

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF THE STATE OF OREGON**

3 **ARB 665**

4 In the Matter of Level 3 Communications,
5 LLC's Petition for Arbitration Pursuant to
6 Section 252(b) of the Communications Act of
7 1934, as amended by the Telecommunications
8 Act of 1996, and the Applicable State Laws for
9 Rates, Terms, and Conditions of
10 Interconnection with Qwest Corporation

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12 **LEVEL 3 COMMUNICATIONS**

13 **REPLY BRIEF**

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16 **October 30, 2006**

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LEVEL 3 COMMUNICATIONS
REPLY BRIEF (ARB 665)

ATER WYNNE LLP
222 SW COLUMBIA, SUITE 1800
PORTLAND, OR 97201-6618
(503) 226-1191

1 “There are two kinds of people in the world: those who divide
2 things into two categories, and those who don’t.” – Anonymous

3 **I. INTRODUCTION AND SUMMARY**

4 As noted in our opening brief,¹ this case involves two primary and related issues –
5 intercarrier compensation and trunking arrangements.

6 **A. INTERCARRIER COMPENSATION.**

7 Qwest epitomizes the aphorism quoted above by trying to shoehorn all traffic into a
8 “local” box or a “long distance” box.² In fact, changes in technology and service offerings,
9 including Internet traffic and Voice over Internet Protocol (“VoIP”) services, “blur the traditional
10 industry and regulatory distinctions that serve as the foundation of the current rules.”³ As a
11 result, traffic need not be crammed into either a “local” box or a “long distance” box. There is,
12 in fact, a third box – for Internet traffic.⁴ Real long distance traffic – a toll call to Colorado – is
13 subject to access charges. Real local traffic – a call next door – is subject to reciprocal
14 compensation. But when a CLEC serves ISPs, the Federal Communications Commission
15 (“FCC”) has given ILECs the right to put that Internet traffic (along with local) into the third
16 box, and exchange it at a special rate of \$0.0007 per minute.⁵ By seeking to take advantage of
17 the FCC’s low \$0.0007 rate, as it does here, Qwest necessarily admits that there is a third box.
18 The only question is how big it is.

19 _____
20 ¹ Level 3 Communications Corrected Opening Brief (filed October 12, 2005) (“*Level 3 Brief*”) at 1.

21 ² See, e.g., Transcript of Hearings, August 30, 2006 (“Tr. II”) at 193, lines 16-21 (hereafter in the form: “Tr. II at
22 193:16-21”): “Q [by ALJ Petrillo]: But for purposes of Qwest’s position, rating a call, the jurisdictional rating of a
23 call is local or interexchange[,], or local or nonlocal ... based on where the end-user customers are located, correct?
A: That’s correct.” See also Tr. II at 60:8-61:3 (Brotherson) (“two classifications ... exist in Oregon today, which is
there are local calls and there are long distance calls. ... **Right now there [are] no middle categories.**”) (emphasis
added).

24 ³ *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd
4685 (2005) (“*Intercarrier Compensation Further Notice*”) at ¶ 15 (footnoted omitted).

25 ⁴ See *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd
9151 (2001) (“*ISP Remand Order*”) (subsequent history omitted).

26 ⁵ *ISP Remand Order* at ¶¶ 77-94 (establishing overall regime); *id.* at ¶ 78 (specifically establishing \$0.0007 rate).

1 Level 3 contends that the “Internet box” is big enough to include Internet traffic that is
2 routed the way Level 3 and Qwest both do it – by means of locally-assigned telephone numbers
3 that, in fact, end up carrying the traffic to modem functionalities in a distant local calling area
4 (“LCA”). The FCC agrees that the compensation regime of the *ISP Remand Order* can be read
5 to embrace this VNXX-routed Internet traffic.⁶ Qwest, however, wants to relegate this type of
6 traffic – that is, essentially *all* Internet traffic – to compensation limbo.⁷

7 The existence of the “Internet traffic” box benefits Qwest, because it limits per-minute
8 payments to \$0.0007; cost-based reciprocal compensation rates are higher.⁸ But there are more
9 interconnection costs than just intercarrier compensation – including transporting traffic from the
10 originating end office. Current federal rules require ILECs to bear these costs – even for Internet
11 traffic, and even to a distant POI.⁹ Level 3 proposes to treat the “Internet traffic” box as big
12 enough to include traffic where the ISP’s equipment is not in the originating LCA, but to pay for
13 transporting that traffic.¹⁰ While Level 3 could legally insist on having Qwest pay for transport,
14 Level 3 will absorb that cost to reach a fair settlement.¹¹

15 Qwest wages a self-destructive attack on Level 3’s proposal, claiming that the only traffic
16 types in Oregon today are local and long distance, and that VNXX-routed Internet traffic, being

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18 ⁶ In *Global NAPs v. Verizon New England, Inc.*, 444 F.3d 59,74 (1st Cir. 2006), the FCC filed an *amicus* brief on
19 whether the \$0.0007/minute regime applied to so-called “virtual NXX” calls. It said that “the *ISP Remand Order*
20 ‘can be read to support the interpretation set forth by either party in this dispute,’” *i.e.*, that it can be read to reach
21 VNXX Internet traffic. (The precise definition of “VNXX” is, of course, at issue in this proceeding. *See infra.*)

22 ⁷ *See, e.g., Qwest Brief* at 28; Tr. at II 61:4 (Brotherson) (Level 3 “shouldn’t pay access on VNXX”). In fact,
23 Qwest says that the Commission should “ban” VNXX. *Qwest Brief* at 28-30.

24 ⁸ For example, the Section 251(b)(5) reciprocal compensation end office rate in Oregon is \$0.00133.

25 ⁹ Noting that some LECs have “targeted ... ISPs” as customers, *Intercarrier Compensation Further Notice* at ¶ 91,
26 the FCC notes that, “[i]n such situations” – that is, where the CLEC has a single, LATA-wide POI – “the originating
27 carrier bears *the cost of interconnection to the single POI selected by the competitive LEC in addition to paying*
28 *reciprocal compensation for the termination of traffic*. Because ISP customers rarely, if ever, originate traffic,
29 there is little traffic flow in the opposite direction, and *the originating carrier bears the majority of the*
30 *interconnection costs between the two carriers.*” *Id.* at n.299.

31 ¹⁰ *See Level 3 Brief* at 16-20. Any tandem-routed traffic would be exchanged on a bill-and-keep basis.

32 ¹¹ *See* Transcript of May 23, 2006 Technical Conference (“Tech. Tr.”) at 258:21-22 (“MR. PETRILLO: ... [A]ny
33 time you can make movement toward the middle, it’s better.”)

1 neither fish nor fowl, is illegal. Aside from flying in the face of federal law, this approach will
2 cost Qwest itself dearly. First, if traffic is either local or long distance, then in large metropolitan
3 areas (such as Portland or Eugene), if Level 3 incurs the expense of placing media gateways,
4 under Qwest's theory Level 3 can demand *full reciprocal compensation rates* for "local" calls to
5 ISPs. Second, if Level 3's method of serving ISPs is illegal under Oregon law, then it is crystal
6 clear – from Qwest's own testimony – that Qwest's method of serving ISPs is illegal, too. More
7 so, in fact: Level 3, at least, uses new technology and routing arrangements to serve its ISP
8 customers – technology and arrangements that the Commission has not specifically addressed.
9 But Qwest is selling its ISP customers FX service plain and simple – precisely what the
10 Commission banned.¹² So, if Qwest's attack on Level 3 is valid, then the Commission must
11 order Qwest to terminate its "Wholesale Dial" service.

12 Level 3 does not believe that the Commission intended its rulings on FX and VNXX to
13 be interpreted in this way. As Level 3 explained, the Commission's concerns about FX and
14 VNXX arose from a desire to protect access charges and toll revenues in the face of bypass – that
15 is, the concerns relate to traffic that *would* have been carried as a toll call but for the banned
16 arrangements. *Level 3 Brief* at 20-24. The record is clear that ISP-bound calls will not be made
17 if they are subject to per-minute charges.¹³ Interpreting the "no FX" rule to apply to Internet
18 traffic would not prevent the loss of any existing toll or access revenue, nor would it generate
19 any new revenue. All it would do is make it economically impossible for hundreds of thousands
20 of Oregonians to obtain access to the Internet. It seems unlikely that the Commission would
21 want to terminate Level 3's (and Qwest's) ability to offer services that support Internet access for

22 ¹² See Tr. I at 12:16-22 (Greene) (in an FX service the customer pays for the line in the foreign exchange and
23 transport back to the customer's location); Tr. II at 65:22-66:5 (Brotherson) ("Q [by ALJ Petrillo]: So, in essence,
24 when I think about PRI service, similarities with FX service come to mind. *Isn't it essentially an FX type*
25 *substitute?* A: *It is an FX type substitute* in virtually all states. Q: And you are saying that that is what
26 distinguishes it from the VNXX situation; is that correct? A: Yes.")

¹³ See, e.g., Tr. II at 36:18-37:8, 61:10-16 (Brotherson); ("Q [by ALJ Petrillo]: Well, [a Level 3 witness] testified
that he didn't believe that end-user customers accessing the internet via dial-up service would be willing to pay toll
charges for that service. Do you basically agree with that? A: The end user would not, I don't believe.")

1 thousands of rural Oregonians.¹⁴ The solution is to adopt Level 3’s compromise proposal.

2 **B. TRUNKING ARRANGEMENTS.**

3 The other main issue is whether Level 3 can send switched access traffic on the “local
4 interconnection service” (“LIS”) trunks the parties now use to exchange Internet and other
5 traffic. The record shows that Qwest’s objections to combining traffic on LIS trunks are illusory,
6 while Level 3’s proven costs of using either separate trunk groups, or building a new Feature
7 Group D (“FGD”) network for the combined traffic, are more than 10 times as high. Moreover,
8 regulatory precedent *favours* combined trunking. Level 3’s proposal – acceptable to all other
9 major ILECs – is technically sound, lowers overall costs, and ensures that Qwest is paid what it
10 is owed in a timely manner. The Commission should adopt it.

11 * * * * *

12 The remainder of this brief tracks Qwest’s opening brief. This does not result in the most
13 natural flow of the argument, but Level 3 hopes it will assist the ALJ and the Commission in
14 directly comparing and contrasting the parties’ positions on the disputed issues.

