITA Petition*").

2. The *WITA Petition* raises two new issues that were not part of the record in this proceeding: (1) WITA's claim that CLECs should be required to pay originating transport to rural LECs for FX-like traffic; and (2) WITA's so-called "phantom traffic" claim that CLECs should be prohibited from combining local and access traffic on the same local interconnection service trunk with Qwest.[4] Just as the *Initial Order* did, the Washington Utilities and Transportation Commission ("Commission") should summarily dismiss WITA's attempt to introduce new issues at this late date.

3. The remaining claimed errors were fully argued and briefed by the parties previously in post-hearing briefs. WITA mischaracterizes the Commission's precedent regarding VNXX in Washington, and the status quo in the telecommunications marketplace. Contrary to WITA's bald assertions, access charges do not now and have never been assessed on locally-dialed foreign exchange-like ("FX-like") services in Washington. Unrebutted record evidence shows that locally-dialed FX-like services and functionally equivalent FX services have never been subject to access charges. Moreover, contrary to WITA's assertions, access charges on CLEC FX-like traffic have never supported universal service in Washington. CLEC FX-like services are not only permitted, Section 251(b)(5) reciprocal compensation has long been due for termination of FX-like traffic in Washington, recently at the FCC's interim rate of $0.007.[5] The Commission should not deviate from its prior course, but remain true to the only approach consistent with the Act, and reject once again the positions WITA restates in its present Petition.

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[4] *WITA Petition*, ¶¶ 6, 14.

[5] *See, e.g., Level 3 Communications LLC v. Qwest Corporation*, Docket No. UT-053039, Order No. 05 (Feb. 10, 2006) ("*Level 3 Order No. 5*"); *Pac-West v. Qwest Corporation,* Docket No. UT-053036, Order No. 05, Feb. 10, 2006) ("*Pac-West Order No. 5*"); CenturyTel-Level 3 Arbitration, Docket No. UT-023043, Seventh Supplemental Order, ¶¶ 1, 35 (Feb. 28, 2003) ("*CenturyTel-Level 3 Arbitration Order*") ("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").

4. Level 3 underscores that the *Initial Order*, in a well-reasoned manner, effectively rejects every aspect of the original Qwest complaint, which sought not to establish a compensation structure for virtual NXX ("VNXX") traffic, but to declare that traffic unlawful. Qwest's Complaint did not include intercarrier compensation issues. Nor did the 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 offer 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.[6] The remaining conclusions in the *Initial Order,* as well as WITA's claimed errors, are beyond the scope of this docket and the Commission should reject them.

II. ACCESS CHARGES HAVE NEVER APPLIED TO FX-LIKE TRAFFIC

5. WITA's positions are predicated on at least two erroneous assumptions: (1) that FX-like traffic has historically been subjected to access charges in Washington both as a matter of law and as a practical reality; and (2) that the assessment of access charges on FX-like traffic supports universal service.[7] Based upon these and other erroneous assumptions regarding the status quo, WITA hypothesizes that the CLECs "should justify the deviation from the standard compensation mechanism of access charges."[8]

6. It is WITA who bears the onus of justifying a "deviation" from the status quo intercarrier compensation regime, rather than the CLECs. WITA's assumptions are simply wrong. Access charges have never applied as a matter of law to FX-like traffic in Washington

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[6] *See, e.g., Initial Order*, ¶¶ 37-38, 50, 55 ("Qwest has not met its burden to show that VNXX service per se is illegal.").

[7] *WITA Petition*, ¶¶ 29, 48, 52, 60-61, 70, 71.

[8] *WITA Petition*, ¶¶ 48, 52, 60-61, 71 ("There is no factual record presented to the Commission in this proceeding that would allow the Commission to modify the existing access charge regime.").

under the longstanding precedent of this Commission.[9] In addition, as the *Initial Order* recognizes, the Commission has both explicitly and implicitly approved and enforced interconnection agreements that provide for reciprocal compensation—not access charges—for the termination of FX-like traffic.[10] The Commission considered variations of these same WITA arguments many times before and repeatedly determined that reciprocal compensation—not access charges—is due for the transport and termination of ISP-bound traffic and FX-like traffic.[11] WITA has presented no new facts, law or arguments that would justify a reversal of the Commission's compensation precedents.

7. The *Initial Order* recognizes the historical fact that non-voice VNXX traffic bound for ISPs "has never been subject to access charges - the original (non VNXX) dial-up ISP service was not available when the access charge system was established and VNXX dial-up ISP service has not been included in determining access charges because it is locally-dialed and has been billed as local."[12] Voice calls and other services provisioned via FX-like services, being more recent innovations, were also not provided when the access charge regimes were established. Thus, it is WITA that seeks a "deviation" from the status quo in seeking to impose access charges on such traffic, which the FCC has characterized as inefficient because they are

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[9] *See supra* note 5 and accompanying text; *See, e.g., Qwest Corporation v. Level 3 Communications LLC et al.*, Docket No. UT-063038, Opening Brief of Level 3 Communications LLC, ¶¶ 27-34 (June 1, 2007) ("Level 3 Opening Brief").

