

**BEFORE THE STATE OF ARIZONA
ARIZONA CORPORATION COMMISSION**

In the Matter of Level 3 Communications,	:	Docket No.	T-01051B-05-0350
LLC's Petition for Arbitration Pursuant to	:		T-03654A-05-0350
Section 252(b) of the Communications Act	:		
of 1934, as amended by the	:		
Telecommunications Act of 1996, and the	:		
Applicable State laws for Rates, Terms, and	:	LEVEL 3'S POST-HEARING	
Conditions of Interconnection with Qwest	:	BRIEF	
Corporation	:		
	:		
	:		

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**BEFORE THE STATE OF ARIZONA
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In the Matter of Level 3 Communications, LLC’s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State laws for Rates, Terms, and Conditions of Interconnection with Qwest Corporation	: : : : : : : : : : :	Docket No. T-01051B-05-0350 T-03654A-05-0350 LEVEL 3’S POST-HEARING BRIEF
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Preliminary Statement

“What we have here is a failure to communicate.”

Paul Newman in *Cool Hand Luke*

The telecommunications regulatory environment has changed over the past ten years. Right after the 1996 Act, policy favored firms like AT&T and MCI, who sought to compete by relying on resale and unbundled network elements (UNEs). But Qwest and other ILECs resisted, arguing that only facilities-based competition is worthy of long-term protection.

The resistance worked. Today, MCI and AT&T are basically gone: both are in the process of being merged into ILECs they once challenged. And dozens of other firms that tried to compete on the “old” terms now rest in the boneyard of the Bankruptcy Code.¹

¹ Two years ago, the Federal Communications Commission (“FCC”) noted that “volatility” in the industry “has already resulted in the bankruptcy of 144 carriers.” Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration, *Memorandum Opinion And Order*, 18 FCC Rcd 25887 (2003) at ¶ 166. The number has only increased since then. See Gates Direct at 20 (“SBC has asserted in testimony filed in other state arbitrations that more than 200 CLECs have ceased operations in SBC territory since 2000.”).

With the demise of resellers and UNE-based competitors, the hope that competition will constrain ILECs lies with wireless services and innovative Internet Protocol (IP) based services. Level 3 is one of those IP-based competitors. Level 3 has constructed an entirely new network – completed in 2001 – that enables IP-based intermodal competition. Level 3 seeks to use the capabilities of this network to compete for Arizona consumers’ business in an arena where Qwest’s head start is less meaningful, to do something different and provide wholly new choices.

Perhaps in hindsight UNE based competition was always doomed – it left the fox in charge of the henhouse. But that means that facilities-based intermodal competition *must* succeed. The alternative is no competition at all – after the incumbent, Qwest, has achieved significant *deregulation* by touting how much competition it faced. The Commission’s decision in this case will clearly indicate whether Arizona’s regulatory policies are going to promote intermodal facilities-based competition – which will always have a different “look and feel” than traditional offerings, like a DVD player competing against a tape-based VCR – or, whether, instead, the Commission will protect Qwest by requiring new competitors to play by Qwest’s rules. It would not have been procompetitive, or even competitively neutral, to have required the first DVD players to be able to record shows from the TV – a basic function of VCRs since their creation. Yet that is just what Qwest is asking the Commission to do here – that is, to require Level 3 to operate not in the manner that makes the most sense given Level 3’s new technology, but instead to operate in the manner that seems natural and comfortable *to Qwest*.

Qwest, of course, opposes new competition, and particularly new competition from a new and different network like Level 3’s. Qwest argues that the Commission should step back 100 years and require new competitors to work under constraints that might have made sense long ago, but that certainly do not now – and that, as the record in this case shows, Qwest itself

doesn't really comply with. Level 3, however, urges Arizona to embrace fair competition in an intermodal age. Level 3 is one of the country's largest carriers providing VoIP and other enhanced services. *See* Ducloo Direct at 16. Level 3 enables nine of the ten largest carriers in the nation to provide next generation IP-enabled services (including VoIP). Qwest is not only interfering with Level 3's ability to compete, but it is also delaying the other competitors who rely upon Level 3's platform to provide connectivity between the Internet and Qwest's circuit switched network. Indeed, VoIP is likely a "killer app" that will drive broadband adoption, long a key goal of telecommunications policy makers.

While trying to put a stick in the spokes of effective intermodal competition through restrictive interconnection terms, Qwest and other ILECs have campaigned nationwide for deregulation. Level 3 agrees with Qwest and others that regulatory principles should be updated to reflect market, technological and economic realities. The public interest is not served by hobbling firms that seek to serve the public with new and innovative services. But Level 3 – apparently unlike Qwest – believes that deregulation should be applied consistently. Qwest in particular has based claims that competition will discipline its pricing largely on the presence of intermodal competitors, especially VoIP providers. Citing cable television systems as well as firms such as Vonage, 8x8, AT&T and many others – firms either enabled by Level 3 or deploying similar technology – Qwest has won some form of deregulation in nearly every state in its territory.² But when faced with a competitor like Level 3 that wants a fair fight in the marketplace, without interconnection or intercarrier compensation rules that make us look and

² *See, e.g., Qwest Deregulation*, ACC Docket No. T-01051B-03-0454.

act like Qwest, Qwest beats a hasty retreat, seeking to impose burdens and obligations that Qwest's network is optimized to meet but that no longer serve any valid public purpose.³

Perhaps most ironic about Qwest's drive for deregulation is that the two services Qwest points to as the most significant competitors – wireless and VoIP – share two essential features that Qwest seeks to penalize in this case. First, both wireless service and VoIP provide nationwide calling at flat rates. Second, both wireless and VoIP provide geographically flexible services, where the service follows the end user device, and is not tethered to any particular location.⁴ So it should be no surprise that Qwest wants to impose terms on Level 3 that make it expensive, burdensome, and ultimately unviable to facilitate the provision of nationwide, geographically flexible services. Specifically, Qwest wants the terms of the Parties' interconnection agreement to pay homage to Qwest's traditional division of the communications

³ See e.g., In the matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion And Order* WC Docket No. 03-211, FCC 04-267, ¶ 25 (rel. November 12, 2004), (“*Vonage Order*”) (“Furthermore, to require Vonage to attempt to incorporate geographic “end-point” identification capabilities into its service solely to facilitate the use of an end-to-end approach **would serve no legitimate policy purpose**”) (emphasis added).

⁴ See, e.g. Combined Application Of Qwest Corporation For Reclassification And Deregulation Of Certain Part 2 Products And Services And Deregulation Of Certain Part 3 Products And Services, *Docket No. 04a-411t*, Staff Of The Colorado Public Utilities Commission's Petition For A Declaratory Order Concerning The Reclassification And Deregulation Of Telecommunications Services Under Parts 2 And 3, Title 40, Article 15 Of The Colorado Revised Statutes (“*Colorado Deregulation Case*”), *Rebuttal Testimony Of Robert H. Brighan on Behalf Of Qwest Corporation*, pp. 97, 110, 113, 120 (Colo. PUC, March 25, 2005) (Testifying that it “defies economic reality” to state that Qwest could simply raise local rates where customers can easily “cut the cord” and substitute cellular wireless services as a replacement service for Qwest's local telephone services and that VoIP services, fueled by growing broadband adoption will have a “price constraining impact on Qwest's local exchange services.” He further claims that providers such as Vonage, AT&T and Packet 8 offer “VoIP-based local exchange service with many features and free long distance, at rates very competitive with Qwest local exchange services.” And “While a Qwest customer pays \$21.28 for a basic line with no features, the CallVantage customer gets the equivalent of a 1FR plus several features for \$19.99.” He ultimately concludes, “**The availability of VoIP-based phone services across the state of Colorado constrains Qwest's ability to raise prices for its traditional basic exchange service**, because an increase in Qwest's prices could cause a *significant number of customers* to replace their wireline service with VoIP-based service, thereby reducing Qwest's customer base and profitability.” (Bold emphasis additional; italic emphasis in the original).

world into “local” and “long distance” calling, with the classification determined by an obsessive focus on the geographic location of the calling and called parties. From one perspective, of course, geography has always mattered to some degree, and it would continue to matter, albeit to a lesser degree, under Level 3’s proposals. But as noted above, geographic flexibility is a key feature of the services that Qwest is most concerned about in the marketplace.⁵ In the absence of an absolutely compelling public policy reason to suppress geographically flexible services, therefore – a reason that Qwest has not articulated and that simply does not exist – in order to truly facilitate intermodal competition, the Commission should do everything it can to facilitate geographically flexible services such as those offered by Level 3 and Level 3’s customers.

In this regard, while Qwest and Level 3 are arbitrating in many states, Arizona is one of the first in line. This is a rare second chance: the efforts of a decade ago to stimulate competition, in a word, failed. New IP-based technologies are the first truly new development in this field since the advent of the telephone,⁶ and one of the only ones with the capacity to turn things around. This nascent competition, however, depends on regulatory decisions that permit new competitors to innovate – to really offer something new – and not just offer shadow versions of services provided over Qwest’s pre-IP legacy network.⁷

⁵ See discussion of Qwest OneFlex, *infra*; Section II.B of this Brief.

⁶ Upon its completion in 2001, the Smithsonian Institution said that Level 3’s network and underlying technology represents, “the biggest change in communications technology in 100 years.” See <http://www.level3.com/673.html>.

⁷ See, e.g., *Vonage Order* at ¶ 7 (“DigitalVoice offers customers a suite of integrated capabilities and features that allows the user to manage personal communications dynamically, including but not limited to real-time, multidirectional voice functionality. In addition to voice, these features include voicemail, three-way calling, online account and voicemail management, and geographically independent “telephone” numbers. Vonage’s Real-Time Online Account Management feature allows customers to access their accounts 24 hours a day through an Internet web page to manage their communications by configuring service features, handling voicemail, and editing user information. At the user’s discretion, the user may, among other options, play voicemails back through a computer or receive them in e-mails

Summary and Background

Level 3 Communications, LLC (Level 3) respectfully submits this post-hearing brief in connection with Level 3's arbitration under Sections 251 and 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 251-52, against Qwest Corporation ("Qwest"), to establish a new interconnection agreement between Qwest and Level 3.

The formal issues here center on network interconnection architecture and intercarrier compensation. At bottom, however, this case is about Qwest's effort to retain intercarrier regulation to protect itself from the same intermodal competitors it touts as justifying retail deregulation.⁸ This Commission cannot reasonably give credence to Qwest's claims in deregulation proceedings that robust competitors justify removal of retail pricing constraints,

with the actual message attached as a sound file. Using other features, users may request that DigitalVoice ring simultaneously the user's Vonage number plus any other number in the United States or Canada regardless of who provides the service connected with that other number.").

⁸ See, e.g., *Colorado Deregulation Case, supra, Rebuttal Testimony Of William E. Taylor on Behalf Of Qwest Corporation* (Colo. PUC, March 25, 2005) ("Q. Are there high economic barriers to entering the VoIP business? A. No, the barriers to entering the VoIP business are not particularly high. Companies such as local exchange carriers, inter-exchange carriers, ISPs, cable operators, enhanced service providers can provide VoIP services with relative ease through a wholesale VoIP service provider. **For example, Level 3 Communications' VoIP EnhancedSM Local and HomeToneSM solutions provide retailers essential building blocks, such as networking trunking, local numbers, local number portability, E-911, operator assistance and directory assistance, required to offer residential customers local and long distance VoIP phone service via any broadband connection.** According to Level 3 Communications, its services give "providers the ability to offer a full-featured, cost-effective, high-quality local and long distance telephone service to consumers quickly and with minimal upfront costs. **A more diverse group of businesses, with no particular experience in providing telephony services are also entering the market. For example, partnered with Level 3 Communications, American Online (AOL) expects to launch a VoIP service over its AOL Instant Messenger (AIM) service, called AOL Internet Phone Service, within a month.** AOL users will be able to use their existing phones by means of an adapter that links the phones to the users' broadband routers. Yahoo! and MSN have client software that delivers VoIP, video conferencing and instant messaging clients. Recent press reports indicate that Google is also preparing to launch a VoIP service that would reportedly be delivered using a downloaded client. **There is a threat that large well-known companies will offer VoIP type services and compete with traditional phone companies.** As recently stated by a telecom analyst: When all you need is a Web site and a brand to sell telephone services, what's to stop Microsoft, or even Wal-Mart, from providing your calls?").

while simultaneously helping Qwest grind those competitors down by imposing interconnection terms that prevent them from actually constraining Qwest in the marketplace.

In this case, Qwest has attempts to retain its privileged – albeit anachronistic – regulatory status in two key ways. First, Qwest seeks contractual provisions that will needlessly complicate physical interconnection, by requiring Level 3 to establish inefficient interconnection arrangements and to pay Qwest for interconnection-related costs that are properly borne by Qwest itself. Second, Qwest seeks to rewrite intercarrier compensation rules in ways that are divorced from the costs Qwest incurs in originating or terminating traffic and from the underlying economics of the services being provided to end users, including distorting intercarrier compensation for traffic using so-called “virtual FX” or “VNXX” routing. In so doing Qwest claims that it is complying with the law; but in fact Qwest is trying to rewrite the law to render economically unviable the most efficient and innovative IP-enabled services – at least for Qwest’s competitors. Qwest itself is perfectly happy, out of region, to do just what Level 3 wants to do here in Arizona.⁹ Accepting Qwest’s intercarrier compensation rewrite would cripple the growth of the sustainable facilities-based competition that Arizona’s citizens deserve. The disparity between the Qwest’s words when seeking deregulation and actions in opposing Level 3’s interconnection rights is blatant. Qwest talks the talk of deregulation. Accepting Level 3’s proposals in this proceeding would give Qwest a real opportunity to walk the walk as well.

Qwest does not want to face Level 3 as a true market competitor. Instead, Qwest wants to force Level 3 to operate on the same terms as Qwest’s retail customers – which automatically

⁹ See Gates Direct at 54.

prevents Level 3 from competing in any fundamentally threatening way. Level 3, on the other hand, has proposed to resolve the open issues with simple, straightforward, efficient and flexible approaches that are consistent with the law and with industry practice – as evidenced by Level 3’s interconnection agreements with ILECs approved by 36 state utility commissions. Level 3 summarizes its positions below.

One Interconnection, One Network. Section I of this Brief addresses interconnection architecture and cost issues. Level 3 is legally entitled to interconnect with Qwest using a single point of interconnection (POI) per LATA, physically located on Qwest’s network. Qwest will not have to build facilities to haul traffic to Level 3, or to receive traffic from Level 3. This POI will be a “meet point,” with each party responsible for costs and operations on its side of the POI.¹⁰ The physical transmission medium for interconnection will be a high-capacity fiber optic facility, with the traffic divided by software into “direct end office trunks,” or DEOTs. DEOTs are not physical transmission facilities. Rather, they are routing arrangements that allow traffic to or from particular Qwest end office switches to flow directly and efficiently to and from Level 3, without using Qwest’s tandem.¹¹

Qwest opposes these arrangements. It gives lip-service to Level 3’s right to a single POI, but over and over again it tries to undermine the single POI (SPOI) concept, by creating exceptions, adding additional facilities requirements, or imposing additional costs on Level 3 for exercising its SPOI rights. Qwest wants to force Level 3, either literally or via coercive economic

¹⁰ A “meet point” interconnection arrangement is a specific form of interconnection under Section 251(c)(2) of the Communications Act and associated FCC rules. This is totally different from the so-called “meet-point billing” that normally applies when two different LECs jointly provide exchange access services to an interexchange carrier. *See infra*.

¹¹ Transcript of Proceedings (“Tr.”) 467-71 and Exhibit (“Exh.”) 21 (diagram showing direct trunking between Qwest and Level 3).

arrangements, to establish multiple, inefficient POIs, based generally on Qwest's legacy network architecture and retail local calling areas. Qwest's network architecture, however, is irrelevant to IP-based carriers such as Level 3, and its retail calling areas are doubly so. In fact, for more than 20 years the logical unit of network architecture for purposes of interconnection has been the LATA, not the end office switch or local calling area. Level 3's proposals, which focus on the LATA as the relevant "unit" of the ILEC network, will not only be efficient from an engineering perspective, they will be competitively efficient as well. By minimizing the physical interconnections between the Parties, and by limiting intercarrier payments to simple per-minute termination charges, Level 3's proposals will force the Parties to compete in the market by winning customers – not in the regulatory arena by looking for ways to export costs to the other.

One of Qwest's key tactics for exporting its costs to Level 3 is the so-called "relative use factor" (or "RUF"). Qwest would apply the RUF not only to transmission facilities dedicated to carrying traffic between the two networks, as the FCC's rulings contemplate, but even to trunking entirely within Qwest's network that brings traffic to Level 3. In fact, the RUF may only legally apply to true internetwork facilities, which basically do not exist when the Parties physically interconnect at a single POI. But more fundamentally, Qwest's formula for calculating the RUF uses mathematical sleight-of-hand to unlawfully shift costs to Level 3. The applicable federal rule says that Qwest may apply a RUF to charge Level 3 *only* for the portion of trunking capacity that *Level 3* uses to send traffic *to* Qwest. *See* 47 C.F.R. § 51.709(b). The rule simply does not contemplate any charges to Level 3 for trunking capacity that Qwest uses to send traffic to Level 3 – even if, as a purely administrative matter, Level 3 communicates the need to route traffic directly to Level 3 (as opposed to through Qwest's tandem) by placing an "order" for direct trunking.