15 **II. ARGUMENT**

16 **A. SCOPE OF INTERCONNECTION AND RESPONSIBILITY FOR COSTS**
17 **OF INTERCONNECTION (ISSUES 1A, 1B, 1D, 1F, 1G, 1H, AND 1J).**

18 **1. Interconnection Under 47 U.S.C. § 251(c) Is *Not* Limited To**
19 **“Telephone Exchange Service” or “Exchange Access” (Issue 1A)**
(Sections 7.1.1, 7.1.1.3, and 7.1.1.4).

20 Level 3’s language assures that Qwest cannot block Internet traffic, VoIP traffic, or
21 terminating access traffic on interconnection facilities. Qwest’s language would allow it to ban
22 or block it by technical or economic means. The Commission should affirm Level 3’s language.

23 Qwest’s key claim is that “a CLEC is *not* entitled to interconnection under Section 251(c)
24

25 ¹⁴ See Tr. II at 58:10-11 (Brotherson) (witness doubts “it would ever be financially viable” to place media gateways
26 or equivalent devices in rural areas – which would be required to avoid VNXX or FX arrangements). See also *Level 3 Brief* at 2 & n.5, 7 & n.12 (estimating number of Oregonians dependent on dial-up).

1 for the purpose of originating or terminating interexchange traffic.” *Qwest Brief* at 3 (emphasis
2 in original). But this is wrong. Section 251(c)(2) requires interconnection for “telephone
3 exchange service” and “exchange access” traffic. These are statutorily defined terms.
4 “Exchange access” is the use of local exchange facilities or services for the origination or
5 termination of telephone toll service. 47 U.S.C. § 153(16). So, allowing Level 3 to terminate
6 long distance traffic over its interconnection facilities is not only a *permitted* use of
7 interconnection under Section 251(c)(2), to the extent it constitutes providing exchange access
8 Qwest has an affirmative duty to interconnect for this purpose.

9 Qwest’s claim is wrong because the very portions of the FCC’s Local Competition Order
10 Qwest says precludes Level 3’s legal right to terminate long distance traffic over its
11 interconnection facilities actually affirm it: “We conclude that the phrase ‘telephone exchange
12 service and exchange access’ imposes at least three obligations on incumbent LECs: an
13 incumbent must provide interconnection for purposes of transmitting and routing telephone
14 exchange traffic or exchange access traffic or both.”¹⁵ Level 3 provides telephone exchange
15 service. It seeks to provide exchange access service.

16 The FCC’s antipathy towards discriminating against particular types of traffic is
17 confirmed by its explicit ruling that traffic *not* covered by Section 251(c)(2) – including traffic
18 that is not even a “telecommunications service” – may be exchanged over a Section 251(c)(2) or
19 Section 251(a)(1) interconnection.¹⁶ Here, Level 3 provides telecommunications services to its
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21 ¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and
22 Order, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”) at ¶ 184 (emphasis added). See *Qwest Brief* at 3.
23 Qwest also ignores the FCC’s conclusion that long distance carriers *could* interconnect under § 251(c)(2) – even to
24 terminate long distance calls – if that was not the *only* type of traffic they terminated. *Local Competition Order* at ¶
191. Interconnection under Section 251(c)(2) is mandatory as long as *some* of the traffic exchanged falls into one of
the categories noted in the statute. The FCC explained that this approach would make it easy and efficient for long
distance carriers to obtain Section 251(c)(2) interconnection, so they could compete against ILECs. *Id.* at ¶ 184.

25 ¹⁶ *Id.* at ¶ 995 (“telecommunications carriers that have interconnected ... under sections 251(a)(1) [or] 251(c)(2)
26 may offer information services through the same arrangement, so long as they are offering telecommunications
services through the same arrangement as well”). The FCC thus supports efficient arrangements where different
“types” of traffic are commingled on the same facility. See *infra*.

1 customers, including terminating exchange access, originating and terminating information
2 access, and telephone exchange services.¹⁷ So, Level 3 is affirmatively *entitled* to include
3 terminating long distance traffic, as well as VoIP and Internet traffic, on its interconnection links
4 with Qwest.

5 Qwest relies on a Colorado PUC decision which is both inapplicable here, and wrongly
6 decided. *Qwest Brief* at 3-4 & Exhibit A. That case involved a rural ILEC, so Section 251(c)
7 was not at issue. For that reason, Level 3 sought interconnection under Section 251(a)(1), but
8 the Colorado PUC erroneously ruled that Section 251(a)(1) is not subject to arbitration.¹⁸ With

9
10 ¹⁷ “Telephone exchange service” is defined at 47 U.S.C. § 153(47). Subsection (A) describes traditional “local”
11 service where subscribers can call within a set of exchanges without a toll charge. Section 153(47)(B) was added by
12 the 1996 Act, and vastly expands the definition to include any service “comparable” to traditional service. The
13 services Level 3 provides to ISPs and VoIP providers are a form of “information access.” *See ISP Remand Order* at
14 ¶ 42 & n.76. While those services do not literally fall under the traditional definition of “telephone exchange
15 service” in Section 153(47)(A), they are clearly “comparable” to those traditional services – even where the call
16 does not terminate in the originating LCA. For example, calls to and from Level 3’s information access services
17 (and Qwest’s competing “Wholesale Dial” services) use normal “local” PSTN numbers. No provider imposes, or
18 ever has imposed, toll charges for these calls. And, they are routed through Qwest’s network to Level 3 exactly like
19 a traditional local call would be. Moreover, they are comparable to calls to wireless customers, which the FCC also
20 found to be “telephone exchange service.” *Local Competition Order* at ¶¶ 1013-14. As a result, Level 3’s services
21 constitute “telephone exchange service,” and they are entitled to interconnection under Section 251(c)(2).

22 ¹⁸ In fact, Section 251(a)(1) duties *are* subject to arbitration – which is a fully sufficient, and independent, reason
23 to include Level 3’s language here. Section 252(c)(1) – governing state arbitration rulings – requires arbitration
24 decisions that conform to *all of* “section 251,” which includes Section 251(a). Numerous states (including Idaho,
25 Indiana, Michigan, North Carolina, North Dakota, Tennessee, Vermont, and Washington) have concluded that the
26 authority to arbitrate intercarrier disputes fully embraces disputes arising under Section 251(a)(1). *See Pagedata’s*
Petition For Arbitration Of Interconnection Rates, Terms And Conditions And Related Arrangements With Qwest
Corporation Pursuant To Section 252(B) Of The Federal Telecommunications Act; Wavesent LLC’s Petition For
Arbitration Of Interconnection Rates, Terms And Conditions And Related Arrangements With Qwest Corporation
Pursuant To Section 252(B) Of The Federal Telecommunications Act, Order No. 29892, Case No. GNR-T-04-5;
CASE NO. GNR-T-04-6; ORDER NO. 29892, 2005 Ida. PUC LEXIS 208 (Oct. 14, 2005) at [*1] – [*2]
(recognizing right to arbitration § 251(a)(1) interconnection); *Sprint Communications Company L.P.’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 Ligonier Telephone Company, Inc., Cause No. 43052-INT-01 (consolidated with 43053-INT
01 and 43055-INT 01), 2006 Ind. PUC LEXIS 249 (September 6, 2006) at [*23] - [*24] (holding that § 251(a)
issues are subject to arbitration under § 252); *Petition of Michigan Bell Telephone Company, D/B/A SBC Michigan,*
For Arbitration Of Interconnection Rates, Terms, Conditions, And Related Arrangements With MCImetro Access
Transmission Services, LLC, Pursuant To Section 252b Of The Telecommunications Act Of 1996, Case No. U-13758
2003 Mich. PSC LEXIS 206 (August 18, 2003) at [*71] –[*73] (addressing §251(a) claims in arbitration); *Petition*
by Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant To Section 252 of the Telecommunications
Act of 1996, DOCKET NO. P-118, SUB 130, 2004 N.C. PUC LEXIS 1568 (October 8, 2004) at [*10] – [*11]
(same; rural exemption does not apply to § 251(a)); *Level 3 Communications, LLC Interconnection Arbitration*
Application, Case No. PU-2065-02-465, 2002 N.D. PUC LEXIS 35 (November 20, 2002) (same); *Petition For*
(note continued)...

1 Section 251(c) not in dispute and Section 251(a) (erroneously) off the table, the Colorado PUC
2 should have been done. Instead, it went on, in one line of unsupported *dicta*, to say that
3 Section 251(c)(2) does not cover Internet traffic where the ISP's gear is in a distant calling area.
4 This makes no sense, for reasons discussed *infra*. But clearly, the Colorado PUC's unreasoned
5 throw-away line does not merit this Commission's reliance or deference.

6 Finally, Qwest relies on Section 251(g) to limit Level 3's interconnection rights. *Qwest*
7 *Brief* at 4. Section 251(g), however, is merely a transitional provision to ensure that ILEC duties
8 to provide access to long distance carriers and information service providers are not impaired by
9 the 1996 Act. It cannot be used to hobble competitors by denying interconnection rights.¹⁹ In
10 fact, because LEC-to-LEC interconnection duties did not exist before the Act, Section 251(g) has
11 no bearing on duties that one LEC (Qwest) bears to another (Level 3).²⁰ So, the Commission
12 must reject Qwest's Section 251(g) arguments, and adopt Level 3's proposed contract language.

13 **2. OC Level Interconnection Should Not Be Implemented Using the**
14 **ICA's BFR Process; It Should Be Subject To Automatic Negotiation**
15 **(Issue 1B) (Section 7.1.2).**

16 Section 7.1.2 requires negotiation of the details of interconnection. Level 3 wants it to

17 ...(note continued)

18 *Arbitration Of Celco Partnership D/B/A Verizon Wireless Petition For Arbitration Of Bellsouth Mobility LLC;*
19 *Bellsouth Personal Communications, LLC; Chattanooga MSA Limited Partnership; Collectively D/B/A Cingular*
20 *Wireless Petition For Arbitration Of AT&T Wireless PCS, LLC D/B/A AT&T Wireless Petition For Arbitration Of*
21 *T-Mobile USA, Inc. Petition For Arbitration Of Sprint Spectrum L.P. D/B/A Sprint PCS, DOCKET NO. 03-00585*
22 *2004 Tenn. PUC LEXIS 102 (April 12, 2004) at [*8] – [*9] (same); Petition of Global NAPs, Inc., for Arbitration*
23 *Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with*
24 *Verizon New England Inc., d/b/a Verizon Vermont, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (December 26,*
25 *2002) at [*4] – [*5] (same); Petition for Arbitration of an Interconnection Agreement Between Level 3*
26 *Communications, LLC., And CenturyTel Of Washington, Inc., Pursuant to 47 U.S.C. Section 252, DOCKET NO.*
*UT-023043, 2002 Wash. UTC LEXIS 418 (October 25, 2002) at [*4] - [*5] (same).*

¹⁹ *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002), held that the sole purpose of Section 251(g) was to
“preserve[e] various ILEC duties that antedated” the 1996 Act.” The 9th Circuit has found that, by virtue of the D.C.
Circuit's ruling that the FCC is “precluded” from relying on Section 251(g) to limit ILEC obligations under the Act,
so too are ILECs “precluded” from relying on Section 251(g) to accomplish that same end. *Pacific Bell v. Pac-West*
Telecomm, 325 F.3d 1113, 1131 (9th Cir. 2003).