[10] *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").

[11] *See, e.g., Level 3 Order No. 5; Pac-West Order No. 5*; *CenturyTel-Level 3 Arbitration Order*, ¶¶ 1, 35.

[12] *Initial Order*, ¶ 72.

exceed actual costs.[13] The Commission should deny WITA's request and continue the status quo of terminating compensation for FX-like traffic.

A. WITA's Position Ignores The Pre-1996 Act Compensation Regime For FX Traffic And The Lack Of ILEC Cost Evidence Justifying a Departure From That Regime

8. As Level 3 has explained numerous times in this proceeding,[14] the Commission must determine intercarrier compensation obligations by applying the terms of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). Under *WorldCom*,[15] Section 251(g), colloquially referred to as the access charge regime, cannot apply to traffic that was not subject to access charges prior to the Telecommunications Act of 1996 ("1996 Act").

9. WITA's argument fails this fundamental statutory test. WITA complains that the "Initial Order approaches the access charge issue from an irrelevant premise" by focusing on the complete absence of ILEC cost evidence in the record to support the imposition of access charges on CLEC FX-like services.[16] Yet in its argument that access charges apply, WITA ignores the pre-1996 Act compensation scheme that applied to FX traffic exchanged between two LECs. Both before and after the passage of the 1996 Act, ILECs did not pay access charges

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[13] *See, e.g., Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 343-346 (1997) ("*Access Charge Reform Order*"), *aff'd, Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998), ("The FCC has repeatedly "explained that *the existing access charge system includes non-cost-based rates and inefficient rate structures*. We stated that there is *no reason to extend such a system to an additional class of customers*, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. We explained that ISPs should not be subjected to an interstate regulatory system *designed for circuit-switched interexchange* voice telephony simply because ISPs use incumbent networks to receive calls ...") (emphasis supplied).

[14] Level 3 Opening Brief, ¶¶ 39-42, 49-54; Reply Brief of Level 3 Communications LLC, ¶¶ 35-50 (June 29, 2007) ("Level 3 Reply Brief"); *Qwest Corp. v. Level 3 Communications, et al.*, Docket No. UT-063038, Level 3 Communication LLC's Petition for Administrative Review, ¶¶ 19-37 (Oct. 25, 2007) ("Level 3 Petition for Administrative Review").

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

[16] *WITA Petition*, ¶ 10.

to each other for the exchange of FX traffic.[17] The crucial point is that in the case of two ILECs exchanging locally dialed traffic between customers that were not physically located in the same local calling area, the originating ILEC did not bill the terminating ILEC access charges for these FX calls. FX-like calls, which are the functional equivalent of FX calls, have been treated in the same manner by ILECs and CLECs. Treating FX and FX-like traffic differently now would be discriminatory and would violate federal and state law.[18]

10. The rating of calls has long been based upon a comparison of the calling party and called party numbers. As a result of this historic rating practice, locally dialed FX-like and FX traffic has not been subject to access charges under standard industry practices.[19] In fact, the FCC has determined that there is no viable alternative to this method of rating calls.[20] Consistent with the FCC, 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.[21] WITA proposes to discard the existing call rating system without offering a viable alternative.

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[17] *See, e.g.,* Sumpter Exh. No. JFS-1T, at 5:9-15 ("the ILECs do not bill each other access charges for" these FX calls). Mr. Linse attempts to rebut this point. However he posits a different factual scenario involving joint ILEC provisioning of FX service. He did not dispute the claim that ILECs did not pay access charges to each other when FX services are not jointly provisioned. Linse, Exh. No. PL-2RBT, at 5:15-6:6.

[18] *See, e.g.,* 47 U.S.C. § 253(a).

[19] *Initial Order*, ¶¶ 22, 50, 53.

[20] *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 at ¶¶ 1-2, 288, 301 (2002) ("*VA Arbitration Order*") ("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.*") (emphasis added); *Starpower Communications, LLC v. Verizon South, Inc.*, FCC No. 03-278, Memorandum Opinion and Order, 18 FCC Rcd 23625, ¶¶ 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."); Level 3 Petition for Administrative Review, ¶¶ 59-62. 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).

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

11. The *Initial Order* concludes that (1) "the Commission's finding in the AT&T Arbitration Order that FX and VNXX are functionally equivalent remains persuasive;"[22] and (2) "CLEC's VNXX services ... may qualify as exceptions" to the numbering guidelines" and thus should not be subject to access charges.[23] As discussed more fully below, the Commission cannot lawfully treat functionally equivalent services differently with respect to intercarrier compensation, numbering and other issues without violating the section 253(a) of the Act. WITA's proposed imposition of access charges on CLECs' FX-like services, but not ILEC FX services, would have the effect of creating unlawful barriers to entry by forcing CLECs to mimic the ILEC network.[24]

12. Given that WITA seeks to introduce an unprecedented revenue stream for itself through the imposition of access charges on services that have never been subject to such charges, the *Initial Order* concludes that it is appropriate for the Commission to consider "whether imposing charges would result in an under or overrecovery of those costs."[25] The ILECs offered no cost evidence to support their access charge arguments in this proceeding.[26] Rather, Qwest engaged in a theoretical discussion of cost causation to avoid presenting cost evidence. In fact, Qwest's settlement agreements indicate that "the collection of access revenues

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[22] *Initial Order*, ¶¶ 34, 38; *In re AT&T Communications of the Pacific Northwest and TCG Seattle*, Docket No. UT-033035, Order No. 04, Arbitrator's Report, ¶ 33 (Dec. 1, 2003) ("AT&T Arbitration Order"); *See, e.g.*, 47 U.S.C. § 253(a).