One Compensation Rate and Structure. Section II of this Brief addresses intercarrier compensation. Level 3 is prepared to pay reasonable intercarrier compensation rates when it sends traffic to Qwest, and expects to receive such rates when it receives traffic from Qwest. Logic, law, and efficiency dictate, however, that Qwest cannot have it both ways – Qwest wants to receive payments from Level 3, but no pay compensation to Level 3 (and maybe even get paid), when Qwest customers place the calls. Nearly all traffic between Level 3 and Qwest – including VNXX traffic – is and will be dialed using calling patterns that indicate to end users that toll charges will not apply. Qwest will efficiently route this traffic to the single POI at *de minimis* cost. And, except for true toll traffic, Qwest would pay Level 3 the lowest applicable intercarrier rate – the FCC’s \$0.0007/minute rate for information access, which the FCC has recently affirmed to be in the public interest.¹² For the relatively small amount of traffic properly subject to access charges, Level 3’s proposals allow Qwest to reliably account for such traffic – just as Level 3 has done with incumbent carriers in 36 states outside Qwest’s incumbent territory.¹³

Qwest opposes these simple arrangements. Qwest treats its high access charges as a regulatorily-guaranteed entitlement, and expects both Level 3 and the Commission to do whatever is necessary to ensure that Qwest continues to receive them. By contrast, under Level 3’s proposals, all traffic would be exchanged over a single, efficient network. Qwest’s demand

¹² In re Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, *Order*, 19 FCC Rcd 20179, ¶¶ 19-21 (FCC rel. Oct. 18, 2004) (Forbearance from rules precluding payment of reciprocal compensation for ISP-bound traffic in “new markets” and above volume caps are no longer in the public interest because regulatory arbitrage concerns have decreased and that these concerns are now outweighed by the public interest in creating a uniform compensation regime.).

¹³ When Level 3 sends toll calls to Qwest for termination, Level 3 will pay appropriate terminating access charges. *See infra*. (Level 3 will not normally receive toll calls from Qwest, so originating access charges are not implicated by the Parties’ agreement.)

for access charges have nothing to do with Qwest's costs. From a cost perspective it makes no difference to Qwest what Level 3 does on its side of the POI. Once Qwest hands off Qwest-originated traffic to Level 3, Level 3 is responsible for carrying it from the POI to the Level 3 customer, whether the customer is 25 feet, or 2500 miles, away.¹⁴ And, when Qwest picks up Level 3-originated calls at the POI, the costs it incurs in getting them to the called parties are unaffected by where the traffic originated.

Level 3 is perfectly willing to pay access charges for any real toll calls – this means traditional “long distance” service where a customer pays Sprint, AT&T or MCI, for example, a per minute rate for carrying traffic across “exchange boundaries” – that Level 3 hands off to Qwest.¹⁵ But Qwest ignores the purpose, history, and statutory basis of access charges in an effort to have this Commission apply them to calls that are not toll calls – to “information access” traffic that is subject to a special compensation regime established by the FCC. Qwest elevates its own *retail* marketing decisions about local calling area boundaries into ironclad *wholesale* pricing rules to constrain what Level 3 can do to compete. Qwest tries to do this with

¹⁴ In addition to the costs savings and features that make VoIP an attractive alternative to traditional local exchange service – as Qwest claims in deregulation proceedings as well as when promoting its own VoIP service – the geographic flexibility of VoIP is another attractive feature. Yet, if Qwest's proposals are followed, a VoIP customer visiting Tucson from Phoenix (or perhaps Denver) having the unlucky accident of a different area code, will eventually pay a toll charge for calling across the street.

¹⁵ See Issue No. 2A, Decision Points List (“DPL”). Level 3 delivers some traffic to Qwest on behalf of IXC's providing an “IP-in-the-middle” service. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, ¶ 1 (rel. April 21, 2004) Level 3 accepts the FCC's finding that to the extent that “certain forms of phone-to-phone IP telephony service are ‘telecommunications services,’ and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers” it will pay similar access charges. *Id.* at ¶ 9. It stands to reason, therefore, that to the extent that the FCC has *not* concluded that providers VoIP (IP-TDM and TDM-IP) services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore *do not* impose the same burdens on the local exchange as do other interexchange carriers, Level 3 *should not* pay similar access charges or be burdened with similar interconnection requirements.

a straight face even while its OneFlex product ignores its own local calling boundaries.¹⁶ Qwest's position in this arbitration is not only contrary to the law – it would economically burden, and therefore suppress, IP-enabled facilities-based competitors and a host of would-be competitors nationwide seeking to deliver the next generation of telecommunications services.¹⁷ This is bad public policy, bad for the consumers of Arizona and bad for the development of the robust, innovative competition that Qwest claims is so effective in constraining Qwest itself.¹⁸

I. TO ENSURE CONTINUED SUSTAINABLE FACILITIES-BASED INTERMODAL COMPETITION THE COMMISSION MUST AFFIRM THE MOST TECHNICALLY AND ECONOMICALLY EFFICIENT SOLUTION: EXCHANGE OF ALL TRAFFIC OVER A SINGLE INTERCONNECTION NETWORK AT A SINGLE POINT OF INTERCONNECTION PER LATA.

Qwest's proposals would enshrine its antiquated, inefficient network organization and retail marketing decisions into law, and would force innovative competitors like Level 3 (and those many providers that rely upon Level 3) to operate equally inefficiently – either in real, operational terms, or in economic terms (by being forced to pay Qwest non-cost-based charges for daring to operate on a different basis than Qwest does). Qwest would have the Commission simultaneously preclude delivery of innovative and desirable services to Arizona consumers,

¹⁶ See discussion of OneFlex™ “Virtual Numbers,” *infra* at Section II.B.

¹⁷ See, e.g., 47 U.S.C. § 157(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”).

¹⁸ Because Qwest demands that Level 3 conform to Qwest's desired interconnection methods – which boil down to either treating VoIP traffic as if it were intrastate telephone toll service subject to state regulation (and therefore passed over FGD trunks) or geographically mirroring Qwest's geographic local calling areas – Commission approval of Qwest's interconnection requirements subjects Level 3's VoIP services to state regulatory requirements where Level 3 has no service-driven reason to create FGD capabilities or assume such costs into its operations. This is inconsistent with the policy announced in the *Vonage Order*, *supra*, at ¶¶ 25, 29.

blunt the market forces that would spur Qwest itself to accelerate delivery of its next generation of services, and simply hand the market back to Qwest.

Level 3's proposed interconnection architecture is simple. Under the Communications Act and the FCC's rules, CLECs may interconnect at a single POI per LATA, which must be physically on ("within") the ILEC's network. 47 U.S.C. § 251(c)(2).¹⁹ Such a POI constitutes a point of physical interconnection (the FCC's rules use the term "interconnection" as well as the term "meet point" to describe the physical linking of two networks). Each party is operationally and financially responsible for getting traffic it originates to that point for hand-off to the other network. See 47 C.F.R. §§ 51.5 (defining "interconnection" and "meet point"); 51.321(b) (defining meet points as technically feasible); *Local Competition Order* at ¶ 553.²⁰ The originating carrier is responsible for paying the terminating carrier for terminating the traffic it originates. 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701.

This straightforward arrangement was illustrated at the hearings during cross-examination. Level 3 Exhibit L18 shows how the two networks would interconnect by means of an efficient SPOI. Traffic that one carrier originates would be carried by that carrier, using that carrier's own network facilities and at that carrier's own expense, to a meet point interconnection, where both operational and financial responsibility would shift to the other

¹⁹ The actual statutory language calls for interconnection "within" the ILEC's network. Except for legal distinctions that the FCC has made with regard to unbundling ILEC interoffice transport, discussed *infra*, Level 3 does not perceive or intend any difference between a point "on" the ILEC's network and a point "within" that network, and uses the more natural term "on" in this brief. In other words, whether "on" or "within," the reality is that Level 3 either collocates advanced network gear within buildings housing Qwest tandems; or splices fiber at "meet points;" or leases capacity to its POIs with Qwest. In each case, customers "on" Level 3's network communicate with customers "on" Qwest's network, and vice versa.

²⁰ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

carrier for getting the traffic onward to its destination. The single POI is a technically feasible arrangement that serves as the bridge connecting the two networks; trunks are analogous the “lines” on the bridge that organize and direct traffic exchanged over the bridge. *See also* Tr. 26-27; 362-66, 368-69; 526-28; Gates Direct at 14-15; Gates Rebuttal at 3-6; Ducloo Rebuttal 10-16. In the words of Mr. Ducloo, it is the means by which Level 3 creates a bridge between the old network and the new IP networks that allows VoIP consumers and VoIP providers to allow for convergence of services across intermodal platforms to occur. *See* Tr. at 41-44.

Level 3 has proposed terms that implement this straightforward arrangement. As explained below, however, Qwest’s proposals subvert it, both technically and economically. Qwest wants to make Level 3 interconnect at multiple, inefficient points to receive traffic, or – economically the same thing – to pay Qwest to receive traffic that Qwest sends to Level 3.

A. Level 3 Is Entitled To A Single Point of Interconnection Per LATA.

Level 3 seeks contract language that provides for a single meet-point POI per LATA. Level 3’s proposed Section 7.1.1.1 provides:

7.1.1.1 Establishment of SPOI: Qwest agrees to provide CLEC a Single Point of Interconnection (SPOI) in each Local Access Transport Area (LATA) for the exchange of all telecommunications traffic. The SPOI may be established at any mutually agreeable location within the LATA, or, at Level 3’s sole option, at any technically feasible point on Qwest’s network. Technically feasible points include but are not limited to Qwest’s end offices, access tandem, and local tandem offices.

This language is completely consistent with applicable FCC rules and regulations. The Act requires an incumbent local exchange carrier (ILEC) such as Qwest to permit interconnection at “any technically feasible point” on the ILEC’s network. 47 U.S.C. § 251(c)(2). The undisputed evidence shows that Level 3’s proposals to interconnect with Qwest by means of a single POI on Qwest’s network in each LATA will work efficiently from a technical point of view, and, indeed,

are working efficiently today. *See* Tr. 506 (“as far as routing is concerned, all you need is the routing address”); Tr. 513-14, 516-17 (trunks presently working and set up correctly to allow traffic to flow). There is therefore no basis for any claim that Level 3 may not use a single POI.

The FCC has repeatedly considered this issue and repeatedly found that its rules require the ILEC to allow CLECs to use a single POI. Consider the following:

- In June 2000, in considering an SBC request for interLATA authority, the FCC stated: “Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. ***This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.***” Texas SBC 271 Proceeding; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78 (emphasis added).
- In April 2001, in discussing its rules in the course of initiating a proceeding regarding intercarrier compensation, the FCC stated: “As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, ***including the option to interconnect at a single POI per LATA.***” In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-92 (released April 27, 2001) at ¶ 112 (footnote omitted, emphasis added).
- In July 2002, in resolving an arbitration between Verizon and WorldCom, the FCC stated: “Under the Commission’s rules, competitive LECs may request interconnection at any technically feasible point. ***This includes the right to request a single point of interconnection in a LATA.***” FCC Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249, 00-251; Released: July 17, 2002; at ¶52 (emphasis added).

Given these rulings, there is no basis for any claim that Level 3 – whether in network or economic terms – must establish multiple POIs within any LATA. Level 3 is, simply and without question, entitled under the law to use a single POI per LATA if Level 3 so chooses.²¹

Qwest opposes this straightforward arrangement. Nowhere in Qwest’s proposed language is there any simple or direct statement that Level 3 may, in fact, use a single POI per

²¹ As Mr. Gates explained, Level 3 has a history of working closely with the ILECs in the establishment of additional POIs where traffic warrants such additional facilities. But where it does not choose to establish multiple POIs, that is solid evidence that there is no economic reason to require it to do so. Gates Direct at 18. The point is not that Level 3 will never, under any circumstances, choose to establish multiple POIs, merely that Qwest may not force Level 3 to do so.

LATA to exchange traffic. The implication of Qwest's language is that Level 3 may indeed be required to establish multiple POIs within a LATA, or that at a minimum Qwest retains the right to claim that more than one POI is needed in some circumstances.²² Level 3 is concerned that Qwest is using its unclear language to set up a game of "gotcha!" with Level 3, where Qwest can invoke ambiguous contract provisions either to charge Level 3 more money or to refuse interconnection entirely, interfering with Level 3's ability to use its interconnection arrangements to serve its customers and compete with Qwest. This was made clear by cross examination of Qwest's witnesses, none of whom could clearly articulate a technical, economic or legal basis for requiring that Level 3 pay Qwest for the privilege of interconnecting to Qwest's network and receiving traffic from Qwest. *See e.g., Tr.* at 39-41 (Qwest's attempts to confuse the concept of where parties interconnect with the type of equipment used in an IP network unsuccessful); *id.* at 78-79 (interconnection "on" or "within" the network irrelevant to the question of physical linking of two networks).

These are not unreasonable concerns: Qwest has suggested a number of scenarios where Level 3 would be required to have a "physical presence" at more than one point per LATA. *See, e.g., Linse Direct* at 3-6 (claiming that because Level 3 seeks interconnection "on" Qwest's network, Level 3's SPOI proposals are technically infeasible, but in any event, Qwest is entitled to compensation for traffic originating on Qwest's network terminating to Level 3 at the Single POI). Qwest knows better than to call these "points of interconnection," but each would be a

²² For example, Qwest proposes (in its Section 7.1.2) that Level 3 establish "at least" one POI per LATA for the exchange of the specific kinds of traffic that Qwest says may travel over its "Local Interconnection Service" or "LIS" trunks. At the same time, in its proposed Section 7.1.1, Qwest states that its LIS service is intended to link end office switches to each other and to tandem switches, but may or may not be available to link tandem switches. This proposed section does not mention anything about POIs at all, making it unclear what Qwest intends with respect to actually interconnecting with Level 3. Qwest's direct testimony, particularly that of Mr. Linse, is equally unclear.

physical location where traffic was exchanged between Qwest and (under Qwest's proposals) new facilities paid for by Level 3. For example, Qwest argues that where it has more than one tandem switch per LATA, Level 3 should establish separate physical facilities to each tandem. *See Easton Direct* p. 4-5. This severely undermines Level 3's SPOI rights. If Qwest wants new connections that look like POIs, and sound like POIs, then Qwest is undermining Level 3's right to a single POI per LATA.²³

Another example is Qwest's repeated argument that even if Level 3 has a single POI per LATA, calls that originate in one local calling area ("LCA") and are delivered to Level 3 at a SPOI in a different LCA are toll calls, unless Level 3 also has a physical presence in the originating LCA. Tr. 292-93 (requiring Level 3 to be "physically located" in the LCA to establish the call as local). Under Qwest's grinding geographic logic, to avoid access charges, Level 3 must, again, build out facilities to multiple points in the LATA. This basically says that unless Level 3 mimics Qwest's retail marketing plans and network architecture, Level 3 has to pay a significant financial penalty. This wholly negates the point of the SPOI requirement, namely, allowing new entrants to deploy their own, more efficient network architectures.

Qwest argues that Qwest itself meets these requirements by having its unregulated affiliate, QCC, buy a PRI in every LCA where it provides services. A PRI is functionally the same thing as a DID, which is the service Level 3 offers to its customers who provide VoIP, ISP

²³ Level 3 is willing to work with Qwest to configure the traffic flowing over a single POI so that it is easy for Qwest to identify and route traffic bound for a tandem switch other than the tandem switch nearest the physical POI. This involves the establishment of DEOTs that electronically divide up an undifferentiated flow of traffic into logical groupings based on where the traffic is coming from or going. But these types of arrangements emphatically do *not* entail building new facilities. As Mr. Ducloo explained in his pre-filed testimony, setting up separate trunk groups in this way is like painting appropriate lanes on a large interstate highway, not like building a new highway. *See Ducloo Direct* at 22.

dial-up and related services in competition with Qwest / QCC. *See* Tr. at 95-96 (describing PRI and DID functionality); *see also* Tr. at 232, 240 (describing Qwest's OneFlex service). Qwest's proposals, however, ensure that Level 3's cost structure exceeds that of Qwest's subsidiary QCC. Level 3's costs would exceed Qwest's because, as Level 3 demonstrated, Qwest's actual cost of terminating Qwest-originated traffic to Level 3 at the a single POI in LATA 666 is *de minimis* and because of Qwest's proposal that Level 3 must either purchase transport or pay a higher intercarrier compensation.

Moreover, in raw monetary terms the transaction between QCC and Qwest Communications International (the publicly traded parent of QCC and Qwest Services Corporation) is a wash. Money goes out of one corporate pocket and into another. Relative to Level 3, however, Qwest's proposed requirements transfer money – without legal, economic, technical or policy justification – from Level 3 to Qwest. *See* Tr. at 439-443 (Mr. Easton conceding that as a general matter investors value transactions between competing companies differently than they do transactions between subsidiaries of the same publicly traded parent corporation). So, it is clear why Qwest would require QCC to “purchase” a “PRI” in each and every local calling area.²⁴ It is therefore also clear why Qwest's extra-legal imposition of this requirement is unreasonably discriminatory to Level 3 and any other providers seeking to offer inexpensive internet access to dial-up subscribers as well as VoIP and other services to providers nationwide.

²⁴ It would be hard to prove that the PRIs QCC “uses” are actually being “used” in a meaningful way since a PRI is a switch-based feature set used with a “large pipe.” Qwest could easily designate a PRI port, but simply loop the signal back onto common transport served from the same switch – an advantage of this being an affiliate transaction. Notably, Qwest adduced no evidence as to what services QCC actually purchased, nor could Qwest's technical expert witness Linse provide more information than that a DID was a “service” and a PRI an “interface”. Tr. at 521.