²⁰ *WorldCom v. FCC, supra*, 288 F.3d at 433-34 (Section 251(g) “speaks only of services provided ‘to
interexchange carriers and information service providers’; LECs’ services to other LECs, even if en route to an ISP,
are not ‘to’ either an IXC or to an ISP”).

1 specify that OC-3 or higher-speed circuits can be negotiated. Qwest says optical
2 interconnections must use a cumbersome “bona fide request” process. *See Qwest Brief* at 4-5.

3 Level 3 is entitled to interconnect using any technically feasible method. *See* 47 U.S.C. §
4 251(c)(2). Level 3 operates a nationwide – indeed, global – fiber optic network.²¹ So does
5 Qwest.²² So, optical interconnection is clearly feasible. In this regard, under 47 C.F.R. §
6 51.321(d), the ILEC “*must prove to the state commission* that the requested method of ...
7 interconnection ... is not technically feasible.” So, even if Qwest has not previously established
8 OC-level interconnection, *see Qwest Brief* at 5, that is irrelevant to whether such interconnection
9 is *feasible*. It doesn’t matter that Qwest *hasn’t*; what would matter would be evidence that
10 Qwest *can’t*. Also, Level 3’s proposed language says it will *negotiate* OC-level interconnection.
11 If Qwest has a technical issue in a particular location, that can be addressed in negotiations.

12 **3. Level 3’s Proposed Modifications to Section 7.2.2.1.2.2 Should be**
13 **Accepted Because That Language Reflects Level 3’s Right To**
14 **Purchase Transport for Interconnection at TELRIC Rates (Issue 1D).**

15 Section 7.2.2.1.2.2 deals with transport functionality for LIS trunks.²³ It says Level 3
16 may buy LIS trunk transport from Qwest at cost-based rates under the Section 252(d)(2)
17 standard, *i.e.*, TELRIC.²⁴ Qwest claims that this would let Level 3 “purchase any transport it
18 requests” at TELRIC rates, and argues that its obligations to provide “unbundled transport at
19 TELRIC rates are limited” by the *Triennial Review Remand Order*.²⁵

20 ²¹ *See, e.g.*, Tr. I at 87:21-23 (Greene) (describing Level 3 network).

21 ²² “Qwest’s *advanced broadband fiber optic network*, diverse product suite, market-based rates, user-friendly
22 online tools, and simplified back-office processes provide you with everything you need.” (Emphasis added.)
23 Available on the Internet at <http://www.qwest.com/wholesale/industrysolution/nationalresellers.html>.

24 ²³ The undisputed language states: “Such transport provides a transmission path for the LIS trunk to deliver the
25 originating Party’s Exchange Service EAS/Local traffic to the terminating Party’s End Office Switch or Tandem
26 Switch for call termination. Transport may be purchased from Qwest as Tandem Switch routed (*i.e.*, tandem
switching, tandem transmission and direct trunked transport) or direct routed (*i.e.*, direct trunked transport).” *See*
Level 3 Brief at 35-36 for a discussion of trunks versus transport facilities.

²⁴ *Local Competition Order, supra* at ¶ 672 (applying TELRIC to interconnection).

²⁵ *Qwest Brief* at 5, citing *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2005),
aff’d, Covad v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

1 Qwest's claim is both wrong and beside the point. This provision relates to
2 interconnection, not "unbundled transport" or any other unbundled network element ("UNE").
3 Specifically, this section relates to the transport functionality needed for LIS trunks, which are
4 used to exchange traffic under Sections 251(c)(2), 251(b)(5), and 251(a)(1). It has no application
5 to UNEs, which is what the *Triennial Review Remand Order* was about.²⁶ As a result, Level 3's
6 language for Section 7.2.2.1.2.2 complies with Section 251, while Qwest's does not.

7 **4. Section 7.2.2.9.6 (Issue 1F) (Direct Trunking).**

8 Level 3 does not concur with Qwest's objections to Level 3's proposal for Section
9 7.2.2.9.6. *See Qwest Brief* at 5-6. However, in light of Level 3's view that establishing direct
10 end office trunks ("DEOTs") to Qwest end offices provides a fair basis for treating Internet and
11 VoIP traffic as subject to intercarrier compensation at the FCC rate of \$0.0007/minute, Level 3
12 withdraws its language for this section, assuming its overall proposal is accepted.²⁷

13 **5. RUF Language (Sections 7.1.1.4, 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2 and** 14 **7.3.2.2.1) (Issues 1A, 1G, and 1H).**

15 The *ISP Remand Order* and the *Inter-carrier Compensation Further Notice*, FCC Rules
16 51.703(b) and 51.709(b), and the *Local Competition Order* all compel the conclusion that the
17 originating carrier must pay to transport traffic – including Internet traffic – to a point of
18 interconnection ("POI") between the two carriers' networks.²⁸ Qwest, therefore, is wrong in its

19 ²⁶ *Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, etc.*, Report and
20 Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 365-66, 548
21 (2003) ("[t]o the extent that [CLECs] need facilities ... to 'interconnect[] with the [ILEC's] network,' section
22 251(c)(2) ... expressly provides for this and we do not alter the Commission's interpretation of this obligation.").
See also SBC v. Missouri PSC, 2006 US Dist. LEXIS 65536 (E.D. Mo. 2006) at [*42] – [*49] (discussing *TRRO* and
affirming that CLECs may obtain *interconnection* (but not access to UNEs) at TELRIC rates).

23 ²⁷ If Level 3's overall proposal is not accepted, then Level 3 submits that its proposed language for Section
24 7.2.2.9.6 is a fair and reasonable clarification of the basis on which Qwest may appropriately request the
establishment of a DEOT to a particular end office, and should be included in the contract.

25 ²⁸ The *ISP Remand Order*, at ¶ 78 n.149, shows that the FCC ruling modifying the rules for compensation for
26 Internet traffic "did not alter other obligations ... such as obligations to transport traffic to points of interconnection."
The *Inter-carrier Compensation Further Notice* notes that CLECs "have targeted customers that primarily or solely
receive traffic, *such as ISPs*, in order to become net recipients of traffic." *Id.* at ¶ 91; the footnote (note 299) then
says that "[i]n such situations, *the originating carrier bears the cost of interconnection to the single POI selected*
(note continued)...

1 analysis of its “RUF” provisions. It is not lawful – or fair – to exclude Internet traffic from the
2 RUF calculations. *See Qwest Brief* at 6-9. However, as explained in our opening brief, Level 3
3 will absorb the cost of DEOTs to Qwest’s end offices as part of an overall compromise, which
4 moots this issue. Level 3 does not waive its arguments regarding the RUF (summarized in the
5 footnote to this section) – and, indeed, reserves the right to press them if its overall compromise
6 is not adopted – but there is no need to resolve them if that compromise *is* adopted.

7 **6. Nonrecurring LIS Costs (Section 7.3.3.2) (Issue 1J).**

8 As part of Level 3’s overall proposal to resolve the issue of intercarrier compensation,
9 Level 3 will accept Qwest’s proposed language regarding responsibility for non-recurring costs
10 for LIS trunk rearrangements. If that compromise is not adopted, then Qwest, not Level 3, is
11 responsible for the nonrecurring costs of establishing and, as need be, rearranging LIS trunks. In
12 the absence of the compromise, these costs are simply the non-recurring aspect of Qwest’s traffic
13 origination costs – which, as a general matter, Level 3 cannot be forced to pay.

14 **B. ALL TRAFFIC TYPES – INCLUDING SWITCHED ACCESS,
15 INTERNET-BOUND, VoIP, AND “LOCAL” – MAY AND SHOULD
16 BE ALLOWED TO BE COMBINED ON LIS TRUNKS; FEATURE
17 GROUP D TRUNKS SHOULD NOT BE REQUIRED (ISSUES 2A &
18 2B) (SECTIONS 7.2.2.9.3.1, 7.2.2.9.3.2, & 7.2.2.9.3.2.1).**

17 Level 3 wants to use its interconnection network to terminate long distance traffic, in
18 addition to using it for the Internet and VoIP traffic that is exchanged over that network today.
19 The parties agree that sending all traffic on a single, integrated network of trunks is more
20 efficient.²⁹ They disagree on whether, if Level 3 uses a single trunking network, it must turn off

21

...(note continued)

22 *by the competitive LEC*, in addition to paying reciprocal compensation for the termination of traffic.” This proves
23 that the FCC understands that even for Internet traffic, the originating carrier is responsible for transport to the POI.
24 As for the FCC’s rules, Rule 51.703(b) bans LEC-to-LEC traffic origination charges, and Rule 51.709(b) requires
25 that the cost of dedicated inter-network transmission facilities – such as DEOTs – be borne in proportion to the
26 amount of traffic each carrier *originates*. That the FCC did not intend to alter these rules when it modified its rules
defining the scope of intercarrier compensation (that is, Rule 53.701) is shown both by footnote 149 of the *ISP
Remand Order* and by ¶ 91 and footnote 299 of the *Intercarrier Compensation Further Notice*, quoted above. *See
also Local Competition Order* at ¶ 1062 (to the same effect as Rule 51.709(b)).

²⁹ There is no dispute that it is feasible to combine all traffic on LIS trunks, *see e.g.*, Tr. II at 104:16-24 (Easton)
(note continued)...

1 its existing, extensive network of LIS trunks³⁰ and replace them with FGD trunks, which come
2 pre-configured to record information often used to bill for switched access. LIS trunks are not
3 now configured to record that information, but can readily be configured to do so (*see, e.g.,* Tr. II
4 at 99-145 (Easton)) – if, indeed, such detailed recording is actually required.³¹

5 Note, from the outset, that there is no basis for any *legal* objection – under Section
6 251(c)(2) or otherwise – to combining different types of traffic on a single network of
7 interconnection trunks. To the contrary, as noted above, the FCC affirmatively approves of
8 using interconnection trunks for multiple types of traffic.³² The only question here is whether the
9 technical or operational concerns that Qwest has raised nonetheless warrant refusing to do
10 something that is plainly permissible as a legal and regulatory matter.³³

11
12
13 ... (note continued)

14 (LIS trunks could be configured to record the data Qwest says it needs), and that combining traffic is a more
15 efficient use of network resources. *See* Tr. II at 137:17-24 (Easton) (Mr. Easton agrees that “combining traffic on a
16 single interconnection network uses fewer network resources than establishing two interconnection networks”).