[23] *Initial Order*, ¶ 38.

[24] The *Initial Order* correctly acknowledges the fact that the "[c]ommission recognized the functional equivalence of FX and VNXX service in the 2003 AT&T Arbitration Order and expressed concern that CLEC network architecture," which is based on deployment of relatively fewer switches not be subject to "barriers" based on these differences. *Initial Order*, ¶¶ 34, 38.

[25] *Initial Order*, ¶ 70.

[26] *Initial Order*, ¶ 70.

per se is not crucial to Qwest's business plan."[27] WITA, as the *Initial Order* acknowledged, presented no witnesses or evidence at all.

13. Even if the ILECs had presented cost evidence, the Act and *WorldCom* preclude the Commission from imposing access charges on FX-like and FX traffic now. WITA's proposal 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).[28] 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).[29] Similarly, because locally-dialed calls to FX customers were not subject to access charges pre-1996 Act, FX and functionally equivalent services cannot be excluded from Section 251(b)(5) compensation either. Thus, while access charges are preserved for some forms of traffic that predate the 1996 Act, they do not, and have never, applied to ISP-bound traffic, or VNXX or other FX-like traffic.[30] 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.[31]

14. Accordingly, the Commission should dismiss WITA's tired arguments and reaffirm its prior precedent that FX-like and FX services are functionally equivalent and that reciprocal compensation should be paid for the termination of locally dialed FX-like traffic.

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[27] *Initial Order*, ¶ 38.

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

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

[30] *See, e.g.*, Level 3 Petition for Administrative Review, ¶¶ 21-37.

[31] *See, e.g.*, 47 C.F.R. § 69.5.

III. UNIVERSAL SERVICE HAS NEVER AND DOES NOT DEPEND ON SUPPORT FROM ACCESS CHARGES IMPOSED ON FX-LIKE TRAFFIC

15. WITA again raises the shibboleth that the "intrastate access charge system is intertwined with universal service issues" and "VNXX can do serious damage to the existing universal service system."[32] This argument is a red herring. Staff concedes, as it must, that the universal service regimes never contemplated revenues from ISP-bound and FX-like services as the universal service and access systems were established "long before dial-up ISP service came into existence."[33] The *Initial Order* correctly concludes that non-voice VNXX traffic bound for ISPs "has never been subject to access charges" because "dial-up ISP service was not available when the access charge system was established and VNXX dail-up ISP service has not been included in determining access charges."[34] Voice calls and other services provisioned via FX-like services, being more recent innovations, were also not available when the access charge regimes were established. Further, terminating access charges on voice services support universal service in Washington, not originating access charges on data services.[35]

16. Moreover, WITA provided no evidence at all that FX-like traffic has siphoned off interexchange minutes of use that are needed for cost recovery, or that USF recovery has diminished. Thus, the *Initial Order* rejects WITA's unsupported assertions that FX-like services "would have the Draconian effect on WITA's revenues as WITA suggests."[36] The *Initial Order* concludes:

> VNXX ISP-bound minutes bear no prior connection with access charge or universal service calculations nor would they be included in future access charge

[32] *WITA Petition*, ¶¶ 29, 32.

[33] *Initial Order*, ¶ 67; Commission Staff's Opening Brief, ¶¶ 19, 44.

[34] *Initial Order*, ¶ 72.

[35] *Initial Order*, ¶ 69; Commission Staff's Opening Brief, ¶¶ 41-42, 109.

[36] *Initial Order*, ¶ 99.

minutes. Even if the Commission were to require the payment of access charges for such calls there would be little impact on WITA revenues because it is unlikely that ISP customers would be willing to incur long distance charges for dial-up service, eliminating the possibility of access and universal service revenues from such calls.[37]

17. Moreover, while WITA decries the loss of the hypothetical USF assessment, it conveniently omits discussion of the windfall profits that additional originating access charges would generate. Accordingly, the Commission should once again reject WITA's unsupported arguments.