Setting aside the fact that federal law requires Qwest to provide a single POI, it is patently discriminatory to force Level 3 to “mirror” Qwest’s network by establishing multiple POIs, whether at a series of Qwest tandems, a series of Qwest end offices, or in a series of Qwest local calling areas.²⁵ Any such requirement would amount to a tax on Level 3 for being different from Qwest. The key purpose of the 1996 Act, however, is to enable facilities-based competitors like Level 3 to flourish. It is anti-competitive and unfair to establish rules that penalize Level 3 for *not* interconnecting in a way that conforms to Qwest’s wishes.

Note also that by insisting upon its right to a single POI, Level 3 is not asking Qwest to reconfigure its network in any way, nor is Level 3 asking Qwest to build new facilities. Qwest already has connections (normally fiber optic facilities) within its own network, between its end office switches and the tandem switches they subtend, as well between and among its tandem switches. Moreover, it is technically a simple matter for Qwest to isolate Level-3-bound traffic (identified by the dialed telephone number) onto separate trunk groups on its interswitch fiber facilities, which will allow that traffic to be efficiently carried to the single POI. *See* Tr. 506-07 *et seq.* (all traffic will route to the single POI (and over a single set of interconnection trunks) regardless of the traffic type or jurisdiction; the only “technical” concerns are related to billing.); *See also* Ducloo Direct at 38 (“The network will have no trouble correctly routing any type of calls, no matter how many are combined on the same trunk group.”) Moreover, as discussed below, the cost that Qwest incurs in getting traffic from within a LATA to a single POI within the same LATA is *de minimis*. *See* Exhibit RRD-22; Tr. 26-27.

²⁵ There is a vast difference between being required from the start to either establish (build or lease) connectivity to each Qwest retail local calling area independent of any traffic management concerns, and establishing trunking (software that directs calls away from the switch and directly to the Level 3 network) in order to avoid waste of Qwest’s tandem resources.

Qwest's ambiguity about Level 3's right to establish a single physical POI per LATA, therefore, is not based either on any technical difficulties or on any significant costs that such an arrangement would impose on Qwest. Level 3 submits that the entire basis for Qwest's less-than-enthusiastic embrace of a single POI per LATA is its understandable – but, ultimately, illegitimate – desire to impose unreasonably discriminatory costs and operational inefficiencies on Level 3 as Level 3 seeks to compete for business within Arizona.

B. Level 3's SPOI Is Both a Technical and a Financial Demarcation.

As described by Mr. Ducloo, Level 3 seeks to establish a single POI per LATA providing its own facilities – a “meet point” interconnection arrangement. Under such a meet point arrangement, each party is responsible for the operation of, and costs associated with, the facilities and equipment on its side of the meet point-POI. Each party pays the other for terminating traffic, but neither can export its traffic origination costs to the other. Each party's end users are responsible for paying the cost of the traffic they originate. Level 3's proposed Section 7.1.1.2 makes this arrangement completely clear:

7.1.1.2 Cost Responsibility. Each Party is responsible for constructing, maintaining, and operating all facilities on its side of the SPOI, subject only to the payment of intercarrier compensation in accordance with Applicable Law. In accordance with FCC Rule 51.703(b), neither Party may assess any charges on the other Party for the origination of any telecommunications delivered to the other Party at the SPOI, except for Telephone Toll Service traffic outbound from one Party to the other when the other Party is acting in the capacity of a provider of Telephone Toll Service, to which originating access charges properly apply.

Level 3's proposed language states that it will pay “intercarrier compensation in accordance with Applicable Law.” This includes both reciprocal compensation and, where applicable, access charges. What Level 3's language makes very clear, however, is that other than originating access charges for toll calls where Level 3 is the IXC (that is, the provider of

“telephone toll service”), Level 3 will not pay Qwest when Level 3 carries calls originated by Qwest’s customers.

This makes perfect sense in the real world. An end user purchasing a long distance toll service from a third party carrier expects to pay a toll for that service. *See* Tr. 487 (end user dialing 1+ expects to pay a toll “typically 1 is known as ‘this is how I initiate a long distance call.’”) Moreover, the network routing of toll calls is different. Calls dialed on a 1+ basis use different network resources for at least three reasons. First, “1” as the first digit instructs circuit switched networks to look for a third party carrier to handle the call. *See* Tr. at 487-88.. Second, on the circuit switched network the numeral 1 dialed as the first digit signifies that the call is subject to toll billing. *See* Tr. at 488 (an initial “1” identifies the call “as an interexchange call.”). Third, on the circuit switched network, for 1+ originated calls Qwest is either paid a toll by its end user, as the provider of “Telephone Toll” service, or receives access charges from a toll carrier that will be paid by the end user.²⁶

Level 3, however, doesn’t sell traditional retail long distance service. Ducloo Rebuttal at 7. In other words, Level 3 does not provide 1+ service. *See* Tr. at 85.

²⁶ *See* Exhibit Q-19 and Q-20; Tr. 167-68 (“So the Qwest end user will pay Qwest for the completion of that toll call. Qwest will carry that call to the single point of interconnection in the LATA, which happens to be in Phoenix. Qwest would then terminate that call to Level 3 over the interconnection trunks and would pay Level 3 reciprocal compensation for termination of that call. So if I’m not mistaken, to add the numbers to this, the intrastate toll rate, retail toll rate that Qwest would receive from its end user is about 3.5 cents, and Qwest would pay Level 3 .0007 for the completion on the call -- of that call on our network”); Tr. at 168 (“AT&T would pay Qwest originating access, which I believe in this state is close to a penny per minute. AT&T would carry the call to the access tandem in Phoenix over Feature Group D trunks. And Qwest would, over the meet point billing trunks that we discussed earlier, route the call to Level 3”).

First, Level 3's network is entirely IP.²⁷ Second, the end user making use of Level 3's network does not have to presubscribe to a third party toll carrier; instead, the end user buys a voice-enabled data service that lets them make or receive calls from any point on the globe where they have a broadband connection to the Internet.²⁸ Third, regardless of whether the call will terminate to a VoIP customer in Bangkok or next door, Level 3 carries the call to the POI at no additional charge to Qwest.²⁹ Level 3 pays Qwest to terminate the call to Qwest's end user.

VoIP providers can require 11-digit dialing. But this doesn't matter for several reasons: First, on an IP network (as opposed to a circuit-switched network), dialing "1" as the first digit means nothing. Second, the customer doesn't expect to pay for a "long distance" service; to the contrary, the most popular calling plans, such as Vonage's or 8x8's are flat rated.³⁰ Third, on an IP network, the customer does not presubscribe to a third party toll carrier; instead, they buy a voice enabled data service that transports the call in IP to anywhere in the world.³¹ Fourth, on IP

²⁷ See Exhibit L-6; Tr. at 55-56 ("In the Level 3 IP network – and as I'm hesitating here, what I'm drawing in the left circle is something that might represent an IP network. A bunch of different servers, routers, Ethernet switches, and connectivity physically between those switches, that route traffic amongst these different pieces of equipment, and they can take any route that they choose. So there's connectivity physically established potentially from Point A on the diagram to Point B, and B to C, but the traffic flows from A to C without realizing that it ever passes through B.")

²⁸ See Tr. at 201 ("And in an IP environment, there really is no IXC. The call is transported over the Internet.").

²⁹ See Tr. at 201 ("And as close as possible to where the PSTN end user resides, the call is converted from IP to PSTN and terminated directly to the providing carrier.").

³⁰ The Qwest® OneFlex™, product appears to offer a flat rated service, but in the really small text at the bottom of the web page it states that "domestic direct-dialed long distance charges are extra." See https://cvoip.qwest.com/oneflex/portal!/ut/p/.cmd/cs/.ce/7_0_A/s/7_0_1D1/s.7_0_A/7_0_1D1. Again, the economic incentive is obvious: not only does QCC collect an additional per minute of use, but in Qwest territory, QCC either pays access charges straight to its affiliate Qwest or "purchases" PRIs in every local calling area. Either way it is a wash transaction between QCC and Qwest.

³¹ See Tr. at 201 ("And in an IP environment, there really is no IXC. The call is transported over the Internet. And as close as possible to where the PSTN end user resides, the call is converted from IP to PSTN and terminated directly to the providing carrier. And in an IP environment, there really is no IXC").

networks, 1+ dialing is irrelevant to how the call is rated, routed, terminated or to what the end user customer pays. *See* Tr. at 201.

Paying for Qwest's facilities to get to the SPOI would also be paying for traffic originated by Qwest's customers. Qwest objects to Level 3's language precisely because Qwest wants to impose such unlawful charges on Level 3.³²

1. Regulatory Precedent Supports Level 3's Position.

Level 3's position is based on, and is completely consistent with, both federal and state authority under the Act. Under federal law, a "meet point" is "a point of interconnection between two networks ... at which one carrier's responsibility for service begins and the other carrier's responsibility ends." 47 C.F.R. § 51.5 (definition of "meet point"). As noted above, ILECs are required to interconnect with CLECs at any technically feasible point. The FCC specifically held that "technically feasible methods of obtaining interconnection ... include, but are not limited to: (2) meet point interconnection arrangements." 47 C.F.R. § 51.321(b). This means that an ILEC must establish a meet point arrangement if a CLEC so requests.³³

³² As discussed in Section II.A., *infra*, there is no legal or economic basis for imposing access charges in any case where the end user does not pay a toll charge. The entire point of access charges is to *share* some of the IXC's toll revenues with the LECs that help originate and terminate the call.

³³ A "meet point interconnection arrangement" – defined in the FCC's interconnection rules cited above – is totally different from a "meet point billing" arrangement. "Meet point billing" refers to an FCC-mandated system for billing a toll carrier when two LECs jointly provide the exchange access that carrier needs to reach an end user. *See, e.g.,* In the matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications, *Memorandum Opinion and Order*, 2 FCC Rcd 4518 (1987) at ¶ 2. This would arise, for example, when a CLEC's end user receives a toll call that is handled by a toll carrier without a direct connection to the CLEC. In that case the toll carrier hands the call off to the ILEC's tandem, which routes the call to the CLEC. In this situation, both the ILEC and the CLEC will bill the toll carrier for the portion of the exchange access service each one provides – the ILEC billing tandem charges and the CLEC billing end office charges. They each will also bill something based on the cost of "transporting" the call between the tandem and the end office. How much transport each one bills to the toll carrier will depend on where the ILEC's and CLEC's networks "meet" – hence the name, "meet point billing," for this access arrangement.

The meet point interconnection is a “bridge” connecting the networks. On one side is the Qwest network, on the other side is the Level 3 network. Between them is a bridge – the physical connection that Level 3 establishes. Governing the traffic between the bridges are trunks. Trunks are software that route traffic. Trunks talk to facilities through trunk ports. Level 3 has trunk ports to talk to Qwest, and Qwest has trunk ports to talk to Level 3. But Qwest wants this Commission to believe that the trunks and trunk ports that Qwest must use to route traffic from Qwest to Level 3, actually comprise a retail service that Level 3 must purchase from Qwest. This makes no sense.

Long-standing federal decisions support Level 3’s position. In the *Local Competition Order*, the FCC made clear that in a meet point interconnection, neither carrier has financial or operational responsibility for the physical arrangements on the other carrier’s side of the meet point. Instead, since each carrier benefits from the interconnection (because each carrier’s customers can call and be called by the other’s), each carrier should bear its own costs in establishing the meet point.³⁴ Furthermore, the question of allocating the cost of internetwork facilities does not arise. Each carrier bears its own costs in establishing the facilities needed to get to the meet point:

³⁴ See Tr. at 444 (“Q. And from your point of view, when the dedicated trunk transport is created, it advantages both parties, Qwest and Level 3, or is it --A. It can advantage both parties. From Level 3’s standpoint, it may make more economic sense to have dedicated transport, and from the Qwest standpoint, it keeps our tandem from being exhausted.”). But note that the Qwest witness in nearly the same breath says, “There’s got to be some crossover point at which it makes economic sense to **buy direct from transport, rather than paying for tandem switching and tandem transmission** on a per minute of use basis.” Tr. at 444-45. On further cross examination, however, he admitted: (a) that dedicated trunking to serve a carrier’s *own* end user’s originated traffic is a tariffed service, Tr. at 450-51; (b) that carriers buy direct trunking out of Qwest tariffs for purposes serving their *own* end users; (c) that the issue illustrated in Exhibit L18 is the exchange of traffic under an interconnection agreement; Tr. at 451; but, finally, (d) that for interconnection trunking, under Qwest’s proposal, Level 3 would **pay** Qwest and receive a credit for Level 3’s originated traffic, *id.*, for traffic **originated by a Qwest end user**. Tr. at 453. In other words, Qwest wants Level 3 to pay Qwest for delivering Qwest-originated traffic.

[O]ther methods of technically feasible interconnection or access to incumbent LEC networks, ***such as meet point arrangements ... must be available to new entrants upon request.*** Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network" (e.g., main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection. In a meet point arrangement ***each party pays its portion of the costs to build out the facilities to the meet point.*** We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, ***the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement.*** Under these circumstances, ***it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement.***

Local Competition Order at ¶ 553 (emphasis added, footnotes omitted).

This is precisely what Level 3 wants to establish with Qwest. Under this arrangement, as noted above, each party bears its own costs for the facilities needed to reach the POI. Aside from being operationally simpler, this arrangement has the added benefit of eliminating the need for any jointly used "internetwork" facilities whose costs must be allocated. The CLEC's network is deemed to extend all the way to the ILEC's network, and the ILEC never has to carry any traffic outside its own, pre-existing network. The CLEC does all the work of getting traffic from the CLEC's customers to the ILEC, as well as hauling ILEC-originated traffic back to the CLEC's customers. In this sort of arrangement it makes no sense to charge the CLEC for the "use" of the ILEC's facilities to deliver ILEC-originated traffic to the CLEC.

Qwest would have this Commission undermine the meet point concept in two ways. First, Qwest proposes to allocate to Level 3 the cost of some of its own network facilities that it uses to *originate*, on the basis of “relative use.”³⁵ Second, and more fundamentally, meet point interconnection does not involve any jointly-used internetwork facilities. Indeed, there are no real “internetwork” facilities at all, because the two networks are deemed to “meet” at a “point,” with each party responsible for getting its own facilities to that point. See Exhibit L-18; Tr. 399 (Easton agreeing that interconnection is the physical linking of two networks). For this reason, there is no basis for imposing or applying any sort of “relative use factor” to either Qwest’s or Level 3’s network.³⁶ In any case, and as discussed immediately below, Qwest fundamentally disregards binding federal law regarding relative use factors, in such a manner as to improperly try to shift Qwest’s traffic origination costs to Level 3.

2. Qwest’s “RUF” Formula Violates Federal Law.

A key aspect of Qwest’s effort to undermine the use of a SPOI as financial demarcation point between the two networks is its “RUF” formula. The purpose and effect of Qwest’s RUF is to shift to Level 3 some or all of the costs that Qwest incurs in getting Qwest-originated traffic to the hand-off point. This is contrary not only to the general federal policy banning origination charges between LECs; it is directly contrary to the specific FCC rule governing charges for internetwork facilities.

³⁵ See, e.g., Qwest’s proposed Section 7.3.1.1.3.

³⁶ See *Local Competition Order* at ¶1062; 47 C.F.R. § 51.709(b). As the cited FCC discussion indicates, relative use factors were developed to apply to situations in which one carrier (often but not always the ILEC) built out facilities from its network to the other party’s network for the sole purpose of carrying traffic between them. With a meet point interconnection, there simply are no such facilities. Instead, the CLEC (here, Level 3) will show up, as it were, on the ILEC’s doorstep and interconnect there. See also Tr. at 444-45.

First, the FCC has a longstanding rule banning a LEC from charging an interconnected carrier for the privilege of receiving traffic that the LEC itself originates. Section 47 C.F.R. § 703(b) states bluntly: “A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.” This rule has been upheld by numerous decisions.³⁷ Qwest’s proposed language ignores not only this requirement, but also the specific requirements of FCC Rule 51.709(b) relating to relative use factors. Qwest’s proposed language says that Level 3 must pay for the entire capacity of facilities that Qwest provides for this purpose, *reduced by* any outbound-to-Level 3 usage that Qwest might generate. That is, Qwest’s “base case” is that Level 3 pays 100% for connections between Qwest’s end offices and Level 3. Qwest-originated traffic then generates a discount off this default case.

But that is not what the FCC’s rule says. The FCC (47 C.F.R. § 51.709(b)) says that the interconnecting carrier – here, Level 3 – can *only* be charged for such a facility based on the *proportion of its capacity* that Level 3 *actually uses*. The actual language of the rule is important here. Here is FCC Rule 51.709(b) in its entirety (emphasis added):

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*. Such proportions may be measured during peak periods.

So if Qwest establishes a DS3 between the two networks, the *only* charge that can be assessed on Level 3, consistent with the FCC’s rules, is the proportion of the DS3 that Level *actually uses* to

³⁷ See, e.g., *MCI Metro Access Transmission Servs. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 880 (4th Cir. 2003); *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 649 (D.C. Cir. 2004); *Southwestern Bell Telephone Co. v. PUC of Texas*, 348 F.3d 482 (5th Cir. 2003). See also *TSR Wireless v. US West Communications*, *Memorandum Opinion and Order*, 15 FCC Rcd 11166 at ¶¶ 18, 40 (2000); *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 ¶ 52 (2002) (citing 47 C.F.R. § 51.709(b) and *Local Competition Order* at ¶¶ 1042, 1062).

send traffic to Qwest. Neither the amount of traffic nor the type of traffic that Qwest might send to Level 3 has any possible relevance under the FCC’s rule.³⁸ To be perfectly clear: the FCC does not permit Qwest to charge Level 3 for facilities used to deliver traffic to Level 3, and then calculate a “discount” off that price to reflect Level 3’s delivery of traffic back to Qwest. The only charge Level 3 can be assessed *at all* is one that reflects the proportion of the capacity of the facilities that *Level 3* uses to send traffic to Qwest.