17 ³⁰ Level 3 has more than 30,000 active LIS trunks in Oregon. Tr. II at 145:17-146:2 (Easton) (Mr. Easton “has no
18 reason to disagree” with Mr. Greene’s testimony to that effect).

19 ³¹ It is not the “trunks” *per se* – that is, the transport capability – that needs to be modified. Recording is performed
20 in the switch ports at the *ends* of the trunks. So, FGD trunks are identical to LIS trunks; what differs is that Qwest
21 configures its switch software differently for these different “types” of trunks. *See* Tr. I at 146:19-21 (Wilson).

22 ³² *See also US West v. MFS*, 193 F.3d 1112, 1124-25 (9th Cir. 1999) (affirming requirement, imposed by
23 Washington state regulators, to “combine local and toll traffic on two-way trunks”).

24 ³³ At the hearing Qwest claimed that mixing traffic types and establishing a charge by weighting the different
25 applicable rates is a practice called “ratcheting,” which, according to Mr. Easton, the FCC has said that “Qwest is
26 not required to do.” Tr. II at 145:10-16 (Easton). *See also Qwest Brief* at 11 n.7 (mentioning, but not condemning,
“ratcheting”). Mr. Easton is obviously wrong in the specific context of Section 251(c)(2) interconnection – the FCC
affirmatively supports combining multiple traffic types on such interconnection arrangements. But he is also wrong
about “ratcheting.” Ratcheting was specifically *blessed* by the FCC more than ten years ago: “In [an earlier order],
we concluded that *interconnector ratcheting was beneficial to access customers* and that *retaining the prohibition
on ratcheting ... is inefficient, artificially increasing the cost of interconnected services without any
accompanying benefits*. We continue to believe that *ratcheting by interconnectors benefits access customers and
competition*, and therefore, decline to modify our rules with respect to ratcheting.” *Transport Rate Structure and
Pricing*, Third Memorandum Opinion And Order On Reconsideration And Supplemental Notice Of Proposed
Rulemaking, 10 FCC Rcd 3030 (1995) at ¶ 125 (footnote omitted, emphasis added). Then, the context was putting
switched access traffic on a special access link. Now, the context is combining switched access and other traffic on
an interconnection trunk. But the logic is exactly the same. *Permitting* “ratcheting” – here, permitting the
combination of multiple traffic types on interconnection trunks – benefits CLECs and competition; banning it
“artificially increase[s] the cost of interconnect[ion] without any accompanying benefits.”

1 The legal standard governing consideration of these operational concerns is Section
2 251(c)(2), which requires interconnection to be just and reasonable. Under Section 251(c)(2),
3 Qwest can only refuse to combine traffic on LIS trunks if its refusal meets that standard. Sorting
4 this out requires a consideration of the costs and benefits of Qwest's position, versus Level 3's.
5 If Qwest's position is more costly overall, it must be rejected. Any other conclusion is irrational
6 – it cannot make sense to impose the *more expensive* solution on the parties.

7 In fact, Qwest's position is unjust and unreasonable. Qwest states that "FGD
8 interconnection trunks are *necessary* so that Qwest ... can properly record and bill" switched
9 access and other traffic. *Qwest Brief* at 11 (emphasis added). But Qwest's own testimony shows
10 this is false. Mr. Easton stated that the recording capabilities now present on FGD trunks could
11 be activated for LIS trunks as well. Tr. II at 143:17-144:4 (Easton). The question is simply how
12 much that might cost. On that point, Mr. Linse claimed that modifying Qwest's LIS trunks to be
13 able to record the relevant information would entail a one-time, region-wide cost of about \$1
14 million.³⁴ This translates to Oregon-specific costs of perhaps \$100,000 to \$150,000, one-time.³⁵
15 But Level 3 presented un rebutted evidence that transferring its interconnections from LIS to
16 FGD trunks would cost Level 3 millions of dollars *each month*. See Level 3 712/Greene. So
17 even if Mr. Linse's estimate is correct, it cannot be "just" or "reasonable" to require Level 3 to
18 spend millions of dollars a month so that Qwest can avoid a one-time cost of \$150,000 or less.

19 _____
20 ³⁴ Qwest did not provide any actual substantiation for this high figure – which Level 3's testimony suggests is
21 excessive. As Mr. Wilson explained, all that Qwest would need to do would be to activate already-developed traffic
22 data recording software on its end of its LIS trunks. See Tr. I at 156:23-157:10. Mr. Easton agrees. Tr. II at
23 143:17-144:4. It is difficult to see how that could cost \$1 million, even on a region-wide basis.

24 ³⁵ Considering that Level 3 and Qwest interconnect in (among other states) Arizona, Colorado, Minnesota, New
25 Mexico, Utah, and Washington, in addition to Oregon, clearly only a small fraction of Mr. Linse's \$1 million
26 region-wide figure could properly be attributed to Oregon. As a rough estimate, note that in the states just listed,
there are about 13.48 million ILEC access lines, of which Oregon accounts for only 1.64 million – roughly 12%.
(Figures calculated from FCC, *Local Telephone Competition, Status as of December 31, 2005* at Table 7.) These
figures include independent telephone companies, but those companies represent "a small minority" in Qwest
territory, Tr. I at 142:3-6 (Greene), so there is no reason to think that the *proportion* of Qwest lines in Oregon is
particularly different from the *proportion* of total ILEC lines here. So, even assuming that Mr. Linse's \$1 million
figure is not inflated, this suggests that the Oregon-specific costs of activating the relevant software capabilities for
LIS trunks would be a one-time expense of perhaps \$100,000 to \$150,000.

1 Qwest does not want to change its existing arrangements to accommodate Level 3. *See*
2 *Qwest Brief* at 11. But an ILEC must provide an interconnection arrangement

3 even if [it] ... requires a novel use of, *or some modification to*, incumbent LEC
4 equipment. ... If [ILECs] were not required, at least to some extent, to adapt their
5 facilities to interconnection or use by other carriers, the purposes of sections
251(c)(2) and 251(c)(3) would often be frustrated.

6 *Local Competition Order* at ¶ 202 (emphasis added). So, the fact that Level 3's proposal might
7 require Qwest to modify its systems is irrelevant to whether it is just and reasonable. Again,
8 what matters are the relative costs of Level 3's proposal as compared to Qwest's.

9 As Level 3 noted, if Qwest has not configured its interconnection trunks to accommodate
10 billing for access traffic, that is a "self-inflicted wound." *See Level 3 Brief* at 38-39. Section
11 251(c)(2) contemplates that interconnection trunks will be used to exchange "exchange access"
12 traffic. In fact, *Qwest itself* cited the portion of the *Local Competition Order* that indicates that,
13 while traditional IXCs may not obtain interconnection under Section 251(c)(2) "solely" to
14 terminate traditional long distance traffic, they may obtain interconnection as long as their traffic
15 *includes* traffic subject to Section 251(c)(2) interconnection.³⁶ The only rational conclusion is
16 that access traffic and "Section 251(c)(2)" traffic may be combined on the same trunks.³⁷

17 ³⁶ *Qwest Brief* at 3, quoting *Local Competition Order* at ¶ 191.

18 ³⁷ In fact, Qwest's position is even more tenuous than might appear, because its own language permits using LIS
19 trunks for the vast majority of the "long distance" traffic that Level 3 wants to deliver. Qwest's language plainly
20 permits using LIS trunks for "jointly provided switched access" service. *See, e.g.,* Qwest proposed §7.2.2.9.3.1
21 ("Exchange Service (EAS/Local), ISP-Bound Traffic, IntraLATA LEC Toll , VoIP traffic and **Jointly Provided**
22 **Switched Access (InterLATA and IntraLATA Toll involving a third party IXC)** may be combined in a single LIS
23 trunk group or transmitted on separate LIS trunk groups"). The term "jointly provided switched access ... "refers to
24 an arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to an
25 Interexchange Carrier, with each LEC (or CLEC) receiving an appropriate share of the revenues from the IXC as
26 defined by their effective access Tariffs" *See* Qwest's proposed ICA (Exhibit A to its response to Level 3's
Petition), Section 4, definition of "'Meet-Point Billing' or 'MPB' or 'Jointly Provided Switched Access'"). For
terminating (inbound) traffic, an IXC delivers its traffic to one LEC for termination to a customer of another. The
LEC directly connected to the IXC will charge the IXC for tandem switching and for transporting the traffic to the
other LEC; the second LEC will charge the IXC for end office switching. Clearly, when IXCs hand their traffic to
Level 3 for termination to Qwest customers in Oregon, that fits the definition of "jointly provided switched access"
to a "T." Level 3 is providing tandem switching (that is, routing the traffic to the appropriate end office), and Qwest
is providing end office switching. Even under Qwest's language, it is entirely permissible to send this traffic over
LIS trunks. The only long distance traffic *not* covered by this definition is traffic where Level 3 itself is the supplier
of long distance services to the calling party in the distant originating location. However, since Level 3 does not
(note continued)...

1 For these reasons, all of Qwest’s arguments in favor of requiring FGD trunks for
2 combined traffic are wrong. Qwest states that its proposal “allows Qwest to continue to use its
3 mechanized systems for recording and billing.” *Qwest Brief* at 11. But that capability would
4 remain if Qwest were to activate the relevant software in its switches to record detailed data on
5 LIS trunks. Thus, Qwest is wrong when it says that combining traffic on LIS trunks “would
6 effectively disable the systems that Qwest” uses for billing. *Id.* It would do no such thing; it
7 would just require Qwest to “adapt [its] facilities” to accommodate efficient interconnection –
8 which it is clearly required to do. This also answers Qwest’s claim that using LIS trunks would
9 interfere with Qwest’s ability to “prepare records for wholesale customers.” *Id.* at 12. All Qwest
10 needs to do to solve this supposed “problem” is enable recording capabilities on LIS trunks – the
11 software equivalent of flipping a switch. This *also* answers Qwest’s claim that Level 3’s
12 proposal would “not allow Qwest” to handle jointly-provided access (that is, where a call routes
13 from a long distance carrier, through Qwest’s tandem, and then on to Level 3, or vice-versa). *Id.*
14 at 12. Again, Qwest can solve all these purported problems by flipping the software switch.³⁸

15
16 ... (note continued)

17 offer 1+ long distance services, this will be a very small amount of traffic. Yet Qwest would force Level 3 to either
18 split its network into a LIS component and a Feature Group D component, or even convert its entire network to
19 Feature Group D, solely to accommodate this minor amount of traffic. The Commission should clearly rule that
20 when Level 3 delivers *third party IXC* traffic to Qwest for termination, that is “jointly provided switched access”
21 under the agreed-to definitions in the contract, so that Level 3 is unambiguously *permitted* to send such traffic on
22 LIS trunks.