IV. WITA'S TRANSPORT AND PHANTOM TRAFFIC ARGUMENTS ARE UNTIMELY AND NOT SUPPORTED BY ANY EVIDENCE

18. In its Petition, WITA brazenly attempts to re-introduce its contentions that CLECs should pay rural LECs for transport relating to the exchange of VNXX traffic. WITA deviously seeks to re-introduce these contentions by first noting that the *Initial Order* provides that CLECs must compensate Qwest for transport relating to FX-like traffic and then disingenuously asserting that this conclusion "presumably" applies to rural ILECs as well.[38]

19. WITA's statement is at a minimum misleading. WITA is fully cognizant that the ruling in the *Initial Order* regarding transport applies only to Qwest, and not to rural LECs.[39] The *Initial Order* was clear that the Commission declined to consider WITA's untimely contentions regarding rural LEC transport because: 1) "[t]here is no support on this record for WITA's transport recommendations, even though WITA had ample opportunity to provide witnesses and evidence;" 2) "[c]onsidering WITA's recommendations at this phase of the

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[37] *Initial Order,* ¶ 99.

[38] *WITA Petition,* ¶¶ 6, 61, 64.

[39] *Initial Order,* ¶ 98 ("we require CLECs to compensate Qwest for the transport of such calls only to the extent the calls actually use Qwest transport facilities.").

proceeding would require reopening the record, a dubious course of action;" and 3) "WITA's transport issues fall outside the scope of the proceeding."[40]

20. In light of the fact that WITA first raised its transport contentions long after the hearings and provided no evidence in support of its "recommendations," the Commission should again summarily dismiss WITA's untimely and unsupported assertions.

21. WITA also raises for the first time in its Petition issues regarding "Phantom Traffic."[41] Specifically, WITA alleges that CLECs are using VNXX and combined local/access trunk groups to terminate "Phantom Traffic," and argues that this traffic continues "to grow."[42] WITA suggests that to stem this growth the Commission should "require full population of signaling records including calling party number and Carrier Identification Codes ("CIC")."[43] As with its transport arguments, WITA's Phantom Traffic arguments are untimely, unsupported by evidence in the record and should likewise be summarily dismissed.

V. <u>CLEC FX SERVICES ARE FUNCTIONALLY EQUIVALENT TO ILEC FX AND FX-LIKE SERVICES</u>

22. Relying primarily on Qwest's previous testimony, WITA repeats the ILEC refrain that VNXX service is not the functional equivalent of ILEC FX services.[44] The Administrative Law Judge evaluated the arguments presented by Qwest and WITA on this point and rejected their position. The *Initial Order* concludes that the "Commission's finding in the AT&T Arbitration Order that *<u>FX and VNXX are functionally equivalent remains persuasive</u>*."[45] WITA offers no new facts or law to buttress its flawed position.

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[40] *Initial Order,* ¶ 92, n.88.

[41] *WITA Petition,* ¶ 14.

[42] *WITA Petition,* ¶¶ 14, n.5.

[43] *WITA Petition,* ¶¶ 14, n.5.

[44] *WITA Petition,* ¶¶ 45-49.

[45] *Initial Order,* ¶ 38 (emphasis added).

23. The CLECs have established that CLEC FX-like services are the functional equivalent of ILEC FX services. In fact, both Staff and Qwest apparently concede that from an end user perspective, Qwest's FX, OneFlex, Wholesale Dial and CLECs' so-called "VNXX" services are functionally indistinguishable.[46]

24. WITA asserts that "VNXX offers no innovation in service or technology," and is a "subterfuge."[47] However, the *Initial Order* correctly recognizes, the "Act established a system whereby CLECs could provide competitive telecommunications services without building the same types of networks as ILECs."[48] The Order notes that "[b]ecause CLEC networks take advantage of technological developments that were not available to ILECs as they were building their legacy facilities-based networks, CLEC network architecture is more streamlined and may *provide functionally equivalent services with more efficient equipment*."[49] In fact, CLECs are using their "streamlined," technologically advanced network to engage in competition with ILECs through the use of innovative FX-like services. The ILECs simply want to retain their near monopoly market share and are opposed to competition.

25. WITA's attempts to characterize "VNXX" service as different from FX services only raise minor provisioning distinctions that are irrelevant to the ultimate factual and legal determinations the Commission must make in this proceeding.[50] As Level 3 demonstrated in its Opening Brief, the bottom line is that the CLEC services provide the same functionality as

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

[47] *WITA Petition*, ¶ 25.

[48] *Initial Order*, ¶ 41.

[49] *Initial Order*, ¶ 41.

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

Qwest's FX and FX-like services from the end user's perspective. Moreover, the CLECs establish a so-called local presence with their points of interconnection ("POI") and extended transport facilities.[51] There can be no legitimate claim that Level 3's purchase of special access transport is not the functional equivalent of Qwest's use of a private line for FX service and PRI for Qwest's FX-like services as each is often provisioned as a logical circuit on transport fiber shared by other users.[52]

26. The Commission should not reverse its prior precedent and require CLECs to pay Qwest's transport costs as proposed in the *Initial Order*. However, even if the Commission ultimately adopts this erroneous position, it must decisively state that: (1) special access facilities purchased by the CLEC to connect its POI to the LCA where the call originated are the functional equivalent of the ILEC PRI or private line that is provisioned in a traditional ILEC FX service; (2) a CLEC that establishes such facilities to the LCA will not be required to pay any of Qwest's purported originating transport costs; and (3) a CLEC that establishes such facilities to the LCA is entitled to terminating intercarrier compensation.