It is important to see how, mathematically, Qwest’s misstatement of the FCC’s rule leads to results that are inconsistent with that rule. Stated mathematically, it is clear that Qwest’s language and the rule’s language produce very different results:

CALCULATION OF THE RUF	
The Real Rule	Qwest’s Misstatement of the Rule
Level 3→Qwest Traffic divided by Capacity Between Networks	(Capacity Between Networks) minus (Qwest→Level 3 Traffic) divided by Capacity Between Networks

The first formula – the one that actually tracks the language of the FCC’s rule – is simple and direct: Level 3 pays only for the portion of capacity between the networks that it uses to send traffic to Qwest. The amount or type of traffic that Qwest sends to Level 3 does not enter into the calculation, for the simple reason that traffic in the Qwest→Level 3 direction is not mentioned in the FCC’s rule. What matters is traffic in the Level 3→Qwest direction. If Level 3 sends traffic to Qwest that uses up half the capacity between the networks, then Level 3 pays for half that capacity. But if Level 3 doesn’t send any traffic to Qwest, then Level 3 pays nothing.

³⁸ Again, these kinds of charges properly apply *only* to internetwork facilities – where the parties, in effect, have to build a new road between their networks – and not to a meet point arrangement, where the CLEC shows up at the ILEC’s doorstep.

The second formula – the one that is embodied in Qwest’s RUF language, but not in the rule – is more complicated, and is designed to shift costs to Level 3. Under that formula, Level 3 starts out responsible for all the capacity between the networks. That is, if Qwest doesn’t send Level 3 any traffic, then the “Qwest→Level 3 Traffic” equals zero. This leads mathematically to the conclusion that the RUF – the factor that determines how much Level 3 must pay – is just “Capacity Between Networks” divided by “Capacity Between Networks,” which will always be 100%. Moreover, under Qwest’s formula, as the amount of Qwest→Level 3 Traffic grows, the RUF – the factor that says how much Level 3 pays – declines from 100%. This means that under Qwest’s formula, the more traffic it sends to Level 3, the more Level 3’s payments go down. That may sound fair, but it is divorced from the FCC’s actual rule which, again, speaks only in terms of traffic that goes in the other direction, that is, from Level 3 to Qwest.

The distinction matters because Qwest’s erroneous (indeed, illegal) formula gives Qwest a powerful incentive to convince regulators that some or all of the Qwest→Level 3 Traffic that actually goes between the networks doesn’t really count. Every minute of Qwest-originated traffic that gets *excluded* from Qwest’s erroneous RUF formula is that much more that Qwest can charge Level 3 for Qwest-originated traffic.

Given this incentive, it is not at all surprising that Qwest takes the position that a lot of the traffic it sends to Level 3 should not count for purposes of the RUF. Most notably, Qwest asserts that ISP-bound traffic should be disregarded. So, if Qwest establishes a large trunk group to Level 3 to carry traffic outbound to Level 3’s ISP customers, in Qwest’s view all of that traffic counts as “0%” in calculating the “relative use factor.” Again, however, the FCC’s rule is stated in exactly the opposite manner: Level 3 does not get a discount off a full-price default case. The FCC’s rule requires that the default case – that is, where the facilities exist but no traffic has yet

been sent in either direction – is that Level 3 pays *nothing*, for the simple reason that in that situation Level 3 isn't sending Qwest any traffic. Under the plain language of the FCC's rule, any charge to Level 3 *must be* limited to the proportion of the trunk capacity that Level-3-originated traffic represents.³⁹

The conclusion that Qwest may not charge Level 3 for Qwest-originated traffic makes perfect economic sense. Telecommunications regulatory policy dictates that costs should be recovered from the cost causer.⁴⁰ When a Qwest end user makes a call, that end user causes the

³⁹ Qwest has claimed that the FCC's rules exclude ISP-bound traffic from the definition of "telecommunications traffic" subject to reciprocal compensation, so that such traffic should not be counted in calculating the RUF. See Tr. at 403. Of course, Qwest was forced to acknowledge that this is wrong on its face: the FCC expressly stated, in footnote 149 of the *ISP Remand Order*, that its ruling was *not* intended to affect anything about carrier obligations under Part 51 of the FCC's rules – that is, the rules about interconnection – other than the specifics of the per-minute intercarrier compensation *rate regime* that the FCC established. See Tr. at 404-405, discussing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") at n.149, *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003). But even if Qwest's claims about the impact of the *ISP Remand Order* on the interpretation of 47 C.F.R. §§ 703(b) were correct at one point in time, the continuing validity of any such exclusion is questionable, in light of the D.C. Circuit's ruling in *WorldCom v. FCC*, *infra*, rejecting the FCC's rationale for excluding this traffic. Moreover, even if Qwest is right that the term "telecommunications traffic" it has nothing to do with FCC Rule 51.709(b), which, as noted above, speaks only in terms of charging Level 3 on the basis of traffic that Level 3 sends to Qwest, not vice versa. Furthermore the rule refers to the generic term "traffic," *not* the specific term "telecommunications traffic," which is the term that was given the limited interpretation under the *ISP Remand Order*. In this regard, it is not permissible to look behind the clear application of these rules to this situation, given that the rules themselves are not unclear or ambiguous. Just as it is wrong to rely on legislative history to interpret a statute that is unambiguous on its face, so too is it inappropriate to rely on "regulatory history" to interpret a clear regulation. It is black letter law that the unambiguous words of a regulation take precedence over any agency interpretation. See, e.g., *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001) ("As the Supreme Court recently stressed ... judicial deference towards an agency's interpretation is warranted only when the, language of the regulation is ambiguous.") (internal quotation marks omitted); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256, 1264 (10th Cir. 2005) ("Where the regulations at issue are unambiguous, our review is controlled by their plain meaning."); *Meek v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000) ("In construing a statute or regulation, we begin by inspecting its language for plain meaning. ... If the words are unambiguous, it is likely that no further inquiry is required. ") (internal citation omitted). All that said, looking to footnote 149 of the *ISP Remand Order*, the "regulatory history" fully confirms the facially clear interpretation of 47 C.F.R. § 51.709(b).

⁴⁰ See *Texcom, Inc. v. Bell Atlantic*, 16 FCC Rcd 21493 (FCC 2001) at ¶¶ 6, 10.

costs involved in getting the call to its destination. Cost responsibility does not magically shift if the called party gets its service from another network. So, it makes no economic sense to charge another network for the privilege of receiving calls. To the contrary, the originating LEC should recover the costs involved in getting the call to the terminating LEC from the cost causer – the originating LEC’s own end user. *See* Tr. 212.

These rules – “no charge for originating traffic” and “no charge for facilities on your side of the POI” – also make economic sense from the specific perspective of encouraging facilities-based, internetwork competition. Prior to the 1996 Act, Qwest faced no significant competition, so both the calling and called party would be on Qwest’s network. When one Qwest customer called another, Qwest would incur three kinds of costs: (a) originating the call at the calling party’s switch; (b) transporting the call (possibly via a tandem) to the terminating party’s switch; and (c) terminating the call at the terminating party’s switch. Once a customer has left Qwest’s network, when Qwest end users calls that customer, Qwest still has to switch the traffic at the caller’s end office switch, but no longer has to transport it to the terminating switch, or to actually perform terminating switching. Instead, it only has to transport it to the meet point-POI, to hand it off to the competitor. *See* Exhibit L-18.

Qwest, therefore, actually incurs *fewer* costs in a competitive environment, as competitors win customers and undertake half the job of completing calls to the customers they win. It would be truly bizarre in these circumstances to permit Qwest to *charge* the CLEC for delivering Qwest-originated traffic to the meet point-POI. Qwest would have to incur those

costs whether the CLEC existed or not. Charging the CLEC for them amounts to nothing less than a penalty on the CLEC for the temerity of winning business away from Qwest.⁴¹

Level 3 is of course aware of this Commission's decision in *AT&T v. Qwest* bearing on this topic.⁴² There are some important differences between Level 3's proposal in this case and AT&T's proposals in that case. For example, as Level 3 understands it, AT&T proposed to interconnect with Qwest not by means of a meet point, but rather by means of special access connections newly established from Qwest to AT&T.⁴³ AT&T then wanted to shift the cost of those facilities from AT&T back to Qwest in reliance on FCC Rule 51.709(b). From that perspective, the problem is not with the RUF; it is with AT&T's attempt to avoid the requirement that interconnection occur "on" or "within" Qwest's network. To the extent that the Commission was concerned with the apparent unfairness of AT&T ordering special access facilities, the costs of which it would then foist off on Qwest, Level 3 submits that the proper legal means for keeping that from happening is by enforcing the requirement that interconnection occur "on" Qwest's network – not by misreading Rule 51.709(b).

To the extent, however, that the Commission truly concluded that the type or amount of traffic that Qwest sent to AT&T affected the proper calculation of the RUF – that is, the amount that AT&T had to pay for connections between Qwest's network and AT&T's – with due

⁴¹ Note that, once the volume of business that Qwest and the CLEC have established DEOTs (discussed below), the costs Qwest incurs in delivering traffic from the originating end office to the POI are both (a) miniscule, *see infra*, and (b) indistinguishable from the costs Qwest would incur in direct-trunking the traffic to one of its own central offices. Indeed, since divestiture, in network terms one *definition* of a "local" call is a call that is direct-trunked from one end office to another. *See United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1064 & n. 18 (D.D.C. 1983). Given this, there is no conceivable basis for charging Level 3 for any Qwest-originated traffic that is direct-trunked to Level 3.

⁴² *AT&T Communications of the Mountain States, Inc.*, Docket Nos. T-02428A-03-0553, T-01051B-03-0553, Decision No. 66888 (ACC April 6, 2004).

⁴³ *Tr.* at 451 (unlike tariffed private line services purchased by AT&T, direct end office trunks between Level 3 and Qwest are established pursuant to an interconnection agreement).

respect, any such conclusion is legally – and mathematically – a mistake, and cannot be squared with the plain language of FCC Rule 51.709(b). As explained above, the rule plainly states that an interconnecting carrier can *only* be charged based on the proportion of trunk capacity that carrier uses to send traffic *to* Qwest.⁴⁴

In sum, there is neither a legal nor economic basis for Qwest to charge Level 3, either for the facilities that Qwest might use in getting traffic from a Qwest end user to the meet point-POI between the two networks, or any sort of per-minute charges for getting such traffic to the POI. Such charges are inconsistent with the nature of a meet point interconnection arrangement; such charges violate FCC rule 51.709(b); and such charges make no economic sense.⁴⁵

⁴⁴ In this regard, the 9th Circuit has clarified that the exclusion of ISP-bound traffic from this type of calculation is not appropriate in light of the D.C. Circuit’s decision in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). In that case the D.C. Circuit found that it was unreasonable to construe the general reciprocal compensation obligation of Section 251(b)(5) to be limited by, or inapplicable to, the “information access” traffic identified in Section 251(g). Looking at that ruling, the 9th Circuit in *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1130-31, n.15 (9th Cir. 2003), concluded that the exclusion of information access traffic from reciprocal compensation was invalid. Just last summer, applying this logic, the Oregon PUC concluded that Qwest’s position that ISP-bound traffic should be excluded from the RUF was not legally sustainable. See *Wantel/Pac-West*, Order No. 05-874, IC8, IC9 (July 26, 2005), at 32-33. In this case, the Oregon PUC recognized that an “important legal rationale underlying the decision in [an earlier order, coincidentally involving Level 3] to exclude ISP bound traffic from RUF has been found to be contrary to federal law.” Specifically, the OPUC recognizes that its earlier decision to exclude ISP-bound traffic from the RUF was premised upon the FCC’s finding in the *ISP Remand Order* that ISP-bound traffic was not “telecommunications” subject to the reciprocal compensation provisions of Section 251(b)(5) of the Act, but was instead properly classified as “information access” under Section 251(g). But this finding, as the OPUC notes, was “subsequently rejected by the D.C. Circuit in *Worldcom v. FCC*. Therefore, under the D.C. Circuit’s decision and until the FCC says otherwise, ISP bound traffic continues to fall within the class of telecommunications traffic subject to Section 251(b)(5). See also *Level 3 v. Qwest*, ACC Decision No. 63550 (April 10, 2001) (ISP-bound traffic included in RUF in earlier arbitration).

⁴⁵ The one exception to this rule is that an interconnected carrier may be charged originating access charges when it is receiving outbound “1+” toll calls. Level 3 is not in the business of providing retail “1+” toll services, so this situation will not normally arise in practice as between Level 3 and Qwest. Even so, Level 3’s proposed language reflects this theoretical possibility. See Level 3 proposed Section 7.1.1.2, quoted above.

C. There Is No Need For Separate Feature Group D Trunks; the Commission Should Allow One Local Interconnection Network.

As a matter of network engineering there is simply no basis for distinguishing different “types” of traffic and placing them on different trunk groups. The only thing that matters from a network engineering perspective is where traffic is going. Getting the traffic onto a trunk that connects to the proper destination switch is like getting a car onto the proper off-ramp to reach its destination. It doesn’t matter whether the car is a Ford or a Chevy, or a sedan or an SUV. All that matters is whether it is going to Scottsdale or Tempe. The way that Qwest might classify traffic into “types” – “Chevy SUV” traffic versus “Dodge sedan” traffic – is particularly irrelevant to Level 3, which – to continue the automotive analogy – only makes high-performance motorcycles anyway. In network terms, Level 3 views all traffic as either IP (the native format of Level 3’s network) or TDM (the native format of Qwest’s network). Qwest’s views about potential subdivisions of TDM traffic are simply not meaningful to Level 3.

Level 3 and Qwest agree, as far as it goes, that it makes sense to establish separate trunks (DEOTs) to carry traffic between Level 3 and particular Qwest end office switches when traffic exceeds a certain volume threshold.⁴⁶ They also appear to agree, at least in some respects, that it is acceptable to include traffic that Qwest views as being of different “types” on the same

⁴⁶ Specifically, the Parties agree on language in Section 7.2.2.9.6 that states: “When CLEC is interconnected at the access tandem and when there is a DS1 level of traffic (512 BHCCS) over three (3) consecutive months between CLEC’s Switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch... .” Establishing a direct end office trunk in such circumstances removes traffic from Qwest’s tandem switches, allowing more efficient call routing and saving Qwest the cost of growing or replacing its tandems. Despite these benefits to Qwest – and despite the fact that it costs Level 3 resources to establish separate trunks – Qwest nonetheless wants to **charge** Level 3 for the privilege of **saving Qwest money**. This is clearly unjust and unreasonable. Level 3 is willing to voluntarily cooperate with Qwest to establish direct end office trunks, because it is good network engineering. Level 3 is not willing to pay Qwest for activities that save Qwest resources and that Qwest should want to do anyway.

physical trunk group within Qwest’s network. But at this point Qwest’s efforts to confuse and complicate the Parties’ interconnection relationship come to the fore.

Qwest distinguishes between “Feature Group D” (FGD) trunks and its so-called “LIS” trunks. Qwest is willing to receive all “types” of traffic (that is, traffic that Qwest places into different regulatory categories) from Level 3 over FGD trunks, but it is unwilling to permit “switched access” traffic to terminate on LIS trunks.⁴⁷ There is no sound reason, however, to set up trunk groups based on regulatory call classification – something that is simply irrelevant to technical network considerations. *See* Tr. 529-30. Accordingly, Level 3’s proposed language allows all traffic types to be exchanged over a single trunking network – whether comprised of “interconnection” trunks or “Feature Group D” trunks:

7.2.2.9.3.2 CLEC may combine Exchange Service (EAS/Local) traffic, ISP-Bound Traffic, Exchange Access (IntraLATA Toll carried solely by Local Exchange Carriers), VoIP Traffic and Switched Access Feature Group D traffic including Jointly Provided Switched Access traffic, on the same Feature Group D trunk group or over the same interconnection trunk groups as provided in Section 7.3.9.

The Commission should adopt Level 3’s language on this point, and reject Qwest’s position.⁴⁸

As described below, Level 3’s proposal is technically feasible, more efficient than Qwest’s, and

⁴⁷ This Qwest position is embodied in various proposed contract provisions. *See, e.g.*, Section 7.2.2.9.3.2.

⁴⁸ Level 3’s proposed Section 7.2.2.9.3.1 makes clear that Level 3 is not attempting to avoid paying access charges on traffic to which such charges legitimately apply. Similarly, Level 3’s proposed Section 7.3.9, referenced in the language quoted above, lays out the different traffic factors that the Parties will calculate to properly apply reciprocal compensation, interstate access, and intrastate access if for some reason they are unable to develop bills based on call information they record at the time the traffic is exchanged. In this regard, as discussed below, Qwest’s proposal is made immensely complicated as a result of its non-statutory, economically unmoored definition of the “switched access” traffic that would have to be carved out of the LIS trunks. Basically, as Level 3 understands Qwest’s proposal, any time traffic crosses a Qwest local calling area boundary, the non-Qwest carrier becomes an “interexchange carrier” using Qwest “switched access” services. (This is apparently true, in Qwest’s mind, even if the carrier doing the haulage across calling area boundaries is Qwest itself.) So, presumably, Qwest would want to impose access charges on all such traffic. Putting aside the regulatory issues associated with

fully adequate for proper billing. Level 3's proposed interconnection terms are therefore "just and reasonable" within the meaning of Section 251(c)(2), while Qwest's by comparison, are not.