23 ³⁸ When the shoe is on the other foot, Qwest vigorously defends its right to *send* commingled local and long
24 distance traffic on a single trunk group, even when that does not permit the terminating carrier to identify different
25 traffic types. As described in *Iowa Network Services v. Qwest*, 385 F. Supp. 2d 850, 857 (S.D. Ia. 2005), “Qwest’s
26 network collects both wireline traffic and wireless traffic and directs this traffic to [terminating carriers]. The
wireline and wireless traffic coming from Qwest include both interstate and intrastate telephone calls. Qwest
‘commingles,’ or mixes together, this wireline and wireless traffic before transmitting it to [terminating carriers].
Because of the commingling of calls by Qwest, the identity of the wireless or other carrier originating each call
cannot be readily determined by [the terminating carriers] equipment[, which made] it infeasible for [the
terminating carriers] to directly bill the wireless carriers” Qwest defended its practice against claims that this
was in any way improper: “[D]uring the proceeding before the Board, [Qwest] *vigorously disputed – and refuted –*
[the] allegations that Qwest’s use of *the same trunk group to deliver intraMTA traffic and long distance traffic is*
improper. In particular, Qwest contends the record before the Board shows the following: (1) use of the same trunk
group to carry and deliver local and long distance traffic, a practice sometimes referred to as ‘commingling,’ is very
common in the telecommunications industry; (2) many wireline ILECs in Iowa themselves commingle local and
long distance traffic; and (3) the purpose of commingling is not to disguise long distance traffic, but to take

(note continued)...

1 The discussion above shows that Qwest cannot require Level 3 to use FGD trunks for
2 combined traffic *even if there were no alternatives* to activating the recording capability of LIS
3 trunks. In fact, Level 3 has proposed alternatives to further alleviate Qwest’s perceived
4 problems. First, Level 3 will not send transit traffic on LIS trunks. Tr. I at 108:13-25 (Greene).
5 This eliminates Qwest’s concerns, *see Qwest Brief* at 11, about providing accurate billing data to
6 third parties.³⁹ Second, if Qwest (a) refuses to activate recording capabilities on LIS trunks, but
7 (b) still wants call detail records, Level 3 will provide such records in industry-standard EMI,
8 “110101” format.⁴⁰ Qwest could use those records to bill third party carriers as well as its “QPP”
9 customers. Even if Qwest has to take some steps to ensure that its billing systems can use these
10 Level 3-supplied records, Tr. II at 117:7-23 (Easton), that is no reason to reject this solution.

11 If Qwest (a) doesn’t want to activate its own recording capabilities for LIS trunks and (b)
12 doesn’t want to make use of *Level 3’s* recording capabilities, then Qwest’s problems can still be
13 solved using Level 3’s proposal to identify billing factors, which would break the traffic down
14 into that subject to interstate access rates, to intrastate access rates, to the FCC’s \$0.0007/minute
15

16 ...(note continued)
17 advantage of efficiencies through use of a single trunk group, particularly when traffic volumes are not sufficient to
18 justify separate trunk groups.” *Id.*, 385 F. Supp. 2d at 893 n.61

18 ³⁹ In light of Level 3’s agreement that it will not send transit traffic over LIS trunks, Qwest’s witness agreed that
19 billing for QPP customers was the only “remaining problem.” Tr. II at 116:19-117:6 (Easton). (QPP is “Qwest
20 Platform Plus,” Qwest’s “commercial” replacement for UNE-P. A CLEC buying QPP will want to be able to bill
21 terminating access charges to long distance carriers who send calls to the CLEC’s end users – who, physically, are
22 served like POTS customers on Qwest’s switches.) In its brief, Qwest runs away from this concession, *see Qwest*
23 *Brief* at 12-13, but Qwest’s objections are baseless. First, it claims that it couldn’t enforce the “no transit” rule
24 without FGD recording capabilities. In fact, if Qwest had any concerns about this issue, it could audit Level 3.
25 Second, it claims that “other carriers who depend on records from Qwest have switches homed to Qwest’s tandems.”
26 *Id.* at 13. But that is exactly the kind of traffic – traffic from Level 3 to a third party, homed on Qwest’s tandem –
that Level 3 won’t send, so this is a *non sequitur*. Third, with no citation to anything, Qwest suggests that traffic
bound for another carrier that has ported a “native” Qwest number would go to the Qwest switch. *Id.* But this is
wrong, too. If Level 3 has a call bound for a “native” Qwest number, Level 3 is the “N-1” carrier – the last carrier
before the carrier to whom the number was originally assigned. Level 3 would be obliged to translate the ported
number before routing it, and so won’t send it to Qwest. *See Telephone Number Portability*, Second Report &
Order, 12 FCC Rcd 12281 (1997) at ¶¶ 73-75 (describing routing responsibilities of “N-1” carrier).

⁴⁰ *See* Tr. I at 100:17-101:4 (Greene). “EMI” means “Electronic Message Interface.” *See* Tr. II at 130:19-131:6
(Easton). The “110101” format is the industry-standard format for the exchange of call detail records that contain
all the data needed for billing. Tr. II at 119:5-19 (Easton).

1 rate, etc. Qwest claims that using factors would leave it unable to provide billing data to its QPP
2 customers. *See Qwest Brief* at 12. But even if this is literally true, it is irrelevant.

3 First, Qwest itself has used factors to bill other carriers. Tr. II at 109:20-24 (Easton).
4 While this may not be Qwest’s “preference,” *id.*, the fact that it has used them with other carriers
5 shows that its problems here cannot be that serious. Second, Qwest’s QPP customers cannot
6 fairly expect to receive data that Qwest itself does not have, so they, too could use the Level 3-
7 provided factors to bill Level 3 or third parties. Or, if detailed call records are so important to
8 QPP customers, they can easily afford to have Qwest generate them. Mr. Easton testified that
9 Qwest has about 103,000 QPP lines in service in Oregon. Tr. II at 117:16-23 (Easton). As
10 shown above, the Oregon-specific cost of configuring LIS trunks to record all necessary call
11 details would be no more than a one-time cost of about \$150,000. So, for a one-time charge of
12 \$1.50 (or less) per QPP line, the QPP customers – who, it seems, are the ones really “causing”
13 the need for recording on LIS trunks – could cover Qwest’s cost of activating that capability.⁴¹

14 So, it is clear that Qwest has a least three ways to deal with the fact that LIS trunks are
15 not, today, configured to record call details. First, enabling that capability is not at all
16 burdensome – particularly when compared to the cost to Level 3 of shifting an entire
17 interconnection network over to FGD. Second, Level 3 can provide the industry-standard, EMI-
18 format, 110101 records to Qwest if it wants them, either for its own purposes or to aid in billing
19 third parties (such as QPP customers). Third, Level 3 and Qwest can develop usage factors to
20

21 ⁴¹ Qwest also raises some technical concerns with Level 3’s factors. *See Qwest Brief* at 42-43. First, it claims
22 using factors is a “manual” process, *id.* at 42, but we must evaluate this claim on an “apples to apples” basis. As Mr.
23 Greene explained, far from being a fully automatic process, Qwest’s actual billing process entails a lot of “manual”
24 intervention to correct errors and make adjustments. Tr. I at 118:23-120:7 (Greene). Compared to the *actual* Qwest
25 billing process, Level 3’s proposal is simpler and better. Qwest complains that auditing factors would be “complex
26 and time-consuming,” but Qwest can avoid the whole problem for a one-time cost of \$100,000 to \$150,000 – to
activate recording on the LIS trunks. That is the *most* Qwest would ever have to incur to resolve all these issues.
Qwest says that Level 3 did not include a factor for intrastate switched access. *Qwest Brief* at 43. This was an
oversight in Level 3’s language; if the parties use factors, there should be one to identify traffic subject to intrastate
access charges. Finally, Qwest objects that Level 3 puts all VoIP in a single category, *id.*, but that is not an error in
the factors; it just reflects Level 3’s proposal that access charges not apply to VoIP. *See infra*. Obviously for factors
to work there should be a factor for each type of traffic subject to a different per-minute rate.

1 allocate the total minutes sent to Qwest on the LIS trunks into different billing categories. Given
2 this array of choices, it is not surprising that *every other major ILEC has agreed to permit*
3 *Level 3 to combine all traffic on interconnection trunks*. That fact should speak volumes to the
4 Commission about the lack of substance behind Qwest’s objections to the use of factors.⁴²

5 For all of these reasons, the Commission should reject Qwest’s attempt to bar Level 3
6 from combining all traffic types on LIS trunks. This is the least-cost way to obtain the benefits
7 of efficient, combined trunk groups while avoiding the enormous and unjustified costs and
8 potential service disruptions Level 3 would incur if it were forced to establish a new FGD
9 network to carry the combined traffic.

10 **C. COMPENSATION ISSUES RELATED TO ISP VNXX TRAFFIC.**

11 Qwest argues that Level 3’s serving arrangements for Internet traffic violate the
12 Commission’s rules regarding FX/VNXX traffic, *Qwest Brief* at 29-30; that no compensation
13 should be paid for such traffic even where Level 3 pays for DEOTs to the originating end offices,
14 Tr. II at 61:3-4 (Brotherson); and that, in any event, Level 3’s serving arrangement should be
15 declared illegal, *Qwest Brief* at 29-30. If Qwest’s views are adopted neither Level 3 nor Qwest
16 will be able to provide affordable Internet access to Oregonians outside of major cities, and, in
17 that event, Level 3 requests a reasonable time to inform its ISP customers that – and why – they
18 will no longer be able to serve rural Oregon.