27. In fact, the "differences" in how ILECs and CLECs provision FX-like services arise because CLECs do not use the legacy "hub-and-spoke" architecture that characterizes the networks of Qwest and WITA's constituents.[53] As demonstrated in Level 3's Opening Brief,

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[51] Level 3 Opening Brief, ¶¶ 75-77.

[52] Level 3 Opening Brief, ¶¶ 66, 74-77; 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 (filed Aug. 8, 2007); Level 3 Petition for Administrative Review, ¶ 51, n.86.

[53] *Initial Order*, ¶¶ 13, 34 ("The CLEC's network architecture is not the same as an ILEC's. CLECs usually have one centrally-located switch that covers a large geographic area").

adopting a service or compensation distinction based on these network characteristics would violate the Act's prohibition on barriers to entry in section 253(a) and undermine the CLEC's right to interconnect at a single POI without mimicking the ILEC network.[54] The Act does not encourage or require replication of the ILEC's network and, without the use of FX-like services, CLECs would have to replicate the ILEC's network to compete. As applications such as VoIP are increasingly divorced from the facilities on which they ride, it makes little sense to impose a local presence requirement as proposed by Qwest that is technologically unnecessary to the services being provided.[55] Nevertheless, where competitive carriers have extended their network further than they are legally obligated to do, that network extension should unquestionably entitle them to collect reciprocal compensation on a non-discriminatory basis.

28. Staff asserts "that VNXX is not the only way for CLECs" to provision FX-like services" and suggests that "a CLEC could locate a channel bank or subscriber carrier facility (through which it *remotes a piece of its existing switch*) in the local exchange."[56] As Level 3 showed in its Opening Brief, and even staff and Qwest recognize, Staff's triple transport proposal is absurd and economically inefficient.[57] The Commission must resist the attempts by the ILECs to inappropriately force economic inefficiencies onto competitive providers when such actions serve only to harm the public interest and needlessly protect incumbent stongholds.

VI. FX-LIKE TRAFFIC IS NOT ANALOGOUS TO 800 TRAFFIC

29. WITA makes the unsupported assertion that "CLEC 'FX-like' service is analogous to an interexchange 800 service."[58] The 8XX analogy is inapposite. As Qwest admits, from the consumer's perspective 800, VNXX, FX, ILEC FX-like, and some locally

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

[55] Level 3 Opening Brief, ¶¶ 75-77.

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

[57] Williamson, TR. 438:15-241; Brotherson, Exh. No. LBB-IT, 293:15-212.

dialed ISP bound services *all* offer the same results – dial-up access to the Internet without the imposition of additional per minute of use charges.[59]

30. Moreover, 8XX calls use the familiar 1+ dialing pattern and consumers expect calls to be routed to an IXC for completion. ISP-bound calls have always been predominately locally dialed, which means a 1+ dialing pattern is not used nor are the services of an IXC.[60] Further, 800 services require updates to a national SMS/800 database and a toll-free database dip for routing[61] whereas FX-like services do not use the 800 database. Also, 800 services typically offer a wide area of service for toll-free calling with a single 800 number, often nation-wide toll-free calling, whereas FX-like services typically facilitate such calling in a single local calling area.[62]

31. In fact, Qwest admits that its FX service and Market Expansion Line ("MEL") services provide the same functionality as 800 services by, among other items, providing a local presence in a foreign exchange to permit toll-free dialing, such that these services should also be treated like 800 services by Qwest's logic.[63] Therefore, if the Commission were to accept WITA's analogy, it would have to impose access charges on both FX and FX-like traffic. However, as Level 3 has shown, imposing access charges would violate the Act, Commission

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[58] *WITA Petition,* at ¶ 48.

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

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

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

[62] *Id.* The 800 system also has the capability to perform complex vertical routing including: (1) call validation, which ensures that the calls originate from the subscribed service areas; (2) translation of 800 numbers into POTS numbers; (3) alternative POTS translation, which allows subscribers to vary the destination of 800 calls based on factors such as time of day, or place of origination of the call; and (4) multiple carrier routing, which allows subscribers to use different carriers based on similar types of factor. These functions are not typically offered in CLEC FX-like services. *CompTel Order*, ¶ 5.

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

precedent and be bad public policy. The Commission should therefore reject WITA's 8XX analogy as a basis for imposing access charges.