For reasons Qwest has never fully explained, it wants to forbid Level 3 from efficiently combining its (relatively small amount of) true switched access traffic onto the same interconnection trunk groups used to handle non-access, locally-dialed traffic that constitutes the vast bulk of the traffic the two carriers will exchange.

Qwest's suggestion that its LIS trunks are somehow not properly configured to handle exchange access traffic is also a bit odd. *See* Tr. 407-08 (recording system of LIS trunks not configured to record data for switched access billing). Qwest invented LIS trunks as a way to meet its responsibilities under Section 251 of the Telecommunications Act. Section 251(c)(2), regarding interconnection, specifically requires that Qwest "provide ... interconnection ... for the transmission and routing of telephone exchange service *and* exchange access." 47 U.S.C. § 251(c)(2)(A) (emphasis added). It is obvious under this language that Qwest would be exchanging access traffic over CLEC interconnection trunks. If 10 years after this law was passed, Qwest has failed to properly configure its LIS trunks – again, the type of trunks it has

these Qwest positions (as to which, *see infra*), as a purely pragmatic matter there is no way to tell in real time which traffic meets this criterion, so any contractual provision requiring that "switched access" traffic (as Qwest defines it) be routed one way or another would be futile. Networks "know" the calling and called telephone numbers associated with a call, but have no way of knowing in any actual, physical, geographic sense, *where* a particular call begins or ends. Tr. 139; *see also* Tr. 1175-1176. Any purported contractual "requirement" that either party sort traffic based on the calling or called party's geographic location will be unenforceable, and will simply lead to disputes. *See also Vonage Order* at ¶ 25 (emphasis added) (VoIP functionalities "in all their combinations form an integrated communications service *designed to overcome geography, not track it*. Indeed, it is the total lack of dependence on any geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points Consequently, Vonage has no service-driven reason to know users' locations Furthermore, to require Vonage to attempt to incorporate geographic 'end-point' identification capabilities into its service solely to facilitate the use of an end-to-end approach *would serve no legitimate policy purpose*. Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, *molding this new service into the same old familiar shape*.").

supposedly set up for interconnection under the Act – to handle access traffic, Qwest must have been dragging its feet with respect to this capability; there can be no serious claim that setting up local interconnection trunks to handle small amounts of “true” access traffic is technically infeasible.⁴⁹ If Qwest has chosen not to acknowledge that statutory duty, that is simply a self-inflicted wound.⁵⁰

Qwest’s position – insisting on a separate set of FGD trunks – is even odder than it seems, in light of Mr. Easton’s acknowledgement that it is perfectly appropriate for a CLEC to send switched access traffic bound for a third-party interexchange carrier over LIS trunks. *See* Tr. 421 (“jointly provided switched access traffic is in fact allowed over the local interconnection trunks”). So according to Qwest, *some* switched access traffic is allowed; it’s only a fraction of

⁴⁹ Compare the effort spent by this Commission and the parties to this proceeding multiplied across 14 state commissions in light of the FCC’s March 3, 2005 release of the Intercarrier Compensation NPRM: “As a general matter, the record confirms the need to replace the existing patchwork of intercarrier compensation rules with a unified approach. Many commenters observe that the current rules make distinctions based on artificial regulatory classifications that cannot be sustained in today’s telecommunications marketplace. Under the current rules, the rate for intercarrier compensation depends on three factors: (1) the type of traffic at issue; (2) the types of carriers involved; and (3) the end points of the communication. These distinctions create both opportunities for *regulatory arbitrage* and incentives for *inefficient investment and deployment decisions*. The record in this proceeding makes clear that a regulatory scheme based on these distinctions is *increasingly unworkable in the current environment* and creates distortions in the marketplace at the *expense of healthy competition*.” In the Matter of Developing a Unified Intercarrier Compensation Regime, *Further Notice Of Proposed Rulemaking* CC Docket No. 01-92, ¶ 3 (rel. March 3, 2005).

⁵⁰ In this regard, FCC Rules 51.305(c), (d) and (e) are instructive. Under those rules, successful interconnection at a particular point on any ILEC’s network using “particular facilities” or adhering to “the same interface or protocol” creates a presumption that such an interconnection arrangement is technically feasible for all ILECs. Here, the evidence shows that Level 3 has established a unified interconnection network using local interconnection trunks, not FGD trunks, with SBC, Verizon and BellSouth in dozens of other states. *See* Tr. 79-80; Ducloo Direct at 40, 73-74 (noting use of OLI field in signaling protocol to identify different “types” of traffic). Qwest therefore bears a heavy burden – which is plainly did not meet here – of proving that what is feasible for SBC and Verizon and BellSouth is somehow beyond Qwest’s technical capabilities. Without such proof, which Qwest did not supply, the FCC’s rules call on the Commission to accept Level 3’s proposal.

switched access traffic that is *persona non grata* on its LIS trunks.⁵¹ This, of course, only adds to the inefficiency of Qwest's proposal. As less and less traffic is affected by Qwest's proposed requirement for separate FGD trunking, the size of the "problem" supposedly being "solved" by incurring the substantial network inefficiencies becomes *de minimis*.

Qwest's position is that it will allow all types of traffic to ride its Feature Group D (FGD) trunks, but will not allow access traffic to ride interconnection trunks. The simple fact, however, is that what is under review is an arrangement for interconnection between local exchange carriers, not an arrangement for giving a toll carrier access to a local exchange network. Accordingly, this interconnection should use LIS trunks, not FGD. A very large majority of the traffic Level 3 exchanges, and will exchange, with Qwest is locally dialed traffic, not subject to access billing. Level 3 does not provide retail toll services and so will not receive any 1+ (Feature Group D) calls from end users. As Mr. Ducloo stated in his rebuttal, "Level 3 has, and will have, very little traffic that utilizes traditional 'access' networks such that any separate trunking, much less FGD trunks, which merely provide additional call recording functionalities, are necessary. So, it makes no sense for Level 3 to order separate FGD trunks for a small amount of access traffic."⁵²

Qwest's claim that Level 3 should have to use FGD trunks to capture recordings for this *de minimis* toll traffic makes even less sense given that Qwest has admitted the FGD trunks have some of the same limitations as the LIS trunks.⁵³ It is quite likely that Level 3 will send Qwest

⁵¹ Cf. Tr. at 47 (comments of Arbitrator Rodda).

⁵² Ducloo Prefiled Rebuttal Testimony at 9. Level 3 delivers some traffic to Qwest on behalf of IXCs providing an "IP-in-the-middle" service. The FCC has ruled that such traffic is subject to access charges, and Level 3 acknowledges that ruling.

⁵³ Indeed, as Qwest's witness admitted, the process of properly billing traffic does not occur in real time, or even at the switch. The switch simply records the originating and terminating numbers. After

more VoIP traffic than 1+ toll traffic. There is no billing standard for VoIP traffic, and there is no evidence to suggest that VoIP calls would be measured more effectively on FGD trunks than on LIS trunks. Qwest argues that FGD trunks are preferable to LIS trunks because LIS trunks will require the use of factors – yet Qwest admits that today it uses factors for certain FGD traffic. Tr. at 426-27. Indeed, there is nothing unusual about using factors – it is commonplace throughout the industry.

Level 3's proposed language requires that the traffic be verifiable and that it be reviewed every 30 days.⁵⁴ Level 3's proposed factors are not some kind of wild guess; Level 3's softswitches record call information in automatic message accounting (AMA) format, which Qwest acknowledges measures actual traffic. Even on LIS trunks, moreover, Qwest will (or should) have call detail records associated with each incoming and outgoing call, so that traffic can be sorted out and rated (access charges or reciprocal compensation) after the fact. *See* Tr. 415-16 (Qwest and Level 3 both have recorded data needed to analyze traffic sent via LIS trunks in case of billing disputes). Either way, Qwest can be sure that it will get the access charges to which it is actually entitled.⁵⁵

Finally, although “trunks” themselves are created by software – they are individual lanes carved out of the broad highways of optical fiber interoffice facilities⁵⁶ – that does not mean that there are no engineering problems with establishing extra trunks. As Mr. Ducloo testified, dividing the traffic heading for a particular switch into different categories on different trunks

the fact, a separate billing system compares those two numbers and decides whether the call, for billing purposes, is subject to access charges or not. *See* Tr. 412-13.

⁵⁴ *See* Level 3's proposed Section 7.3.9.

⁵⁵ Level 3's suggested language, in various subsections of Section 7.3.9 of the contract, expressly provides for the use of different factors to identify and rate different “types” of traffic.

⁵⁶ *See* Tr. 401 (direct end office trunks make traffic move on Qwest's side of the POI); Tr. 470 (“A trunk is essentially the software configuration so that two switches can talk to one another.”)

requires the establishment of *more* trunks than would otherwise be needed. *See* Ducloo Direct at 31-32. As he explained, it could well be that Qwest can establish these extra trunks without real financial consequence if, for example, Qwest had over-invested in trunk ports on its switches in the past, so that it could add trunks without having to invest in any new trunk ports at all. Level 3, however, is not burdened with such idle investment, so needlessly proliferating trunk ports imposes real inefficiencies on Level 3.⁵⁷

In sum, Level 3 has repeatedly indicated its willingness to do what is necessary to ensure that traffic is properly billed on efficient, combined trunks. As evidence of that willingness, Level 3 reiterates that BellSouth, Verizon and SBC also have obligations to subtended LECs, yet Level 3 was able to work out terms with each of those carriers.

II. THE COMMISSION SHOULD ACCEPT LEVEL 3'S SIMPLE, FAIR PROPOSALS FOR INTERCARRIER COMPENSATION AND REJECT QWEST'S IMPROPER ATTEMPT TO MAXIMIZE ITS ACCESS REVENUES AT THE EXPENSE OF ARIZONA CONSUMERS.

Intercarrier compensation is the main area of dispute between Qwest and Level 3. The Parties agree that they want to operate under the FCC's regime established in the *ISP Remand Order*.⁵⁸ Unfortunately, they disagree about how that regime applies. Qwest takes the position that the FCC permits Qwest to discriminate against ISP-bound traffic, and pay Level 3 nothing for terminating it, even though it expects Level 3 to pay Qwest for terminating non-ISP-bound local calls. In addition, Qwest claims that the most common type of ISP-bound traffic – VNXX-

⁵⁷ If the trunks themselves are the lanes on the highway, trunk ports are the on-ramps and off-ramps. Repainting the lanes (*i.e.*, carving different trunk groups out of a fiber optic transmission facility) is relatively easy, and can be modified over time to accommodate changes in traffic flow. But building more on-ramps or off-ramps than needed is clearly a waste of real resources.

⁵⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003).

routed ISP-bound traffic – is not even covered by the FCC’s ruling. Moreover, while the Parties appear to agree that routing VoIP traffic to and from the PSTN is a form of “information access,” they disagree about whether that means the FCC’s regime should apply to it, or whether, instead, access charges should apply.

These disagreements are embodied in any number of contract provisions, ranging from general contractual statements about intercarrier compensation payments to the detailed definitions of specific terms such as “telephone toll service” and “exchange access.” Level 3’s position, however, is quite simple: access charges apply, under the law, to real toll calls – that is, calls where an end user is charged a toll, which can itself provide funds to pay access charges to the originating and terminating LECs. Otherwise, the FCC’s \$0.0007 rate applies. Level 3’s proposed contract language sets this out clearly:

7.3.1.1.3.1 Intercarrier compensation. Intercarrier compensation for traffic exchanged at the SPOI shall be in accordance with FCC Rule 51.703 and associated FCC rulings. For avoidance of doubt, any traffic that constitutes “telecommunications” and that is not subject to switched access charges, including without limitation so-called “information access” traffic, shall be subject to compensation from the originating carrier to the terminating carrier at the FCC-mandated capped rate (as of the effective date hereof) of \$0.0007 per minute. Any dispute about the appropriate intercarrier compensation applicable to any particular traffic shall be resolved by reference to the FCC’s rule and associated orders.

Qwest disagrees. As described below, however, a key problem with Qwest’s approach is that it is unsupported by either the Communications Act or by FCC rulings interpreting the Act. Indeed, Qwest’s approach is contrary not only to the Act itself but to legal precedent going back at least as far as the court rulings that broke up the old Bell System in the early 1980s. From a legal perspective, in other words, Qwest is basically just making this stuff up.

Note that Qwest's access charge claims *have nothing to do with Qwest's costs*. Once the Parties have established their single POI, it will cost Qwest *exactly* the same to terminate any given call inbound from Level 3, whether that call is classified as "toll" or "local" or "information access." Similarly, it will cost Qwest *exactly* the same to originate any call outbound to Level 3. Again, *these disputes have nothing to do with Qwest's costs*. The dispute relates only, and entirely, to Qwest's desire to enhance its *revenues*.

From this perspective, the question before the Commission is how much Qwest should be allowed to impose non-cost-based charges onto a key facilities-based competitor – Level 3 – as Level 3 tries to bring efficient new technology to bear on competing with Qwest in Arizona. Level 3 urges the Commission to keep this economic reality in mind when assessing Qwest's claims on these topics, and submits that, while Level 3 certainly may fairly be called upon to pay access charges for real "toll" calls, all other traffic exchanged between the Parties should be rated at cost-based reciprocal compensation rates.

The remainder of this section addresses these issues in the following way. First, we discuss the legal and economic basis for access charges. Qwest's key argument is that access charges should apply any time any call crosses a local calling area boundary. As shown below, Qwest's position seriously departs from sound legal and economic analysis. Then, we discuss the specific FCC rulings that apply to ISP-bound traffic – including VNXX traffic – as well as VoIP traffic. These rulings – particularly when read in light of the legal and economic basis for access charges – confirm that the proper intercarrier compensation rate for both types of traffic – including VNXX traffic – is the low FCC-established intercarrier compensation rate of \$0.0007.

A. Access Charges and Toll Calls.

1. Access Charges Before The 1996 Act.

The idea behind access charges is that a toll carrier will collect a toll charge from the calling party, and then share that money with the LECs at the beginning and end of the call by paying them access charges. The economic idea is that, with toll calls, the toll carrier collects money from the end user – the cost causer – knowing full well that it will have to pay the LECs at the beginning and end of the call.⁵⁹ Knowing that this is how the payment obligations are structured, the toll carrier will set its rates high enough to pay the access charges that it knows it will owe.

Access charges were established at the time of the 1984 break-up of the Bell System, when the Bell System was restructured into a set of local companies, known as the Bell Operating Companies (now, essentially, the ILECs) and a long distance company (AT&T).⁶⁰ Prior to the break-up, AT&T collected toll revenues from end users and distributed some of the money to its subsidiary LECs. That system, however, wouldn't work after the break-up, when multiple toll carriers – MCI, Sprint and others, along with AT&T – would all be connecting with the local carriers as part of their provision of competitive toll service. The solution was to establish tariffed charges for both origination and termination – access charges – which all toll

⁵⁹ Both the FCC and the courts have characterized the situation in which access charges apply as one in which two LECs – an originating LEC and a terminating LEC – collaborate with a separate IXC in between them to complete a toll call. *See Local Competition Order* at ¶ 1034; *Bell Atlantic v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

⁶⁰ The old Bell System was the target of a government antitrust lawsuit brought under Section 2 of the Sherman Act. The case was settled with an agreement between the parties, approved by the court, that AT&T would divest itself of its local operating subsidiaries. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982). The local companies were subject to various restrictions on the businesses in which they could engage, notably long distance service between LATAs. *Id.* One of the purposes of the Telecommunications Act of 1996 was to establish a statutory mechanism by which the former Bell companies could get out from under those restrictions. *See* 47 U.S.C. §§ 271-272.

carriers would pay. AT&T, MCI, Sprint and other toll carriers would then be able to compete on the basis of fair and equal wholesale relationships with the Bell ILECs.⁶¹ So, after divestiture, the toll carriers would charge end users for toll calls, just like before. But now every toll carrier would pay an “access charge” to both the originating and terminating Bell ILEC.

The government and AT&T clearly understood the distinction between local calls, for which there were no separate toll charges, and long distance calls, for which there were. Indeed, they used this understanding to classify AT&T’s services into different antitrust markets. “Local communications services are the ordinary telecommunications services used in most homes and businesses *for which generally no long distance rates are charged.*” *United States v. AT&T*, 524 F. Supp. 1336, 1346 n.17 (D.D.C. 1981) (emphasis added). In other words – just like today’s statutory definitions – what distinguished the local market from the long distance market was whether a toll was assessed. This market definition was so uncontroversial that AT&T – the defendant in the government’s antitrust case – did not even contest it. 524 F. Supp. at 1346 n.22. This definition was also fully consistent with the definition of “telephone toll service” in the Act, which is the same now as it was then – the provision of service between local areas for which there is a separate toll charge. 47 U.S.C. § 153(48). As noted below, this distinction is now hard-wired into the Communications Act.

Although tariffed access charges were made necessary as a result of the settlement of the government’s antitrust case against AT&T, the federal court handling that case did not have the authority to establish or enforce tariffs. That task fell to the FCC. At that time, however, the Communications Act did not expressly address access charges. The FCC, therefore, based its

⁶¹ See In the Matter of MTS and WATS Market Structure, *Third Report and Order*, 93 F.C.C.2d 241 (1983) (“*Access Charge Order*”) at ¶¶ 1-8 (summary of access charge plan); ¶¶ 11, 37-39 (describing AT&T’s “Division of Revenues” process and related industry arrangements for sharing toll revenue).

decision to require tariffed access charges on its general authority over interstate communications services contained in Section 201 of the Act. Specifically, Section 201(a) empowers the FCC “to establish through routes and charges applicable thereto and the divisions of such charges.” “[T]hrough route” refers to a situation where more than one carrier is involved in providing an end-to-end service to a customer, which is exactly what happens when a customer’s long distance call goes from the LEC serving the customer, to the long distance carrier, to the LEC serving the called party. And, in fact, the FCC expressly relied on its authority to direct the division of revenues arising from jointly-provided service – here, jointly-provided toll service – as the legal basis for establishing access charges. *See Access Charge Order, supra*, at ¶¶ 37-41. So, from the moment of their creation, the purpose and the legal basis of access charges has been to share toll revenues among the carriers involved in handling a toll call. If there were no toll revenues to share, there was no legal, logical, or economic basis to charge any access charges.