19 In fact, however, there is no need to interpret federal or Oregon law as forbidding
20 Level 3’s serving arrangements for Internet traffic. Those arrangements, like Internet traffic

21
22 ⁴² See Tr. I at 121:4-7 (Greene) (other ILECs accepted factors). Qwest complains that Level 3 offered other ILECs
23 “concessions” on the FCC’s \$0.0007/minute rate to get them to agree to use factors – concessions that Level 3
24 supposedly did not offer Qwest. See *Qwest Brief* at 12. That is not true. The other ILECs struck a deal in which (a)
25 they would pay for all Internet traffic, without regard to its status as “VNXX;” (b) they would transport that traffic to
26 agreed-upon POIs; (c) Level 3 gets a lower per-minute rate (to reflect that transport); and (d) they would accept
factors for billing. Qwest is refusing to pay *anything* for Internet traffic where the modem functionality is outside
the originating caller’s LCA, *and* wants to impose all transport costs on Level 3, *and* won’t accept factors for
billing. Here, Level 3 has offered, as part of its overall proposal, to pay for DEOTs – essentially absorbing 100% of
transport costs – with Qwest paying the \$0.0007/minute rate. That is a *major* “concession” compared to what Level
3 understands the law to be.

1 itself, are *sui generis*. As far as Level 3 is aware, no carrier has ever presented the Commission
2 with Level 3's proposed serving arrangement – under which Level 3 accepts financial
3 responsibility for all transport beyond the originating switch. Level 3 urges the Commission to
4 take a fresh and careful look at this arrangement, rather than accepting Qwest's unthinking
5 invitation to apply precedents designed for handling traditional voice traffic.

6 The discussion below tracks, to the extent feasible, Qwest's presentation of issues and
7 arguments. See *Qwest Brief* at 13-30. Level 3 also respectfully refers the Commission to
8 Level 3's affirmative discussion of its proposal in its opening brief at pages 15-32.

9 **1. Definition of VNXX Traffic (Issue 3B). Qwest's Definition Ignores the**
10 **Technical Nature of Internet Traffic, The Purpose and Proper**
11 **Application of Oregon Decisions, and the Plain Meaning of the *ISP***
***Remand Order*; Level 3's Proposal Would Fully Conform to Oregon**
And Federal Law.

12 The definition of VNXX for Internet traffic must be consistent with the FCC findings
13 regarding the legal and technical nature of that traffic. Otherwise (aside from violating the law),
14 the definition will produce perverse and nonsensical results, divorced from both the technology
15 and economics of providing dial-up Internet access.

16 In February 2000 the courts found that Internet traffic is neither local nor long distance.
17 *Bell Atlantic v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). In April 2001 the FCC agreed, finding that
18 this traffic cannot be classified based on where the calls (supposedly) terminate, because they
19 don't really "terminate" at all; instead, the end user communicates with different Internet sites,
20 often at the same time. *ISP Remand Order* at ¶¶ 58-59; see *Level 3 Brief* at 25-26. It found that
21 intermediate points, *including, specifically, the location of ISP equipment*, are irrelevant:
22 "Consumers would be perplexed to learn regulators believe they are communicating with ISP
23 modems, rather than the buddies on their e-mail lists." *ISP Remand Order* at ¶ 59. It classified
24 Internet traffic as "information access," *id.* at ¶¶ 42, 44, and concluded that even though the
25 service originates in an "exchange area," attempting to "engraft[] a geographic limitation" on it
26 is "strained," because the definition does not "require that the transmission ... terminate within

1 the same exchange area” where it originated. *Id.* at ¶ 44 n.82. Note also that the term “exchange
2 area” refers to an entire LATA, not an LCA. *See Level 3 Brief* at 30 n.94. In short, information
3 access provided to ISPs is a unique, jurisdictionally *interstate* service, *ISP Remand Order* at ¶¶
4 52-65, so limitations and definitions applicable to traditional intrastate services do not apply.

5 The Commission’s analysis of FX and VNXX arrangements on the PSTN does not
6 transfer cleanly to the legal and technical realities of Internet traffic. With FX service, a
7 customer in (say) Salem buys a private line into (say) Portland to get “local” service there. With
8 this arrangement, a locally-dialed and -billed call starting in Portland will terminate in Salem.⁴³
9 VNXX is a similar arrangement provided by CLECs who use a single switch to serve multiple
10 exchange areas, so a customer located one area can obtain a telephone number from another area
11 served by the same switch. The Commission’s definition of both FX and VNXX is location-
12 dependent – it assumes, as the starting point that a customer with a definite physical location
13 wants to receive traffic from a different calling area as a local call. Specifically, the Commission
14 defines VNXX as occurring “when a CLEC assigns a ‘local’ rate center code to a customer
15 *physically located* in a ‘foreign’ rate center.”⁴⁴

16 These definitions apply easily to normal PSTN traffic, but not to Internet traffic, because
17 there is no defined point where such traffic terminates. Qwest is aware of this problem, but
18 sweeps it under the rug by defining VNXX as traffic that does *not* terminate in the originating
19 area.⁴⁵ This dodge ignores the true characteristics of Internet traffic while allowing Qwest to

20 ⁴³ A subscriber to FX service “receives a dial tone, a local number assignment, and local calling service in an
21 exchange different from the one from which the subscriber would normally receive service. For instance, a business
22 person in Salem subscribing to FX service can have customers in Portland call the business number without the
23 imposition of toll charges.” *Access Provisions and Charges of Telephone Utility Companies in Oregon*, Interim
24 Order, UT 5, Order No. 83-869 (OPUC Dec. 23, 1983) at 22 (emphasis added). *See also Level 3 Brief* at 20-21.

25 ⁴⁴ *Investigation into the Use of Virtual NPA/NXX Calling Patterns*, Order, UM-1058, Order No. 04-504 (Sept. 7,
26 2004). The Commission’s location-oriented definition of VNXX directly parallels its earlier definition of FX: “a
customer *physically located in Portland* might order a phone number from a CLEC with a Salem NXX rate center
code. Calls between that Portland customer’s phone and other Salem area customers would be treated as if they were
local calls, even though the calls between Salem and the customer’s physical location in Portland is a distance of
some 50 miles.” *Id.* at 2 (emphasis added).

⁴⁵ *See* Qwest’s proposed definition under Issue 3B of the Joint Matrix: “‘VNXX traffic’ is all traffic originated by
(note continued)...

1 pontificate about keeping “local” traffic confined to “local” calling areas. There may be good
2 reasons to restrict intrastate PSTN calls to the “local” and “long distance” categories.⁴⁶ But those
3 reasons do not, and legally cannot, apply to Internet traffic, which is neither local nor long
4 distance, *see Bell Atlantic v. FCC, supra*, 206 F.3d at 5, and which has no defined termination
5 point, *ISP Remand Order* at ¶¶ 44, 58-59.⁴⁷

6 For this reason, while the Commission plainly has the authority, under Sections 251 and
7 252, to sort out the terms on which Qwest and Level 3 will interconnect and exchange traffic,
8 including Internet traffic, that authority does not directly reach jurisdictionally interstate services,
9 so it is not broad enough to permit the Commission to direct how Level 3 must or must not
10 provide those interstate services. Qwest, therefore, is wrong when it states (referring to Level 3’s
11 certificate) that Level 3 “has a legal obligation in Oregon to comply with fundamental industry
12 standards relating to LCAs.” *Qwest Brief* at 16. Level 3 indeed bears that obligation for the
13 jurisdictionally intrastate services which its certificate authorizes. But that certificate, and that
14 obligation, do not affect Level 3’s authority to provide jurisdictionally interstate services such as
15 information access for dial-up Internet traffic.⁴⁸

16 ... (note continued)

17 the Qwest End User Customer that is not terminated to CLEC’s End User Customer physically located within the
18 same Qwest Local Calling Area ... ”

19 ⁴⁶ *See, e.g., Qwest Brief* at 15-16; Tr. II at 193:16-21 (“Q [by ALJ Petrillo]: But for purposes of Qwest’s position,
20 rating a call, the jurisdictional rating of a call is local or interexchange[,] or local or nonlocal ... based on where the
21 end-user customers are located, correct? A: That’s correct.” *See also* Tr. II 60:8-61:3 (Brotherson) (“two
22 classifications ... exist in Oregon today, which is there are local calls and there are long distance calls. ... **Right**
23 **now there [are] no middle categories.**”).

24 ⁴⁷ For this reason, both the provisions of Oregon state law and the conditions on Level 3’s certificate that Qwest
25 quotes are irrelevant. *See Qwest Brief* at 15-16. Oregon state law does not govern the provision of interstate
26 information access services, which is what Level 3 provides to its ISP customers. Similarly, Level 3’s authority to
provide those interstate services does not derive from its Oregon CLEC authorization. It derives from the FCC’s
regulations that permit any entity to provide any interstate service. *See* 47 C.F.R. § 63.01(a) (“Any party that would
be a domestic interstate common carrier is authorized to provide domestic, interstate services to **any** domestic point
and to construct or operate **any** domestic transmission line...”) (emphasis added). Level 3 provides a variety of
“loop” services for various customers on the strength of its Oregon certificate, *see, e.g.,* Tr. I at 25:9-26:7, but the
interstate services it provides to ISPs are, legally, neither authorized nor restricted by that certificate.

⁴⁸ To this extent, and with due respect, the *Universal* case cited by Qwest is wrongly decided. It is simply *ultra*
vires for the Commission to say that a CLEC cannot provide interstate information access – that is, services that
provide PSTN connectivity for ISPs and VoIP providers – just as it would be *ultra vires* for the Oregon Commission
(note continued)...