VII. WITA'S PROPOSALS VIOLATE SECTION 253 OF THE ACT BY IMPOSING MATERIALLY DIFFERENT COMPENSATION OBLIGATIONS ON FUNCTIONALLY EQUIVALENT FX AND FX-LIKE SERVICES

32. WITA's proposal to impose access charges on CLEC FX-like traffic while ILECs continue to receive reciprocal compensation for FX traffic is discriminatory and in violation of Section 253(a)[64] of the Act because it imposes a different intercarrier compensation scheme on functionally equivalent services.[65]

33. The *Initial Order* correctly concludes that FX services and CLEC's VNXX services are functionally equivalent," that both services "qualify as exceptions to the geographic basis" of the numbering guidelines, that the use of VNXX does not violate any statute or regulation, and that VNXX services legitimately arose from the deployment by CLECs of "more streamlined" networks that "take advantage of technological developments that were not available to ILECs as they were building their legacy" networks.[66]

34. Notwithstanding these well-reasoned conclusions, the *Initial Order* inexplicably states that "*CLECs cannot escape the fact* that VNXX calls, even though locally dialed, are not locally terminated," and "appear to be local but are in reality non-local."[67] WITA seizes upon these statements in the *Initial Order* to justify its proposed discriminatory imposition of

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[64] 47 U.S.C. § 253(a): "No State or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[65] *Qwest Corporation v. Level 3 Communications LLC et al.*, Docket No. UT-063038, Pac-West Petition for Administrative Review of Order No. 2 Initial Order, ¶¶ 19-20 (Oct. 25, 2007). Likewise, the *Initial Order's* imposition of bill and keep is discriminatory in violation of Section 253(a) of the Act because it imposes a different intercarrier compensation scheme on functionally equivalent services.

[66] *Initial Order*, ¶¶ 37-38, 41, 46, 55-56 ("VNXX service per se is not illegal").

[67] *Initial Order*, ¶¶ 146-47 (emphasis added).

inefficient access charges on CLEC FX-like services but not the functionally equivalent ILEC FX or FX-like services.[68]

35. WITA's proposal is discriminatory and logically inconsistent because it permits ILEC FX and FX-like services (e.g., Qwest's Market Line Expansion ("MEL"), Wholesale Dial) to "escape" these so-called "facts" by permitting ILEC FX services, which also by definition do not terminate locally, to continue to be subject to reciprocal compensation payments at a non-zero rate while CLEC FX-like services are subject to access charges. [69]

36. Moreover, WITA's proposal creates barriers to competition in violation of Section 253(a) because it applies different intercarrier compensation regimes to ILEC FX services (and ILEC FX-like services) than CLEC FX-like services, which the Commission has held, and the *Initial Order* affirms, are functionally equivalent.[70] Differing regulatory treatment cannot be based solely upon the identity of the provider of the service (i.e., CLEC or ILEC).

37. The Commission should reject WITA's proposal to impose access charges on FX-like traffic and should revise the *Initial Order* to avoid the blatant discriminatory effect it has relative to traditional and more recent FX services offered by ILECs.

VIII. FX-LIKE SERVICES ARE EASILY DISTINGUISHABLE FROM "TOLL BRIDGING" AND IP-IN-THE-MIDDLE

38. The Commission has consistently held, without exception, that ISP-bound traffic and FX-like traffic should be subject to the same reciprocal compensation regime as voice

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[68] *WITA Petition*, ¶¶ 6-8.

[69] *WITA Petition*, ¶¶ 6-8; Likewise, the *Initial Order* is logically inconsistent because it applies a "local" geographic distinction to VNXX traffic for intercarrier compensation purposes, despite the fact that the *Order* at the outset rendered any local distinction wholly irrelevant by concluding that VNXX services are an exception to the "geographic basis" of the numbering guidelines. *Initial Order*, ¶¶ 37-38, 41.

[70] *Initial Order*, ¶¶ 34, 38.

traffic, and not access charges. The Commission found this to be the case in 2001,[71] 2003,[72] 2005,[73] and 2006.[74] The *Initial Order* rejected WITA's toll bridging arguments concluding that FX-like services are legal and that the "CLECs are correct that toll bridging and VNXX are technologically different, and that toll bridging cases were decided in a different era in the telecommunications industry."[75] Undeterred, WITA repeats the same arguments that were evaluated and dismissed in the *Initial Order*.[76]

39. The "toll bridging" cases that WITA relies on[77] are irrelevant to this proceeding. The FX-like service provided by CLECs is nothing like the "toll-bridging" undertaken by MetroLink and U & I CAN. First, the *MetroLink* order cited by WITA involved a Commission finding that an interexchange service provider (*i.e.*, a "toll bridger") was subject to Commission regulation. The case did not turn on the propriety of MetroLink's service.[78]

40. Likewise, the *U & I CAN* case also involved the Commission's determination that a service provider did, in fact, provide a regulated telecommunications service. While the

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

[72] *CenturyTel-Level 3 Arbitration Order,* ¶ 7.

[73] *Pac-West Telecomm, Inc. v. Qwest,* Docket No. UT-053036, Order No. 3, Recommended Decision to Grant Petition (Aug. 23, 2005) ("*Pac-West Order No. 3*").

[74] *See Level 3 Order No. 5*; *Level 3 v. Qwest,* Docket No. UT-053039, Order No. 06 Denying Petition for Reconsideration (June 9, 2006); *Pac-West Order No. 5.*

[75] *Initial Order,* ¶ 50.