2. Access Charges Under The 1996 Act.

As part of the 1996 Act, Congress codified the idea of access charges as a way to share toll revenues. First, Congress created a definition of “local exchange carrier,” codified at 47 U.S.C. § 153(26). This definition was needed not only to codify access charges, but also as an important element in the new statutory scheme for promoting competition. Specifically, Section 251 (also added by the 1996 Act) established pro-competitive “duties” for different types of carriers. Section 251(b) contains various duties applicable only to “local exchange carriers,” which includes both ILECs and CLECs. One of these duties is the duty to establish “reciprocal compensation” arrangements under Section 251(b)(5), which is at the heart of this aspect of the dispute between Qwest and Level 3.

So, as part of its plan to promote competition, Congress had to say what a “local exchange carrier” was, in order to identify the entities subject to these new duties. It defined a LEC as “any person ... engaged in the provision of telephone exchange service or exchange access.”⁶² The definition of “telephone exchange service” – basically, normal retail telephone service – was already on the books (Section 153(47)), although Congress amended it. But prior to the 1996 Act, there was no definition of “exchange access” – which Congress recognized as one of a LEC’s essential activities.

This is the genesis of Section 153(16), which simply states that “exchange access” means “the offering of access to telephone exchange services or facilities” (LEC facilities) “for the purpose of the origination or termination of telephone toll services.” So, unless the use of a LEC’s facilities is “for the purpose of” originating or terminating “telephone toll services,” as a matter of law that LEC simply is not providing “exchange access.”⁶³

The Act had long contained a specific definition of “telephone toll service,” now codified at 47 U.S.C. § 153(48). That definition succinctly establishes a two-part test (bracketed numbers added):

The term “telephone toll service” means telephone service [1] between stations in different exchange areas [2] for which there is made a separate charge not included in contracts with subscribers for exchange service.

⁶² The definition also says that wireless carriers will not be deemed to be LECs unless the FCC finds that they should be so treated. That issue is not relevant to the present dispute.

⁶³ Note that while the FCC’s original concept of access charges, based on Section 201 of the Act, technically applied only to interstate traffic under its direct jurisdiction, the definition of “exchange access” in Section 153(16) applies whether the underlying traffic is interstate or intrastate in nature. In this regard, the local competition provisions of the Telecommunications Act of 1996 deeply blurred the traditional distinction between federal and state authority over local telephone service, injecting federal law and policy into areas previously reserved to the states. *See Iowa Utilities Board v. AT&T*, 525 U.S. 366, 378-79 & n.6 (1999). *See also* 47 C.F.R. § 51.701(b)(1) (expressly referring to “interstate or intrastate exchange access”).

Clause [1] shows that telephone toll service has to be, in common parlance, a “long distance” call. That is, the call has to start and end in different “exchange areas” (not a defined term, but, basically, the area served by a single “exchange” or switch – *see* 47 U.S.C. § 153(47) (defining “telephone exchange service”)). Clause [2] shows that the call *also* has to be, in common parlance, a “toll” call, *i.e.*, there has to be a separate, identified charge for it over and above charges for local (*i.e.*, “exchange”) service. The definition is clear and unambiguous: if there is no “separate charge” for the call, the call simply is not “telephone toll service.”

But, as just discussed, in order for a LEC to be providing “exchange access,” the use of its facilities *has to be* “for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16). So if there is no separate charge for the call, any LEC handling that call is not, and by definition cannot be, providing “exchange access.” Again, this is clear and unambiguous. There is no room in these succinct definitions for interpretation or disagreement. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

Of course, in addition to being clear and unambiguous, these definitions also make sense, for the reasons discussed above. If a carrier is charging a toll for a long distance call, and is using the services of a LEC to originate or terminate that call, it is perfectly reasonable to expect the carrier to use those revenues to pay the LEC for its work. That is precisely what access charges were invented to do, and the new definitions in the Act show that Congress intended that function to continue.

By the same token, if a carrier is providing a service but is *not* assessing a toll charge on the subscriber, why would it make any sense to suggest that the carrier should have to pay access charges when another carrier completes the call? The completing carrier is certainly entitled to

something, but, as discussed below, that “something” is not access. It is reciprocal compensation.

3. Qwest’s Position Is Inconsistent With The Law And History.

Despite the legal and historical underpinnings of access charges just discussed, Qwest argues that access charges apply whenever a call begins and ends in a different Qwest-defined local calling area. This approach has no economic or statutory basis. If a carrier has no toll revenues from end users, how will it *pay* access charges? Assessing access charges on the basis of location simply penalizes any competitor that tries to efficiently provide service over broad geographic areas.⁶⁴ If new technology allows wide-ranging calling at low cost, Qwest’s “geographic” access charge theory will act as a tax – an economic drag – on any competitor that tries to pass its low costs onto the consumer. At the same time, even the retail long distance market has been evolving away from any sort of geographic-based toll calling and towards flat-rated, nation-wide calling plans. Such plans have been offered by wireless carriers, toll carriers (including ILECs with Section 271 interLATA authority) and VoIP providers. It is hard to imagine a better way for an ILEC like Qwest to slow down these competitive marketplace developments than to not only make competitors pay extra for offering such services, but to

⁶⁴ This is what changes in technology have enabled and encouraged. Consumer demand for Internet access created a need to efficiently connect literally millions of end users to ISPs. *See* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, CC Docket Nos. 96-98, 99-69 (February 26, 1999) at ¶ 6 (“The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago.”) The only logical way to do that is with centralized modem banks that are locally dialable by the end user. *See* discussion of materials the FCC cited in developing the *ISP Remand Order, infra*. Moreover, developments in softswitch technology permit a competitor like Level 3 to use a single centralized device to provide switching over a very broad area, as the FCC has expressly found. In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, WC Docket No. 04-313; CC Docket No. 01-338 (rel. Feb. 4, 2005) at ¶ 207.

make them pay extra *to Qwest itself*. Level 3 submits that slowing down competitors, while enriching itself, is Qwest's key motivation for its approach to access charges.

Level 3 understands that under the law, access charges apply to traditional circuit-based toll calls. But if the call is not a traditional toll call, there is no sound economic or policy reason to expect Level 3 to pay access charges to Qwest. To the contrary, in order to encourage competition – particularly facilities-based competition – the scope of access charges should be construed as narrowly as possible.⁶⁵

Qwest's geographic view of access charges, therefore, is simply anti-competitive. Because access charges contain subsidies, Qwest wants them to apply to as wide a range of traffic as possible. Yet that is precisely why the Commission should refuse to accept Qwest's arguments. The purpose of the 1996 Act is not to create a regime in which competitors subsidize Qwest. To the contrary, the purpose of the 1996 Act is to encourage competition that will put real pressure on Qwest to modernize and streamline its own operations and lower its own costs. The beneficiary of actually forcing Qwest to compete in this way is the entire consuming public. The only beneficiary of accepting Qwest's arguments for continued subsidies is Qwest itself.

⁶⁵ In this regard, one of the purposes of the 1996 Act – specifically, Section 254 – was to reform the universal service subsidy system so that the traditional subsidies that ILECs received (indirectly) from toll revenues, via access charges, would be eliminated and replaced by an explicit, competitively-neutral subsidy mechanism. *See* In the Matter of Developing a Unified Inter-carrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-92 (released April 27, 2001) at ¶ 32 (“Congress, in passing the 1996 Act, recognized that the implicit subsidies historically contained in access charges are not sustainable in competitive local telecommunications markets. Accordingly, Congress in the 1996 Act directed this Commission and the states to reform universal service, and in particular, to eliminate implicit subsidies contained in access charges and instead make all universal service support *explicit*.”) (footnotes omitted, emphasis in original). The reform of universal service still has a way to go, but at a minimum the policy of Section 254 means that the system of implicit subsidies in access charges should be confined to its traditional scope – normal PSTN toll calls. Precisely because it is the beneficiary of these subsidies, however, Qwest wants to expand their scope.

B. The Commission Should Embrace The Use Of Geographically Independent Telephone Numbers, Specifically “Virtual FX” Or VNXX, For Both Level 3’s VoIP And ISP-Bound Services.

One aspect of the intercarrier compensation dispute between Qwest and Level 3 relates to the treatment of VNXX-routed traffic. Level 3’s proposed contract language regarding the treatment of “Virtual Foreign Exchange” or VNXX traffic as between Qwest and Level 3 is clear and simple:

7.3.6.3 If CLEC designates different rating and routing points such that traffic that originates in one rate center terminates to a routing point designated by CLEC in a rate center that is not local to the calling party even though the called NXX is local to the calling party, such traffic (“Virtual Foreign Exchange” traffic) shall be rated in reference to the rate centers associated with the NXX prefixes of the calling and called parties’ numbers, and treated as 251(b)(5) traffic for purposes of compensation.

Under this language, the rating of traffic for purposes of intercarrier compensation will be based on whether the NXXs of the calling and called numbers are “local” to each other. The actual physical location of the calling and called parties will have no bearing on rating. For the reasons described below, the Commission should adopt this language.

Qwest seeks to treat VNXX-routed traffic as some kind of second-class citizen. The basis of Qwest’s position is that NXX codes supposedly act as sacrosanct markers of the geographic location of the calling and called parties, with that location supposedly critical to the correct rating of calls. In fact, NXX codes were originally introduced to identify particular PSTN switches for internal network routing purposes. However, because each PSTN switch served customers in a relatively confined area, NXX codes (also called “exchange” codes)

naturally became associated with specific geographic communities.⁶⁶ But for at least the last 20 years, that linkage has been steadily eroded and is now essentially gone.

One of the first elements of change was the introduction of the ESP exemption. The ESP exemption allowed access to distant computer services by means of dialing a local telephone number. *See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631 (1988) at ¶ 2 n.8; ¶20 & n.53 (describing operation of ESP Exemption). The connection between NXX codes and location truly began to crumble, however, with the widespread growth of mobile wireless services. At the very dawn of wireless service, a cell phone might only work within a relatively small area; but very soon after the introduction of cellular service, mobile carriers entered into “roaming” arrangements, so that a call to a cell phone with a “Scottsdale” NXX might find the mobile user in San Francisco or St. Petersburg or St. Louis. The 1990s and early 2000s saw the emergence of several nationwide wireless carriers, and nationwide calling plans, so that a wireless customer could be reached anywhere; and, at the same time, wireless customers could call anywhere with no toll charges.⁶⁷

⁶⁶ See Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability; CC Docket Nos. 99-200, 96-98, & 95-116, *Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200* (released June 18, 2003) at ¶ 1 n.1 (“The NANP was established over 50 years ago by AT&T to facilitate the expansion of long distance calling. It is the basic numbering scheme for the United States, Canada, and most Caribbean countries. The NANP is based on a 10-digit dialing pattern in the format NXX-NXX-XXXX where “N” represents any digit 2-9 and “X” represents any digit 0-9. The first three digits represent the numbering plan area (NPA), commonly known as the area code. The second three digits represent the central office code, or NXX, commonly referred to as an exchange. The last four digits represent the subscriber line number.”)

⁶⁷ See *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd 20597 (2004) at ¶ 64 (noting nationwide calling plans); *id.* at ¶ 113 (“Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of MOUs *to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges*”) (emphasis added); *id.* at ¶¶ 76, 144 (describing roaming arrangements generally).

The most recent – and probably fatal – blow to the notion that a particular NXX code relates to a telephone customer in a particular location is IP-based telephony. Now, “SIP” devices work anywhere they can be plugged into a broadband connection, and services like Vonage – or Qwest’s own OneFlex service – allow a user to select any NPA or NPA-NXX combination they may fancy for the call stream, without regard to the “usual” code for their physical residence.⁶⁸ Indeed, with Qwest’s OneFlex, the user doesn’t even have to commit:

⁶⁸ See Tr. at 238 (“Q. Okay. Generally speaking, does Level 3 provide ISP services any differently than any other company in the industry, whether it be Qwest or any other company? A. No. I’ve researched the offerings all around the country. SBC provides something called VPOP-DAS, virtual point of presence dial access service. Verizon provides its Internet protocol routing service. Qwest has Wholesale Dial, which provides local numbers for 85 percent of the population in the United States in the same manner that Level 3 offers its services.” See also Qwest Wholesale Dial Product Description:

Expanded Internet access for your virtual enterprise

Virtual enterprises break physical barriers to business. They replace bricks and mortar with virtual storefronts that know no geographical boundaries.

As an Internet service provider (ISP), you have built your business on this paradigm. You market and deliver your services to a loyal customer base. To expand that base, you need a company with the resources and expertise to make it happen quickly and seamlessly. Qwest can help.

Transparent dial-up access for your end users

Qwest Wholesale Dial provides you a high quality, reliable, cost-effective dial-up network infrastructure solution. It is a completely outsourced, dial-up network access option for ISPs to quickly enhance their dial-up service and coverage across the country. Qwest Wholesale Dial gives your end-users seamless dial-up functionality on the Qwest Dial Access Network. When your end-user dials a local Internet access number provided by Qwest, special server protocols authenticate the calls over the Internet without compromising data security. With Qwest Wholesale Dial, your dial Internet access needs—from call origination to termination—are completed behind the scenes.

“Qwest Wholesale Dial is available in select areas nationwide. However, for customers originating Internet access in the states of AZ, CO, IA, ID, MN, MT, ND, NE, NM, OR, SD, UT, WA and WY, Qwest Internet services are provided in conjunction with a separate required Global Service Provider (GSP) that supplies connectivity to the global Internet. When Qwest receives regulatory relief, it will offer this service without the use of a GSP.”

available at: <http://www.qwest.com/wholesale/pcat/wholesaledial.html>. In this same vein, here is how Qwest itself defines the “virtual numbers” available for use by ISPs and others:

Qwest offers a choice of to five such NPA-NXXs, assigned to five different geographic locations. This genie is a long way from the bottle; geographically independent NXXs are here to stay.

Notably, the record here shows beyond any possibility of doubt that Level 3's use of VNXX arrangements, including for ISP-bound calling, does not place any material additional costs on Qwest. Under Level 3's proposed contract, as discussed above, all Level-3-terminated traffic will be carried by Qwest to the single POI for that LATA. This is true whether VNXX is used or not, and is true whether the call is a voice call or an ISP-bound call. Qwest's only task – and it is the same task for all Qwest-originated locally-dialed calls, whether VNXX or not, whether VoIP or not, and whether ISP-bound or not – is simply to properly route the traffic to the single POI. The record shows that the cost to Qwest of doing that is close to zero – measured in thousandths of a cent per minute. *See* Tr. 402; *see also* Tr. 174. And, once the traffic is handed off to Level 3 at the POI, any and all costs associated with delivering the traffic fall on Level 3 – whether the call ends ten feet from Level 3's switch, or goes halfway around the world.

Qwest's only real argument here is not that Level 3 has raised Qwest's costs, but instead that Qwest is for some reason entitled to supra-competitive, subsidy-laden access charges on any

Virtual Numbers are alias phone numbers that can be associated with your OneFlex™ phone number. Your friends and family can dial your Virtual phone number and avoid incurring long-distance charges.

For example, if you live in Denver and your primary # is 303.xxx.xxxx and your family lives in Omaha, your family has to call long-distance. With OneFlex, you can get a virtual phone number assigned to your account with an Omaha area code, so your family doesn't have to pay long-distance charges.

You can have up to 5 Virtual Phone Numbers attached to one primary OneFlex phone number.

available at:

https://cvoip.qwest.com/oneflex/portal!/ut/p/.cmd/cs/.ce/7_0_A/.s/7_0_1DD/ s.7_0_A/7_0_1DD.

communication that leaves the geographically-limited local calling area of Qwest's legacy service. The basis for access charges – and why they are not appropriately applied to the traffic in this case – was explained in Section II.A., above. That said, it is well-established that denying Level 3 the use of VNXX and instead requiring that VoIP calls and ISP-bound calls be dialed on a “1+” basis would have severely anti-competitive results. These results would be adverse to Level 3 and to competition in Arizona generally, but most unfortunate is the impact such a decision would have on Arizona's consumers. One likely result is that ISPs would simply not offer local dialing access in smaller communities. *See* Pre-filed testimony of Timothy J. Gates at 41. It is certain that accessing the Internet would get more expensive for many Arizonans.

For all these reasons, the Commission should embrace the use of VNXX routing, not penalize it by allowing Qwest to impose non-cost-based charges on such traffic. Indeed, as discussed below, the FCC is well aware that VNXX is used for ISP-Bound traffic, has contemplated such a use and has taken that into account in its rulings on ISP-Bound traffic.

C. Information Access – ISP-Bound Traffic and VoIP Calls.

Although disagreements about access charges underlie the Parties' disputes regarding intercarrier compensation, their specific disputes revolve around two particular types of traffic: (a) calls that Qwest end users make to ISPs served by Level 3, and (b) calls that Qwest end users either make or receive by means of VoIP providers that connect to the PSTN through Level 3.