1 In light of the federal materials noted above, Qwest’s claim that Level 3’s analysis is
2 “inconsistent with federal law,” *see Qwest Brief* at 17-19, is absurd. Qwest’s cases show, at
3 most, that the federal law analysis of information access has enough “play in the joints” to permit
4 states to apply different specific compensation regimes to that traffic. For example, Qwest cites
5 *Verizon California v. Peevey* as a case supposedly showing that Level 3’s proposal is
6 inconsistent with federal law. *Qwest Brief* at 18-19. Yet, as noted in Level 3’s opening brief,
7 *Peevey approved* a compensation regime for Internet traffic – including “VNXX” traffic – that is
8 *less* favorable to Qwest than Level 3’s proposal in this case.⁴⁹ Indeed, Level 3’s recognition of
9 the “play in the joints” in federal law underlies its proposal here.⁵⁰

10 Qwest complains that Level 3’s approach is flawed because “call rating has never been
11 based on a POI location.” *Qwest Brief* at 19-20. Qwest fundamentally misconstrues Level 3’s
12 proposal. “Call rating” – that is, how end users are charged for a call – is not based on POI
13 location. Instead, just as in *Peevey*, call rating is based on the NPA-NXXs of the calling and
14 dialed numbers.⁵¹ That would not change for any call to Level 3’s ISP customers, no matter
15 where the POI was located. Level 3’s approach addresses the different questions of how to
16

17 ...(note continued)

18 to say that a CLEC may not provide interstate switched access services. Notably, the FCC has found certain
19 switched access services to be directly analogous to providing “information access” for ISPs. *See ISP Remand*
20 *Order* at ¶ 61: “In most cases, an ISP’s customer first dials a seven-digit number to connect to the ISP server before
21 connecting to a website. Long-distance service in some network configurations is initiated in a substantially similar
22 manner. In particular, under ‘Feature Group A’ access, the caller first dials a seven-digit number to reach the IXC,
23 and then dials a password and the called party’s area code and number to complete the call. Notwithstanding this
24 dialing sequence, the service the LEC provides is considered *interstate* access service, not a separate local call.”
25 (Footnote omitted, emphasis in original.) *See also Local Competition Order* at ¶ 873 & n.2091 (“Feature Group A is
26 *similar* to a local exchange service, but is used for *interstate* access”) (emphasis added).

⁴⁹ *Level 3 Brief* at 4, 17-19. Given this, Level 3 is quite perplexed by the claim that its proposal here is
“inconsistent with” *Peevey*. *Qwest Brief* at 20.

⁵⁰ For example, in *Global NAPs v. Verizon New England*, 454 F.3d 91 (2nd Cir. 2006), the court considered whether
the FCC had so clearly dealt with the issue of VNXX-like Internet traffic that states were completely preempted
from taking different approaches to the issue, and concluded that they were not. But, as noted above, in that same
case the FCC affirmatively represented to the court that the *ISP Remand Order* could indeed be read to extend its
compensation regime to such VNXX-like traffic. *See* note 6, *supra*.

⁵¹ Qwest’s witness made clear that this is how Qwest rates traffic, indeed even for intercarrier compensation
purposes. *See* Tr. II at 109:22-110:3 (Easton).

1 handle intercarrier compensation, and the costs of transport for Internet traffic. Level 3's
2 proposal links its right to receive the FCC's \$0.0007/minute rate to its taking on the obligation to
3 transport the traffic from a geographically local POI. Far from being unprecedented, as Level 3
4 explained, this is what the California PUC did in *Peevey* and what the Arizona Commission just
5 did in resolving a recent arbitration between Level 3 and Qwest.⁵²

6 * * * * *

7 We noted above that Qwest's attack on Level 3's proposal was "unthinking" and "self-
8 destructive." This is particularly so for its argument that the Commission should ban VNXX.
9 See *Qwest Brief* at 29-30. We believe, for the reasons stated above, that the interstate
10 information access services that Level 3 provides to its ISP and VoIP customers are not only
11 fully lawful, but also innovative and efficient. That said, Level 3 is constrained to point out that
12 if *its* services are not permissible and can be banned by this Commission, the services that Qwest
13 provides to its affiliate, QCC, to enable that affiliate to provide its "Wholesale Dial" services, are
14 even more clearly impermissible. As a result, it would be grossly discriminatory – indeed,
15 plainly unlawful – for the Commission to ban or impair Level 3's ability to provide its services
16 without simultaneously banning Qwest's provision of Wholesale Dial.

17 The Commission banned FX service in 1983. Yet Qwest has admitted that its Wholesale
18 Dial service is simply FX for ISPs, *i.e.*, just a tariffed dial tone line (in this case, a PRI circuit) in
19 a distant LCA linked via a tariffed private line to get it back to the customer's location:

20 "QCC pays for the local exchange service and the ability to receive calls in the
21 local calling area. QCC does not ask for free transport. They pay tariff private line
22 for the transport of that traffic." Tr. II at 18:21-25 (Brotherson)

23 ⁵² See *Level 3 Brief* at 17-20. To the extent that it is fair to characterize Level 3's proposal as using a POI location
24 to rate calls, that approach is entirely consistent with relevant FCC precedent. The issue being addressed here is that
25 Internet calls have no well-defined termination point. When the FCC encountered a similar problem – what to do
26 with the mobile end of a call to or from a wireless customer – it affirmatively approved using the POI as the wireless
customer's "location" for purposes of intercarrier call rating. See *Local Competition Order* at ¶ 1044 ("LECs and
CMRS providers can use *the point of interconnection between the two carriers* at the beginning of the call *to
determine the location of the mobile caller or called party*") (emphasis added).

1 “[T]hree or four ISPs might share a private line to a community. That would be
2 what, in essence, wholesale dial offers. So QCC would buy the tariff service, and
then make it available for the ISPs to utilize.” Tr. II at 33:12-16 (Brotherson)

3 “I want to clarify a little bit. The PRS service, local PRS service is a local
4 exchange service to get the traffic to another exchange, as you have described.
5 Would also require purchasing private line in combination with the PRS service.
6 So you need to buy two tariff products, one out of the local exchange tariffs, and
one out of the access tariffs.

7 “I don't know in Oregon whether the private line is carried in the access tariffs or
8 the local exchange tariffs. Some states, they are carried in both, but in others we
have merged them and they are only carried in one.” Tr. II at 36:18-37:5
(Brotherson)

9 “The customer of record is QCC of the tariff service. What they in turn do is offer
10 that to – deliver that traffic to the ISPs. So several ISPs could receive calls on that
11 single PRS and private line combined product, more than one.” Tr. II 37:21-25
(Brotherson).

12 “Q: So if I am an end-user internet customer, and I am using one of the ISPs that
13 subscribes to QCC's service, then I am going to call a local number that has been
14 made available to the ISP by QCC by virtue of paying for this PRI service. And
15 that traffic that I originate over the internet is going to be transported by QCC
16 over private line to QCC's network access server, which is as you indicate in
Exhibit 39. And the mode and functionality is going to be performed at that point
in much the same way that Mr. Greene testified yesterday that the modem
functionality was performed by Level 3 at the media gateway. Is that essentially
how that works?

17 “A: I would say that that is a true statement.” Tr. II at 40:1-15 (Brotherson)

18 So the Commission has a choice. It can declare that the two largest suppliers of Internet
19 connectivity in Oregon – Qwest and Level 3 – are violating the law and direct them to stop, with
20 severe consequences for the ability of Oregonians – especially rural Oregonians – to obtain
21 affordable access to the Internet. Or, it can step back from the brink and recognize that its earlier
22 rulings about FX and VNXX service were not crafted with efficient information access service –
23 that is, efficient PSTN connectivity for Internet and VoIP traffic – in mind. It can then deal with
24 that situation on its own merits, as the Arizona Commission just did, and as the California PUC
25 did, with the approval of the 9th Circuit, in *Peevey*. But it would be arbitrary and capricious – not
26

1 to say blatantly discriminatory – for the Commission to purport to impair or restrict Level 3’s
2 services to ISPs while allowing Qwest’s Wholesale Dial service to remain operational.

3 **2. Compensation for VNXX Traffic (Issue 3A) (Section 7.3.6.3). Qwest’s**
4 **Definition Ignores Applicable FCC Rulings and Principles of Cost**
5 **Causation and, Combined with Its Definition of VNXX Traffic,**
6 **Would Eliminate Viable Dial-Up Internet Access In Rural Oregon.**

7 [and]

8 **3. Compensation for VNXX Traffic (Issue 3C) (Section 7.3.6.1). Qwest’s**
9 **Language Is Inconsistent With Federal Law And Policies.**

10 Level 3 proposes that Internet traffic be subject to the FCC’s rate of \$0.0007 per minute,
11 irrespective of the location of the ISP’s equipment or modem functionality, as long as Level 3
12 establishes a Primary or Secondary POI in the originating LCA. Qwest wants no compensation
13 at all for Internet traffic *except* where the ISP’s modem functionality is in that LCA.

14 Qwest claims that Level 3’s proposal is contrary to federal law. *See Qwest Brief* at 26.
15 This is clearly wrong: the FCC stated in federal court that the *ISP Remand Order* can be read to
16 apply the \$0.0007/minute regime to all Internet traffic. *See* note 6, *supra*. The *most* that
17 Qwest’s cases show (*see Qwest Brief* at 28-29) is that in some situations it might not violate
18 federal law for a state to read the *ISP Remand Order* more narrowly. And the result in *Peevey* –
19 a 9th circuit case – plainly *supports* imposing intercarrier compensation duties even on VNXX-
20 routed Internet traffic. This is the course taken by the Washington Commission as well.⁵³

21 Qwest’s entire cost-causation argument, *see Qwest Brief* at 24-29, is fundamentally
22 flawed. It is premised on the idea that there are two types of traffic – local and long distance –
23 with two types of compensation – reciprocal compensation and access – and that the way to
24 determine compensation for Internet traffic is to decide which box it falls in. In fact, Internet
25 traffic does not fall into either category, and the compensation rules applicable to it are not the

26 ⁵³ See Level 3 Communications, LLC v. Qwest Corporation, Dkt. UT-053039, Order No. 6 (June 9, 2006) at ¶ 21.

1 same as apply to either category. As the FCC plainly stated in the *Intercarrier Compensation*
2 *Further Notice*, “a long-distance call carried by an IXC is subject to a different regime than a
3 local call carried by two LECs. Moreover, CMRS providers and LECs are subject to different
4 intercarrier compensation rules, and *ISP-bound calls are subject to yet another regime.*” *Id.* at
5 ¶ 3 n.8. The question is how that regime should be interpreted to apply to efficient, centralized
6 information access services of the sort that Level 3 and Qwest provide to their ISP customers.