[76] *WITA Petition,* ¶¶ 11-32.

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

[78] Qwest acknowledges that there are technical differences between "toll bridging" and CLEC FX-like services. Qwest's Opening Brief, ¶ 31. If "technical differences" are irrelevant to the toll bridging comparison, then Qwest's FX service is also analogous to toll bridging and should be treated the same for intercarrier compensation. Moreover, if FX-like services are prohibited, then the functionally equivalent ILEC FX services should also be prohibited.

Commission in that case found the practice of "toll bridging" to be unlawful, the method by which MetroLink and U & I CAN provided their services are in stark contrast to CLEC FX-like services at issue in this proceeding:

> MetroLink manufactures, sells and leases a device known as a Telexpand. The Telexpand receives, translates, controls and directs transmission of signals to and through the central office switching equipment of the local exchange company to recreate a call conferencing or call forwarding function. MetroLink markets a service which allows subscribers to bridge overlapping EAS areas, thereby avoiding toll charges. The subscriber places a call to the Telexpand number. When the Telexpand answers, the subscriber enters a personal identification number which is checked for authorization and recorded for billing purposes. The Telexpand forwards the number to the U S WEST central office, which treats the request as an original local call and dials the requested number. The Telexpand then drops off the line.[79]

Further,

> U & I CAN operates its telecommunications system by using call-forwarding features it (or its members on its behalf) purchases from the local exchange company. U & I CAN uses a personal computer containing a voice mail card. When the computer receives a call, the voice mail card will "flash hook" and redial. The software in the computer answers calls and requests the calling party to identify the party being called. To complete the EAS bridge, the voice mail card in U&I CAN's computer transmits a series of three tones to the calling party. In response, the calling party enters his or her personal identification number. The computer gives another audible tone, at which signal, the calling party then enters the telephone number of the party being called. The computer transmits a final series of tones to the calling party, who is then connected with the party being called.[80]

41. CLEC FX-like services do not rely on retail services provided by ILECs, nor do they "bridge" between different calling areas. Instead, CLECs use their own switches and facilities to provide these services, which operate as functional equivalents to ILEC FX services as this Commission has repeatedly held. Like Qwest, customers of CLEC FX-like services pay for the transport to the answering location, and do not ride over ILEC facilities without compensation. Special access facilities purchased by CLECs to extend their networks

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[79] *MetroLink*, *29.

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

beyond their POI to local calling areas to transport their traffic, including VNXX calls, are functionally equivalent to the PRI trunks used by Qwest in its FX-like services. Further, unlike the toll bridgers, CLEC networks, including transport facilities, establish a "local" presence in the local calling area. From a technical perspective, Level 3's use of a POI and special access and direct end office transport to assume responsibility for the transport and termination of FX-like traffic demonstrates the fundamental difference between FX-like services and toll bridging. In short, as the *Initial Order* found,[81] the manner in which CLECs and "toll bridgers" provide their respective services is fundamentally different.[82]

42. If the test is whether an end user can make a call across exchanges without incurring toll charges, then ILEC FX service "has the same effect as toll bridging" and ILECs, including Qwest, should likewise not be permitted to avoid access charges "simply because technological or legal loopholes might allow such avoidance."[83] However, that is not the test established by the Commission. WITA has shown no improper use of ILEC networks, nor have they introduced cost evidence to support their positions. The Commission should affirm the *Initial Order's* well reasoned rejection of the toll bridging analogy.[84]

43. CLEC FX-like services are not akin to "IP-in-the-middle" services either.[85] "IP-in-the-middle" is a VoIP call that begins in time division multiplex ("TDM") format on the PSTN, is routed to a computer gateway and converted into Internet Protocol ("IP"), routed over the Internet, reconverted back into TDM format, and then sent to its final destination on the

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[81] *Initial Order*, ¶ 50.

[82] Level 3 Reply Brief, ¶¶ 22-28.

[83] *WITA Petition*, ¶ 19; *see also* Qwest Opening Brief, ¶ 30.

[84] *Initial Order*, ¶ 48-50.

[85] WITA's Opening Brief, ¶ 7. *Washington Exchange Carrier Assoc., et al. v LocalDial Corp.*, Order, 233 P.U.R.4th 208 (Wash. U.T.C., June 11, 2004) ("*LocalDial*"); *AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, FCC 04-97 (rel. April 21, 2004) ("*AT&T Order*").

PSTN. In *LocalDial* and the *AT&T Order*, the Commission and the FCC determined, respectively, that such services are "telecommunications" as opposed to "information services." Because "telecommunications services" are subject to state and federal jurisdiction, LocalDial and AT&T were both required to pay access charges on long distance calls just as other providers of pure PSTN services are required to do.[86] However, FX-like service is fundamentally different from VoIP IP-in-the-middle long distance services. Further the dispute is not about whether FX-like services are subject to regulation as telecommunications services but rather whether they should be treated the same as traditional ILEC FX services for intercarrier compensation purposes.