1. ISP-Bound Traffic.

The FCC has specifically addressed the intercarrier compensation regime for ISP-bound calls. Qwest and Level 3 both agree that the FCC's regime governs this issue between them. The problem is that they don't agree on what the FCC's ruling means. Specifically, Qwest claims (a) that the FCC's integrated intercarrier compensation regime excludes ISP-bound calls

that are dialed on a VNXX basis; and (b) that it is acceptable to exchange non-VNXX ISP-bound traffic on a bill-and-keep basis even while assessing normal intercarrier compensation on other calls. Neither of these positions is sustainable or consistent with the underlying rationale of the FCC's orders.⁶⁹

a. Background – The February 1999 Order And *Bell Atlantic v. FCC*.

To understand why Qwest is wrong about ISP-bound traffic, it is necessary to review the history of the FCC's decisions regarding this issue.

In 1996, the FCC established rules that required ILECs to pay CLECs "reciprocal compensation" for ILEC-originated traffic that CLECs terminated. The underlying statute (47 U.S.C. § 251(b)(5)) requires such compensation for all "telecommunications" the ILEC might send to the CLEC (or vice versa). The FCC, however, initially viewed the statute as applying only to "local" traffic, and so stated in its initial rule for reciprocal compensation. *See Local Competition Order* at Appendix B (1996 version of 47 C.F.R. § 51.701). Following this rule, many ILECs entered into interconnection agreements with CLECs calling for compensation for "local" traffic with no mention of traffic bound for ISPs. At the same time, consumer demand for dial-up Internet access was booming, and for any number of reasons ISPs found CLECs to be superior suppliers of the PSTN connectivity that the ISPs needed. As a result, ILECs started receiving large bills from CLECs for reciprocal compensation for calls to ISPs. ILECs objected,

⁶⁹ As noted above, Level 3's proposed contract language would treat all non-toll calls as subject to the FCC's default \$0.0007 rate.

and industry parties in mid-1997 sought an explicit ruling from the FCC that ISP-bound calls counted as “local” calls for purposes of the FCC’s then-existing reciprocal compensation rule.⁷⁰

In February 1999 the FCC issued a convoluted answer to this question.⁷¹ The FCC said that ISP-bound calls were jurisdictionally interstate – which few had actually contested. It then said that, because the calls were interstate, they could not be “local,” which was a non-sequitur.⁷² It then said that it had no rule addressing such traffic. It then said that, notwithstanding the fact that the calls weren’t *really* “local” under its rules, and that it had no rule for this type of call, it was perfectly alright for an interconnection agreement to have the effect of *treating* such traffic as though it *were* “local,” and laid out some criteria for assessing whether this was so in the case of any particular contract – criteria that almost compelled the conclusion that a contract that did not specifically identify and carve out ISP-bound traffic from the “local” category probably meant to include them. And then it initiated a rulemaking proceeding to set a general rule. *ISP Declaratory Ruling, supra*.

The courts did not view this ruling kindly. To the contrary, on review the D.C. Circuit concluded that it didn’t make any sense. *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). The fact that ISP-bound calls were jurisdictionally interstate, the court found, had no particular bearing on whether the calls were subject to reciprocal compensation or not. 206 F.3d at 3. The question was whether calls to ISPs were more like “normal” LEC-to-LEC local calls, or more

⁷⁰ See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, CC Docket Nos. 96-98, 99-69 (February 26, 1999) (“*ISP Declaratory Ruling*”) at ¶ 1 n.1.

⁷¹ *Id.*

⁷² There are plenty of calls that are simultaneously “local” and interstate, most notably landline-wireless calls that cross a state line but remain within a “Major Trading Area.” The same FCC ruling that limited reciprocal compensation to “local” calls specifically defined any such intra-MTA traffic to be “local” for these purposes. See *Local Competition Order* at ¶¶ 1033-35; 47 C.F.R. § 51.701(b)(3).

like calls where two LECs collaborate to help a toll carrier to which they both connect complete a call. 206 F.3d at 5. Given that the FCC had so badly confused things, the court vacated the ruling “for want of reasoned decisionmaking” and sent it back to the FCC for another try.

b. The *ISP Remand Order* And The End Of “Local” Traffic.

In April 2001 the FCC tried again. This time the FCC paid more attention to what the statute said. It noted that Section 251(b)(5)’s reciprocal compensation requirement on its face applied to all telecommunications, which would include all “information access” traffic, including, specifically, calls to ISPs. In this connection it noted that its original decision to limit the reach of Section 251(b)(5) to “local” traffic was a “mistake” that had created “ambiguity,” because “local” was not a term that was used or defined in the underlying statute. It therefore amended its reciprocal compensation rules to remove all references to “local” traffic. *ISP Remand Order* at ¶¶ 45-46.

That said, the FCC did not believe that Section 251(b)(5) applied to *all* “telecommunications.” Instead, it concluded that two classes of traffic identified in another section of the law – Section 251(g) – were properly viewed as excluded. These two supposedly excluded categories were “information access” and “exchange access.”

In its ruling, the FCC did not set up any special compensation rule for “exchange access,” which makes sense because the pre-existing access charge regime already ensured that exchange access charges would be payable in connection with toll calls. The FCC, however, re-affirmed its interstate jurisdictional authority over ISP-bound traffic as a form of “information access,” and set up a special intercarrier compensation regime applicable to it. Under that regime, ISP-

bound traffic and non-toll traffic (that is, traffic that isn't "exchange access") are to be treated the same, with the specific rate – reciprocal compensation or FCC-set – chosen by the ILEC.⁷³

In reaching this conclusion, as noted above, the FCC expressly disclaimed its previous reliance on the idea that intercarrier compensation was limited to "local" traffic and removed that term from its rules. This action devastates Qwest's argument that the FCC somehow only meant to include "local" ISP-bound traffic within the reach of its new plan.

c. Discrimination Is Prohibited.

The genesis of the controversy over ISP-bound calls was that ILECs were being called on to pay large sums to CLECs for such traffic. *ISP Remand Order* at ¶ 89 & n.175. To try to minimize those payments, many ILECs argued that ISP-bound traffic should be payable, if at all, at some rate that was *lower than* the rate applicable to "normal" Section 251(b)(5) traffic. The FCC, however, flatly rejected those arguments. Just as the FCC had found that requiring the payment of full reciprocal compensation rates for ISP-bound traffic had led to uneconomic distortions, the FCC also found that discriminating *against* ISP-bound traffic by subjecting it to a lower compensation rate would be inappropriate:

It would be unwise as a policy matter, *and patently unfair*, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed. Because we

⁷³ Under the FCC's rule, the ILEC can choose whether the rate that applies is a state-determined "reciprocal compensation" rate or the FCC's own low rate (now \$0.0007 per minute), but *the same rate applies to all non-toll traffic*. To deal with what it saw as an immediate problem of "arbitrage," the FCC initially ruled that the rate of growth in CLEC bills for ISP-bound traffic would be limited to a 10% annual traffic growth cap, and that no compensation for ISP-bound traffic would be due to CLECs who were not serving ISPs in a particular market as of the first quarter of 2001. These restrictions were removed as of October 2004 in the *Core* ruling. In re Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, *Order*, 19 FCC Rcd 20179 (FCC rel. Oct. 18, 2004). As a result, it is simply unlawful discrimination to establish a regime in which ISP-bound and non-ISP-bound "Section 251(b)(5)" traffic are compensated at different rates.

are concerned about the superior bargaining power of incumbent LECs, we will not allow them to “pick and choose” intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate. Thus, if the applicable rate cap is \$.0010/mou, the ILEC must offer to exchange section 251(b)(5) traffic at that same rate. *Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and keep basis in a state that has ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis.* For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This “mirroring” rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

This is the correct policy result because *we see no reason to impose different rates for ISP-bound and voice traffic.* The record developed in response to the *Inter-carrier Compensation NPRM* and the *Public Notice* fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP. Assuming the two calls have otherwise identical characteristics (*e.g.*, duration and time of day), a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP. *We therefore are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic.*

ISP Remand Order at ¶¶ 89-90 (footnotes omitted, emphasis added). Given this clear FCC ban on establishing a different rate for ISP-bound traffic than for “normal” traffic, Qwest’s suggestion that ISP-bound traffic could be exchanged on a bill-and-keep basis while “normal” traffic would be subject to compensation, therefore, is completely unacceptable.⁷⁴

d. The FCC Was Fully Apprised Of VNXX Traffic When It Issued The *ISP Remand Order*.

The *ISP Remand Order* not only banned discrimination against ISP-bound traffic; it fully embraced VNXX ISP-bound traffic.

⁷⁴ The FCC permitted different rates, for an interim period, where a specific interconnection agreement (as of April 2001) already provided for bill-and-keep for ISP-bound traffic and Section 251(b)(5) compensation for other traffic. *See ISP Remand Order* at ¶ 89 & n.178. This one exception to the “mirroring” rule has no application here, where a new interconnection agreement is being arbitrated.

By 2001, the FCC was much more fully informed than in 1999 about the services that CLECs were providing to ISPs. Specifically, while back in February 1999 the FCC might have thought that the typical arrangement by which ISPs received local calls from end users involved the ISP having modem banks located in a large number of dispersed local calling areas, by 2001 the FCC had been repeatedly informed that CLECs and ISPs alike found it much more efficient to locate the ISPs' gear centrally, at the same location as the CLEC's switch in a LATA. This is absolutely clear from the materials that the FCC cited in its April 2001 *ISP Remand Order*. In fact, one reason the FCC was aware of this practice is that Qwest itself complained about it.

At that time, as noted above, several ILECs, including Qwest, were arguing that the FCC should establish a compensation rate for ISP-bound traffic that is lower than "normal" Section 251(b)(5) rates. One aspect of that argument was to claim that CLECs delivering traffic to ISPs incurred lower costs than ILECs delivering "normal" traffic to "normal" customers. And one aspect of *that* argument was that CLECs save money by avoiding the cost of running loops to distant ISP locations, by allowing the ISPs to collocate with the CLEC – in other words, by means of a VNXX arrangement. In the course of making this latter argument, Qwest's expert, Dr. William Taylor, stated as follows:

Unlike CLECs, ILECs must be prepared to provide local service to any or all such customers, regardless of their usage or location. In contrast, the incremental cost of an ISP-bound call does *not* reflect such a composite. ***ISPs can place their equipment in high-density, central business locations and frequently can collocate equipment in the CLEC's switch.*** Transport costs for such calls will be lower than for an average of all traffic terminating within the local exchange.

Exhibit L10, Letter from Melissa Newman, U S West, to Magalie Roman Salas, Secretary, FCC, Attachment at 8 (Dec. 2, 1999) (emphasis added). The FCC was plainly aware of this specific aspect of this specific filing, because the FCC *cited to it, specifically*, in its ruling. *See ISP Remand Order* at ¶ 92 n.189 (citing Qwest filing). Tellingly, the FCC was citing this material in

the course of stating that the distance between the CLEC's switch and the ISP's equipment was "irrelevant" to the compensation regime it was establishing.

Indeed, as noted above, ILECs had argued that the lower costs of serving ISPs – arising, in part, from CLECs allowing ISPs to place all their equipment in a single, central location – justified a regime in which ISP-bound traffic was paid at a lower rate than "normal" Section 251(b)(5) traffic. The FCC rejected this claim and instead established a regime in which, at the ILEC's option, either FCC-mandated low rates (now \$0.0007 per minute) or state-established higher "Section 251(b)(5) rates" would apply uniformly to **both** "normal" traffic and ISP-bound traffic. The FCC found the length of the "loop" connection between the CLEC and the ISP to be "irrelevant" for compensation purposes, because loop costs are not part of the costs to be recovered by these charges in any event.⁷⁵

Qwest was not the only party who brought these issues to the FCC's attention. The same footnote just cited (*ISP Remand Order* at ¶ 92, n. 189) notes the submission of Mr. Fred Goldstein on behalf of a CLEC as describing "the CLEC reduction of loop costs through collocation." In particular, the FCC makes reference to SBC comments before the agency that (among other things) take note of Mr. Goldstein's observation. Those same SBC comments contain the following statement:

[I]t has become ***routine practice*** for CLECs to assign NXX codes to switches that are nowhere near the calling area with which that NXX is associated. The CLECs then market themselves to their ISP customers on this basis, boasting that ***the ISP's subscribers will be able to connect to the ISP through a local call.***

⁷⁵ See *ISP Remand Order* at ¶ 92. As noted above, given this ruling, any claim that the compensation rate applicable to ISP-bound traffic should ever be lower than the compensation rate applicable to "Section 251(b)(5)" traffic is simply discrimination.

Comments of SBC Communications Inc., 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 (filed July 21, 2000) at 43 (emphasis added).⁷⁶ This remains true today. *See* Tr. at 512 (Linse agrees that Level 3’s network as presently configured is a typical configuration for serving ISP-bound customers.) In other words, by July 2000 – nearly a year in advance of the FCC’s ultimate ruling – that body was aware that VNXX-routing of ISP-bound traffic was “routine practice.” Given this, the only reasonable conclusion is that, when the FCC repeatedly refers to “ISP-bound traffic” in the *ISP Remand Order* it fully understood that term to embrace the “routine practices” of CLECs in handling such traffic – that is, VNXX arrangements.

Other materials cited by the FCC also prove that the agency was well aware that CLECs were serving ISPs, not by running loops from a central switch out to ISP equipment dispersed in numerous ILEC local calling areas, but, rather, by encouraging ISPs to locate their equipment in a central location. For example, in the course of establishing the presumption that traffic above a 3:1 ratio is ISP-bound, the FCC considered and discussed a decision by the New York PSC regarding what that body called “convergent” traffic (essentially, lots of traffic inbound to a small number of customers). *See ISP Remand Order* at ¶ 79 n.150. That order includes the following observation:

[One party] contends a CLEC can "serve" a wide geographic area by allowing its customers to collocate with it, even without constructing a fiber network traversing the area: "a CLEC may 'serve' a wide geographic area. . . by incurring the costs associated with ***allowing its customers that need to receive calls from such an area to collocate at [its] switch***, by incurring the costs associated with

⁷⁶ These filings are part of the public record of the FCC’s decision, and are available to the public 24-hours per day, online at www.fcc.gov. These materials, therefore, are properly citable in this brief.

deploying physical facilities to customer locations in different local calling areas throughout the LATA, or some combination of both."

New York Public Service Commission, Op. No. 99-10, Proceeding on Motion of the Commission to Reexamine Reciprocal compensation, *Opinion and Order* (Aug. 26, 1999) at 41 (emphasis added, footnote omitted).⁷⁷

In these circumstances, there is no reasonable basis to conclude that the FCC, when it issued the *ISP Remand Order* establishing a compensation regime for "ISP-bound traffic," somehow meant to exclude the "routine" class of VNXX-routed ISP-bound traffic. To the contrary, the materials noted above prove, beyond any doubt, that the FCC understood that "ISP-bound traffic" included, and includes, VNXX-routed ISP-bound traffic. This constitutes a more than sufficient reason to deny Qwest's effort to exclude VNXX-routed ISP-bound traffic from the intercarrier compensation regime.⁷⁸

⁷⁷ This analysis highlights the underlying economic efficiency of ISP collocation/VNXX arrangements: The ISP can pay the costs of having numerous modem banks in numerous local calling areas, and the costs of getting loops out to those locations; or it can incur the costs of paying the CLEC for space to collocate. Because the latter costs are normally lower, it is a more efficient way to serve the ISPs than a dispersed architecture. For this reason, banning or discouraging VNXX arrangements for ISP customers is both anticompetitive and inefficient.

⁷⁸ In this regard, even states that have been skeptical of VNXX arrangements in general have acknowledged that the specific class of *ISP-bound* VNXX traffic is, in fact, covered by the FCC's regime and is compensable on that basis. See, e.g., *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (2005) (holding, for Connecticut, that all ISP-bound traffic, including VNXX traffic, is subject to compensation; see *infra*); *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036, Order No. 03, *Recommended Decision to Grant Petition* (Aug. 23, 2005) at ¶¶ 31, 37; In the matter of the application of TELNET WORLDWIDE, INC., for arbitration of interconnection rates, terms, and conditions and related arrangements with VERIZON NORTH INC. and CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS, Case No. U-13931 2004 Mich. PSC LEXIS 356 (Michigan PSC October 14, 2004); Investigation as to Whether Certain Calls are Local; Independent Telephone Companies and Competitive Local Exchange Carriers - Local Calling Areas, *Final Order*, DT 00-223; DT 00-054; ORDER NO. 24,080, 2002 N.H. PUC LEXIS 165 (N.H. PUC October 28, 2002).

e. Other Considerations Show That The FCC Intended To Include VNXX Traffic Within The Regime Of The *ISP Remand Order*.

Putting aside the materials that the FCC had before it when it issued the *ISP Remand Order*, there is certainly nothing in the FCC's rules that would suggest that VNXX-routed ISP-bound traffic should be excluded. To the contrary, the FCC said that reciprocal compensation applies to all telecommunications that are not "exchange access" or "information access." The FCC then set up a special regime for the supposedly excluded "information access" traffic. Had it wanted to exclude the majority of this traffic because it did not get routed through "local" ISP modems, it surely would have said so. Of course, that would have been peculiar, given that it was purging the term "local" from its rules. Even so, the FCC's failure to say what Qwest says it really meant, simply shows that Qwest is wrong.

Qwest appears to believe that, because the FCC at various points in the *ISP Remand Order* made reference to ISP modem banks being located within the originating caller's local calling area, this means that ISP-bound calling to centrally located modem banks is outside the scope of the rules – a construction that would effectively narrow the impact of this major order to a few large cities where ISPs are based. This argument, however, elevates stray *dicta* in the *ISP Remand Order* over the actual reasoning the FCC used to establish its interim compensation regime.