44. Staff has also recognized the technical differences between toll bridging and IP-in-the-middle long distance services on the one hand, and CLEC FX-like services on the other: "["VNXX," toll bridging and "IP-in-the-middle"] differ in how they technically achieve their goal."[87] In sum, the significant technical and service classification differences between FX-like, toll-bridging, and "IP-in-the-middle" long distance services show that WITA's analogies are inapposite. As the Commission has recognized, the most relevant analogous service to CLEC FX-like service is the "functionally equivalent" ILEC FX service.[88] Both permit end users to call from one local calling area to another without incurring toll charges. The Commission should therefore affirm the *Initial Order's* finding that FX-like services do not

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

[87] Williamson, Exh. No. RW-1T, 24:3-5. Qwest similarly acknowledges that FX-like services are not provided the same way as "toll bridging" services, instead focusing on the end-user results of each of these service. Qwest's Opening Brief, ¶ 31.

[88] *Initial Order*, ¶¶ 34, 38; AT&T Arbitration Order, ¶ 33.

violate state or federal law and deny WITA's Petition.

IX. THE COMMISSION SHOULD ADOPT THE NINTH CIRCUIT'S APPROACH IN *PEEVEY*

45. Level 3 underscores that the Ninth Circuit in *Peevey* upheld the California Commission's decision that FX-like traffic is subject to reciprocal compensation under section 251(b)(5) and rejected Verizon's arguments that access charges should apply.[89] Recently, the Washington District Court acknowledged that *Peevey* determined that reciprocal compensation applies to CLEC FX-like traffic and concluded that the WUTC could reach the same conclusion.[90] Level 3 agrees with the Washington District Court and Staff that the Commission "'could reach the same result' (*i.e.,* requiring Qwest to pay the CLECs compensation on VNXX calls)" as the California Commission and Ninth Circuit.[91] Because its substantive determination in the *Level 3 Order No. 5* and at least four earlier decisions were correct, this Commission should reach the same result both in this proceeding and, separately, on remand from the Court, relying on state and federal law rather than federal preemption by the *ISP Remand Order*.

X. CONCLUSION AND RECOMMENDATIONS

46. The *Initial Order* concludes that the use of "VNXX" does not now, and has not in the past, violated state or federal law.[92] Having determined that "VNXX" is not illegal, it is illogical for the Commission to reverse its prior precedent and impose access charges on such

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[89] *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1158-59 (9th Cir. 2006) ("*Peevey*") ("Pac-West is entitled to reciprocal compensation for traffic that appears to originate and terminate within a single exchange by virtue of Pac-West's assignment of ... so-called 'Virtual Local' or 'VNXX traffic.'").

[90] *Qwest Corp. v. Washington State Utilities and Transportation Commission et al.*, 484 F.Supp.2d 1160, 1176 (D. Wash. Apr. 9, 2007) ("Washington District Court Remand Decision") ("By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac-West and Level 3 for the ISP-bound VNXX calls at issue ... *It is plausible that the ultimate conclusion of the WUTC will not change.*") (emphasis supplied).

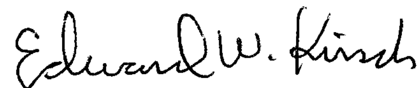
[91] Commission Staff's Opening Brief, ¶ 67; Washington District Court Remand Decision, at *26; *Peevey* at 1159 ("Pac-West is entitled to reciprocal compensation for Virtual NXX traffic.").

[92] *Initial Order*, ¶¶ 139, 155.

FX-like services as advocated by WITA and its constituents. Moreover, access charges have never applied to ISP-bound and FX-like traffic. Further, as determined in the *Initial Order*, there is no cost evidence in this record to support the imposition of access charges on FX-like traffic. In sum, WITA provides no reasoned basis in fact, law, or changed circumstances to justify departing from the Commission's prior precedents.

47. For these and the other reasons stated herein, Level 3 respectfully requests that the Commission review the *Initial Order*, reject WITA's proposed Findings of Fact and Conclusions of Law and adopt the Findings of Fact and Conclusions of Law set forth in Level 3's Petition for Administrative Review which are consistent with both the Ninth Circuit's *Peevey* decision and the Washington District Court.[93]

Respectfully submitted,



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[93] *See*, Level 3 Petition for Administrative Review, ¶¶ 19-37; *Peevey*, 462 F.3d 1142, 1158-59; Washington District Court Remand Decision, at *26.

CERTIFICATE OF SERVICE

I, Jeffrey R. Strenkowski, hereby certify that on the day of November 14, 2007, true and correct copies of Level 3 Communications, LLC's Response to the Washington Independent Telephone Association's Petition for Administrative Review was served on all parties of record in this proceeding listed below via electronic mail and first class mail. In addition, the original plus three (7) 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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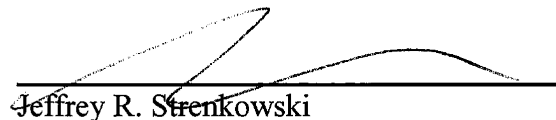

Jeffrey R. Strenkowski

Dated this 14th day of November, 2007