First, the FCC itself described what it was doing as establishing "the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)." *ISP Remand Order* at ¶ 1. This statement is not qualified in any way. It does not refer to "local traffic delivered to ISPs." It does not refer to "traffic delivered to ISPs within an ILEC local calling area." It refers without limitation to any and all "telecommunications

traffic delivered to” ISPs. If the FCC actually meant to limit its new regime to what Qwest would call “local” ISP-bound traffic, it surely would have said so.

Indeed, in a companion order to the *ISP Remand Order* issued the same day, the FCC used similarly expansive language. In its *Intercarrier Compensation NPRM*,⁷⁹ the FCC described the *ISP Remand Order* as follows:

In a related order that we are adopting today (“*ISP Intercarrier Compensation Order*”), we address intercarrier compensation for traffic that is specifically bound for Internet service providers (“ISPs”). We adopt interim measures that, for the next three years, will significantly reduce, but not altogether eliminate, the flow of intercarrier payments associated with delivery of dial-up traffic to ISPs.

Intercarrier Compensation NPRM at ¶ 3 (footnote citing *ISP Remand Order* omitted). The FCC did not suggest that the *ISP Remand Order* was limited to “local” ISP-bound traffic. To the contrary, it characterized the *ISP Remand Order* as addressing “intercarrier compensation for traffic that is specifically bound for” ISPs – with no concern or qualification about where those ISPs might be located. Indeed, a fair reading of this language is that the FCC thought it had, at least for the time being, put disputes about compensation for ISP-bound traffic to bed. This would make no sense if the FCC had intended the *ISP Remand Order*’s compensation regime not to apply to the “routine” practice of CLECs serving ISPs by means of VNXX arrangements.⁸⁰

Moreover, Qwest is not the only ILEC seeking to exclude VNXX-routed ISP-bound traffic from its compensation obligations. As a result, other decisionmakers have addressed Qwest’s arguments. The essence of those arguments is that, in a few places in the *ISP Remand*

⁷⁹ In the Matter of Developing A Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-92 (released April 27, 2001) (“*Intercarrier Compensation NPRM*”).

⁸⁰ Comments of SBC Communications Inc., 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 (filed July 21, 2000), *supra*, at 43.

Order, in describing the background of the issue, the FCC makes reference to a “typical” situations in which an ISP’s equipment might be located in the originating caller’s local calling area. These references, in *dicta*, are then bootstrapped into a supposed definitional limitation on the entire scope of the *ISP Remand Order*’s analysis.

Level 3 submits that the most cogent refutation the claim that these passing references to “local” ISP-bound traffic is contained in the recent opinion of the federal district court in Connecticut, dealing with essentially identical claims by the Southern New England Telephone Company.⁸¹ We quote that opinion at length below.

The court had previously ruled that the “*ISP Remand Order* covers *all* ISP-bound traffic, without exception. *See Global NAPS, Inc.*, 327 F. Supp. 2d at 300 (‘The FCC did not distinguish traffic between an ISP and its customer in different local calling areas from traffic between an ISP and its customer in the same local calling area.’).” 359 F. Supp. 2d at 230. SBC (the owner of Southern New England Telephone) objected strongly to this conclusion, and asked the court to reexamine it.⁸² Specifically, as the court notes, SBC made three arguments:

In support of its contention that the FCC only intended the *ISP Remand Order* to cover “local” ISP-bound traffic, SBC makes three arguments. First, SBC argues that there is language in the FCC’s order and the D.C. Circuit’s decision reviewing that order that refers to ISPs in the same “local calling area” as the ISP subscriber. Second, SBC argues that the context of the *ISP Remand Order* makes clear that the FCC was discussing only local ISP-bound traffic. Third, SBC argues that interpreting the order as applying to all ISP-bound traffic will have unintended consequences, including the creation of new arbitrage opportunities.

⁸¹ *Southern New England Telephone Company v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229 (2005).

⁸² “SBC argues that the *ISP Remand Order* does not cover all ISP-bound traffic, but only covers ‘local’ ISP-bound traffic.” 359 F. Supp. 2d at 230.

359 F. Supp. 2d at 230 (footnote omitted). Argument number one is, of course, exactly what Qwest argues in this case. Here is how the court dispensed with that argument:

I start by noting that, in the *ISP Remand Order*, the FCC did not use the term "local ISP-bound" traffic and did not impose any explicit restriction on the term "ISP-bound traffic." Moreover, as I explained in the Decision, the FCC expressly disavowed the use of the term "local," making it difficult to believe the Commission nevertheless intended that term to be implicitly read back into its ruling. *ISP Remand Order* at 34. ("We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meaning and, significantly, is not a term used in section 251(b)(5) or section 251(g)."). Put simply, the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for such traffic.

Bearing in mind that SBC bears a heavy burden in attempting to argue against the plain language of the FCC's order, I now turn to its arguments.

First, SBC argues that in a number of places the language of the *ISP Remand Order* makes clear that the FCC was discussing local ISP-bound traffic. SBC points to the FCC's statement that "the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the *same local calling area*," *id.* P13 (emphasis supplied), and to the D.C. Circuit's statement that the FCC held that it could "'carve out' from § 251(b)(5) calls made to internet service providers ('ISPs') located *within the caller's local calling area*," *WorldCom v. FCC*, 351 U.S. App. D.C. 176, 288 F.3d 429, 430 (D.C. Cir. 2002) (emphasis supplied).

I agree that these statements indicate the FCC began by addressing the question whether ISP-bound traffic that would typically be subject to reciprocal compensation – which at the time would have consisted of "local" ISP-bound traffic – was nevertheless exempt. In other words, because at the time only "local" traffic was subject to reciprocal compensation, the question before the FCC was whether "local" ISP-bound traffic was exempt from reciprocal compensation. Other forms of ISP-bound traffic were already exempt because they were not "local."

What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC: (a) disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether "local" ISP-bound traffic was

subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.

359 F. Supp. 2d at 231-32 (emphasis in original). Level 3 submits that the court’s analysis is plainly and compellingly correct. The FCC *started* its analysis in the *ISP Remand Order* by noting that under its old rules, only “local” traffic was subject to compensation. But when the FCC got down to brass tacks, it *rejected* the notion that the “local” status of traffic has anything to do with whether that traffic is subject to compensation. It determined that *all* ISP-bound traffic was exempt from Section 251(b)(5) on the theory that *all* ISP-bound traffic falls into the excluded class of “information access.” It then proceeded to set up a compensation mechanism applicable to all such traffic – whether “local” or not.

Other decisionmakers accept this court’s reasoning. For example, an ALJ in Washington State recently rejected Qwest’s attempt to exclude compensation for VNXX-routed ISP-bound traffic in specific reliance on the reasoning of the *Southern New England Telephone* case. See *Pac-West Telecom, Inc. v. Qwest Corporation*, Docket No. UT-053036, Order No. 03, *Recommended Decision to Grant Petition* (Aug. 23, 2005) at ¶¶ 31, 37. As stated there:

This Order adopts Pac-West’s interpretation of the scope of “ISP-Bound” traffic described by the FCC in the *ISP Remand Order*. Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. This interpretation is consistent with the Commission’s decision in the *Level 3 Arbitration*, as well as a recent of the U.S. District Court for the District of Connecticut.

Id. at ¶ 37 (footnote omitted).

f. The *ISP Remand Order* Focuses On LATAs, Not Calling Areas.

The reading of the *ISP Remand Order* set out above provides a further basis for concluding that VNXX-routed ISP-bound traffic is indeed included within the scope of that

order's compensation regime. As described above, and in the *ISP Remand Order* itself, ISP-bound traffic falls within the class of traffic designated as "information access." See *ISP Remand Order* at ¶¶ 47-47. As that order itself acknowledges, see *id.* at ¶¶ 39, 42-43, the term "information access" derives from the "Modification of Final Judgment" or "AT&T Consent Decree" that broke up the old Bell System. The AT&T Consent Decree was not concerned with ILEC local calling areas. It was concerned with LATAs. The divested Bell ILECs were permitted to offer services *within* LATAs, but were not permitted to offer service across LATA boundaries. See *United States v. AT&T*, 552 F. Supp. 131, 141 (D. D. C. 1982).⁸³ As a result, "information access" under the AT&T Consent Decree referred to the provision of links between an end user and an information service provider (such as an ISP) *within the same LATA*. Nothing in the AT&T Consent Decree suggests or requires that the provision of "information access" (or any other kind of access) conform to ILEC local calling areas (which varied considerably among the divested companies).⁸⁴ It follows that any intraLATA ISP-bound traffic, VNXX-routed or not, is "information access" covered by the *ISP Remand Order's* compensation regime. The status of the traffic as "local" or not, with reference to the ILEC's local calling areas, is simply irrelevant to that regime.

⁸³ See also *id.* at 142-43 (analogizing LATA-wide access provided to interexchange carriers to access to be provided to information service providers).

⁸⁴ The definition of "information access" in the AT&T Consent Decree is "the provision of specialized [intraLATA] telecommunications services by a [Bell ILEC] in [a LATA] in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services." *Id.* at 229. The actual language of the decree speaks of "exchange telecommunications services" in "an exchange area." "Exchange area," however, is also a defined term, and is, specifically, the decree's term for "LATA." *Id.* at 228. In other words, from the very beginning, the concept of "information access" has always referred to a service offered on a LATA-wide basis, not on the basis of originating ILEC local calling areas. LATAs are, and always have been, quite different from (and large than) local calling areas. See *United States v. Western Electric Co.*, 569 F. Supp. 990, 994-95 (D.D.C. 1983).

g. WorldCom Confirms That All ISP-Bound Traffic Is Covered.

Finally, the subsequent history of the *ISP Remand Order* further confirms that VNXX-routed ISP-bound traffic is not excluded from the FCC’s compensation regime. That ruling was reviewed by the D.C. Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The court did not vacate the *ISP Remand Order*, as it had vacated the FCC’s earlier effort to deal with this question. But at the end of the day, the court rejected the FCC’s central legal claim – and the only claim that would even arguably permit exclusion of VNXX-routed ISP-bound traffic. Specifically: (1) the FCC ruled that ISP-bound traffic was a species of “information access” traffic, as that term is used in 47 U.S.C. § 251(g);⁸⁵ (2) it ruled that “information access” traffic (and other traffic identified in § 251(g)) is “carved out” of the reciprocal compensation obligation of § 251(b)(5)⁸⁶; and (3) it exercised its authority under 47 U.S.C. § 201 to establish its interim compensation regime, under which ISP-bound traffic and “normal” traffic are compensated at the same rates, either high or low at the ILEC’s option.⁸⁷

In *WorldCom*, the D.C. Circuit said that point (2) above was flatly wrong – that it was “precluded” as a basis for establishing a compensation regime under Section 251(b)(5). *WorldCom*, 288 F.3d 430, 432. At the same time, however, the court let the FCC’s new compensation regime stand – not because it made sense to carve out ISP-bound traffic under §251(g) and then require compensation under §201 (which the FCC had done), but because there is “a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i)).” *WorldCom*, 288 F.3d at 434. In other words, the D.C.

⁸⁵ ISP Remand Order at ¶¶ 42-47.

⁸⁶ ISP Remand Order at ¶¶ 34-41.

⁸⁷ *ISP Remand Order* at ¶¶ 52-65 (exercise of § 201 authority); ¶¶ 77-94 (establishing new regime).

Circuit allowed the FCC’s interim compensation regime to survive because that specific regime – identical compensation for ISP-bound and other traffic, but at lower rates – could probably be justified under §§ 251(b)(5) and 252(d)(B)(i).

Whatever the FCC might have meant in 2001, as of today, the *ISP Remand Order* must be read in light of the D.C. Circuit’s ruling in *WorldCom*. In that ruling, with surgical precision, the court excised the key erroneous element of the FCC’s thinking – that “information access” traffic isn’t covered by 47 U.S.C. § 251(b)(5). By cutting out *only that element* of the FCC’s analysis, while leaving the rest intact, the court eliminated any logical basis, going forward, for excluding *any* “information access” traffic from reciprocal compensation under § 251(b)(5). It allowed the FCC’s compensation regime to remain intact, not on the theory that it is legally proper to exclude “information access” from reciprocal compensation, but rather on the theory that the FCC’s could properly establish a low interim rate applicable to all such traffic.⁸⁸

Indeed, this conclusion is inescapable here in the 9th Circuit. The *PacWest* decision noted above. In that case, the 9th Circuit was confronted with claims by Pacific Bell that the FCC’s decision in the *ISP Remand Order* to exclude “information access” from the scope of reciprocal compensation was still intact, because the *WorldCom* court had not vacated the FCC’s order. The 9th Circuit rejected that claim, stating that “[a]lthough the D.C. Circuit did not vacate the

⁸⁸ It bears emphasis that the *WorldCom* court, in striking down the FCC’s conclusion that traffic of the types identified in Section 251(g) were “carved out” of Section 251(b)(5), said that it was required by principles of administrative law to *uphold* any “reasonable” FCC interpretation of the statute, *i.e.*, any interpretation that was not “precluded by the language of the statute, read with the ordinary tools of statutory construction.” 288 F.3d at 432. Therefore, when the court said that treating “information access” as being “carved out” from Section 251(b)(5) *was* “precluded,” it was saying that there is no reasonable way to interpret Section 251(b)(5) to reach the FCC’s result. It follows that it would be *unreasonable* for any subsequent decisionmaker to rule that “information access” – that is, ISP-bound traffic and VoIP traffic – is *not* subject to reciprocal compensation under Section 251(b)(5). What the *WorldCom* court let stand was the particular reciprocal compensation *regime* that the FCC established in the *ISP Remand Order* – including the \$0.0007 rate that Level 3 seeks to implement here.

[*ISP Remand Order* when it found that the FCC's 'reliance on § 251(g) [was] precluded[,]’ its explicit rejection of the FCC's use of § 251(g) as a justification for excluding ISP calls from reciprocal compensation provisions *defeats Pacific Bell's arguments that rely on § 251(g).*” *Pacific Bell v. Pac-West, supra*, 325 F.3d at 1131. The import of this ruling is clear: in the 9th Circuit, “arguments that rely on § 251(g)” to exclude information access traffic from the scope of Section 251(b)(5) are “precluded.”

2. VoIP Traffic.

The discussion above shows not only that access charges do not apply to VNXX-routed ISP-bound traffic. It also shows that as a legal matter, the best way to read the *ISP Remand Order*, in light of *WorldCom*, is that “information access” traffic is *not* properly viewed as carved out from the compensation obligation of Section 251(b)(5). Treating such traffic as *not* subject to reciprocal compensation under Section 251(b)(5) is precisely the legal conclusion that the *WorldCom* court found to be “precluded.”

This means that when Qwest and Level 3 exchange VoIP traffic, that traffic, too, should be subject to reciprocal compensation, not access charges. This is true because VoIP traffic is a form of “information access” traffic just like ISP-bound traffic, and such traffic cannot lawfully be excluded from Section 251(b)(5).

This result is also fully consistent with the historical and statutory basis for access charges, discussed above. In economic and historical terms, access charges properly apply only to the origination and termination of normal “toll” calls, where the toll carrier bills the end user a separate fee designed to cover the access charges that the toll carrier knows that it owes. VoIP traffic is not traditional toll traffic, and particularly for VoIP-originated traffic that Level 3 seeks to terminate to Qwest, there is no indication that there is any such charge imposed by VoIP

providers. To the contrary, VoIP services make a point of offering an integrated nationwide service for a flat fee. Without any toll charges, access charges are economically inappropriate.

Moreover, it is poor public policy to apply access charges to VoIP traffic. VoIP represents one of the few significant competitive challenges to Qwest's total domination of the local exchange market. As was discussed above, Qwest itself has cited competition from VoIP providers as a basis for relieving it from state and federal regulatory requirements. VoIP providers use broadband Internet connections supplied by LECs (via DSL services) or cable operators to allow their customers to send and receive calls from anywhere in the country (or, in some cases, the world). The Commission here should be encouraging the growth and development of this innovative new competitive technology. This does not mean that the Commission should exempt VoIP traffic from access charges if it were legally required that such charges apply. But it does mean that the Commission should not reach out to extend access charge obligations to VoIP traffic in the absence of a clear legal requirement to do so.

Finally, as noted above, as statutory matter, "exchange access" only applies to the origination and termination of traditional "telephone toll service" traffic. VoIP service is clearly not in that category. As a result, it is plainly not mandatory that access charges be applied to VoIP traffic. Even if this Commission were to conclude (erroneously, in Level 3's view) that it had the statutory authority to impose access charges on VoIP traffic, therefore, it should refrain from doing so for policy reasons – specifically, to encourage the growth and widespread deployment of this new technology. Qwest should not be allowed to penalize VoIP as a way to keep its most promising type of competition from becoming economically feasible.

III. CONCLUSION.

For the reasons described above, the Commission should accept Level 3's positions on the issues in dispute between Level 3 and Qwest. Specifically, the Commission should rule: (a) that Level 3 may interconnect with Qwest at a single POI per LATA; (b) that Qwest may not charge Level 3 for originating traffic to Level 3, either on a per-minute basis, a per-facility basis, or on the basis of a "relative use factor"; (c) that all traffic types may be combined on "local" interconnection trunks; (d) that Level 3 may use VNXX routing for its ISP-bound and VoIP traffic; and (e) that the intercarrier compensation rate for all traffic shall be \$0.0007 per minute, other than true telephone toll service traffic, to which access charges apply. Level 3's contract language implements these reasonable conclusions and should be adopted.

RESPECTFULLY SUBMITTED this 18th day of November, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original of the foregoing document was delivered by hand delivery and/or electronic mail to the persons listed below at the addresses indicated on November 18, 2005.

[parties]