7 There can be no question that the ultimate “cost causers” with respect to Internet traffic
8 are the end users. Qwest itself concedes that, when its end users access the Internet, they do so
9 by means of using their “local exchange service.” See *Qwest Brief* at 26 n.22. It follows that –
10 as Qwest itself concedes – no access charges should be assessed in connection with VNXX-
11 routed Internet traffic. Qwest, however, does not want to pay the FCC’s \$0.0007 rate either. But
12 letting Qwest completely “off the hook” for this traffic ignores the fact that it is *Qwest’s* end
13 users, using their local exchange services, who are imposing costs on Level 3 – in the form of
14 transporting traffic to the Internet and providing modem and related functionalities to get those
15 local-exchange-service calls where the end users want them to go.⁵⁴

16 It is no answer to say that Level 3’s ISP customers “cause” the calls. Of course in some
17 abstract sense that’s true, but it’s equally true that a doctor “causes” calls from sick people, a
18 pizza parlor “causes” calls from hungry people, a bank “causes” calls from people who need
19 loans, and this Commission “causes” calls from people complaining about their telephone
20 service. In each case, the existence and nature of the party receiving the traffic provides the
21 subjective *motivation* for the end users to pick up the phone and dial. But we normally assign
22 cost responsibility (and, indeed, all responsibility) on the basis of what people *do*, not what they
23 *feel*. Here, the actual, effective “cause” of the traffic – in the sense of actual behavior, something

24
25 ⁵⁴ The *ISP Remand Order* was very clear that there should be no compensation distinction between Internet traffic
26 and “normal” reciprocal compensation traffic. *Id.* at ¶ 89. Yet Qwest’s proposal would create exactly such a
distinction for VNXX-routed Internet traffic. Even if the Commission thinks that the FCC’s compensation regime
does not literally cover such traffic, the reasons for avoiding separate rates for Internet traffic apply equally here.

1 observable in the world – is the end user deciding to call the doctor, order a pizza, call the bank –
2 or access the Internet.

3 Making Qwest pay \$0.0007/minute for Internet traffic does not result in a “subsidy” –
4 particularly where Level 3 pays for transport from the end office onwards. It simply recognizes
5 that Level 3 is performing a variety of functions at the behest of Qwest’s end users and calls for a
6 very modest contribution by Qwest towards the cost of those functions.⁵⁵ Again, precisely
7 because Level 3 has proposed a fair and reasonable compromise of the competing positions on
8 this issue, the Arizona Commission recently accepted it. This Commission should do so as well.

9 **D. VOIP ISSUES (DEFINITION OF VOIP (ISSUE 16), NEW ISSUE**
10 **RELATED TO “PSTN-IP-PSTN TRAFFIC” DEFINITION) AND QWEST**
11 **ISSUE 1A (SECTIONS 7.2.2.12 AND 7.2.2.12.1).**

12 [and]

13 **E. COMPENSATION FOR VOIP AND VOICE TRAFFIC (ISSUE 4)**
14 **(SECTIONS 7.3.4.1 AND 7.3.4.2) (VOIP ASPECTS OF ISSUES 3A, 3B,**
15 **AND 3C); QWEST ISSUE 1A (VOIP AUDIT AND CERTIFICATION**
16 **REQUIREMENTS) (SECTIONS 7.1.1.1 AND 7.1.1.2).**

17 These issues relate to how to define VoIP traffic and how it should be handled for
18 purposes of intercarrier compensation. Qwest’s language seeks to make two physical locations
19 crucially relevant – the VoIP end user premises and something it calls the “VoIP Provider Point
20 of Presence.” See *Qwest Brief* at 34. Level 3, by contrast, seeks to integrate the definition of,
21 and intercarrier compensation for, VoIP traffic with intercarrier compensation for Internet traffic.
22 Level 3 accomplishes this by proposing that, for purposes of the agreement, the relevant location
23 is the Level 3 POI at which VoIP traffic is exchanged. This will have the effect of causing VoIP
24 traffic to be subject to the FCC’s \$0.0007/minute rate in all cases where the traffic is exchanged
25 at a Primary or Secondary POI within the non-VoIP party’s LCA.

26 ⁵⁵ To quantify this, suppose that a Qwest customer uses dial-up Internet access for 45 minutes per day every day of
a 30-day month. Cf. Tr. I at 82:15-21 (Greene). That’s 1350 minutes per month. At \$0.0007 per minute, Qwest
would pay \$0.945 – less than a dollar – to Level 3 for all of that usage, including hauling it from the local calling
area to Seattle, converting it to IP format, and directing it on to the Internet.

1 As noted in our opening brief, although the regulatory situation surrounding VoIP traffic
2 is not identical to that surrounding Internet traffic, they are in many respects parallel. First and
3 foremost, just as the nature of communications with the Internet makes it impossible to assign an
4 unambiguous “end point” to Internet traffic, so too is it generally very difficult, if not impossible,
5 to know where any particular VoIP user might be.⁵⁶ Qwest waves away these features of VoIP
6 service by assuming that a VoIP provider will have a clear “POP” and by giving that “POP”
7 significance in setting intercarrier compensation rates. *See Qwest Brief* at 31, 35-36.

8 Qwest misunderstands the so-called ESP Exemption, on which it relies for this argument.
9 That exemption says that information service providers may, if they so choose, purchase
10 connections to the PSTN out of intrastate end user business tariffs, even though they are using
11 interstate information access service. *See, e.g., ISP Remand Order* at ¶¶ 11, 55. It does not say
12 that all ESPs must connect to the PSTN by means of such a tariff. Nor does it say that any
13 particular intercarrier compensation obligations result from any particular ESP’s decision
14 whether or not to do so. In this regard, if the ESP exemption meant what Qwest seems to think –
15 that is, the ESP is to be treated as an end user with a physical location at its “POP” – there would
16 never have been any controversy about ISP-bound calls. The FCC would have simply declared
17 all such calls to be “local” or not based on the location of the ISP, and there would have been no
18 reason to establish a separate, special compensation regime for them. Instead, the FCC created a
19 new regime precisely because the location of the ISP is irrelevant. *See ISP Remand Order* at
20

21 ⁵⁶ *See, e.g., Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public*
22 *Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 6429 (2004) at ¶ 9 (“in marked contrast to*
23 *traditional circuit-switched telephony, a call to a [VoIP] number can reach that customer anywhere in the world and*
24 *does not require the user to remain at a single location”); id. at ¶ 24 (VoIP “harnesses the power of the Internet to*
25 *enable ... users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they*
26 *may find a broadband connection, and to manage their communications needs from any broadband connection. The*
Internet’s inherently global and open architecture obviates the need for any correlation between [VoIP service and
[the] end users’ geographic locations”); id. at ¶ 25 (“The geographic location of the ‘termination’ of the [VoIP]
communication is ... difficult or impossible to pinpoint [because of] the inherent capability of IP-based services to
enable subscribers to utilize multiple service features that access different websites or IP addresses during the same
communication session and to perform different types of communications simultaneously”).

1 ¶ 59. This history of how the FCC actually applied the ESP Exemption to ISPs totally
2 eviscerates Qwest’s argument about how the ESP Exemption works, and in particular how it
3 should be applied to VoIP providers.⁵⁷

4 Moreover, as a practical matter, Qwest’s proposals will be impossible to implement.
5 VoIP providers use multiple Internet functionalities, distributed in multiple locations, to provide
6 their services. The equipment providing those functionalities may or may not be anywhere near
7 the point at which VoIP traffic is exchanged with the PSTN. In other words, to the extent that
8 VoIP providers have identifiable “POPs” at all, those locations do not necessarily have any
9 particular technical significance. So, for purposes of intercarrier compensation – the only real
10 disputed issue here – Level 3 submits that it is far superior to focus on a something that the
11 parties *will* know unambiguously – the location of Level 3’s POI with Qwest.⁵⁸

12 It is true that this will result in the overwhelming majority of VoIP traffic being subject to
13 the FCC’s \$0.0007 rate rather than any form of originating or terminating access charges. This is
14 completely appropriate, however, because there is no reason that this traffic should be subject to
15 such charges. As a purely economic matter, calls to or from VoIP users will not entail the
16 collection of toll charges. Thus, there will not be a source of revenues from which payment of
17 access charges could reasonably be funded.⁵⁹

18
19 ⁵⁷ If Qwest wants to be faithful to the ESP Exemption, the appropriate analysis is exemplified by the federal district
20 court’s recent ruling in *SBC v. Missouri Public Service Commission*, *supra*, 2006 U.S. Dist. LEXIS 65536 at [*49] –
21 [*81]. The court found that because VoIP was an information service (due to net protocol conversion), VoIP
22 providers were deemed end users not subject to access charges. It then found that because (a) reciprocal
23 compensation under Section 251(b)(5) applies to all “telecommunications” and (b) CLECs serving VoIP providers
24 supply “telecommunications services” (to get VoIP traffic between the VoIP provider and the ILEC), reciprocal
25 compensation obligations – not access charges – apply to VoIP. This analysis of the ESP Exemption implements its
26 key purpose – protecting information service providers from directly or indirectly being subject to access charges –
without engaging in any fetish about determining precisely where this or that communications function takes place.
The Missouri court’s analysis would, of course, support the result that Level 3 seeks here.

24 ⁵⁸ See *Local Competition Order* at ¶ 1044 (approves use of POI as call rating location for wireless calls).

25 ⁵⁹ As discussed in our opening brief, both legally and economically, access charges are linked to toll charges.
26 Legally, the definition of “exchange access” in 47 U.S.C. § 153(16) requires that it be provided in connection with
“telephone toll service,” which entails a separate toll charge, under 47 U.S.C. § 153(48). Moreover, when the FCC
created access charges in 1983, it relied on its authority under 47 U.S.C. § 201 to divide charges on “through routes”
in which more than one carrier was involved in completing an end-to-end call. Similarly, as an economic (and
(note continued)...

1 **F. LEVEL 3’S PROPOSALS FOR SECTION 7.3.8 ARE APPROPRIATE AND**
2 **SHOULD BE ACCEPTED (ISSUE 20) (SECTION 7.3.8).**

3 Level 3’s proposed language reflects the fact that some VoIP services (such as Skype)
4 have the capability of connecting to the PSTN without having any PSTN telephone number
5 associated with the originating call. As explained in its opening brief, Level 3’s proposed
6 language simply recognizes that this situation exists and ensures that Level 3 is not contractually
7 penalized if it occurs. *See Level 3 Brief* at 46-47. Level 3 rests on that discussion here.

8 **G. THE COMMISSION SHOULD ACCEPT LEVEL 3’S PROPOSED**
9 **LANGUAGE RELATING TO QUAD LINKS (NEW ISSUE) (SECTIONS**
10 **7.2.2.6.1.1, 7.2.2.6.1.2, AND 7.2.6.1.3).**

11 Qwest appears not to understand the purpose of Level 3’s language regarding Quad links.
12 Qwest notes that it is not obliged to provide SS7 signaling as a UNE. *Qwest Brief* at 45-46. But
13 that is not what Level 3 is seeking. Level 3’s language relates to the terms on which the parties
14 will *exchange signaling information* with respect to traffic they exchange – a Section 251(c)(2)
15 issue, not a UNE issue.⁶⁰ If Level 3 provides its own SS7 signaling, the parties have to agree on
16 how to connect their *signaling* networks, just as they need to agree on how to connect their TDM
17 trunks to exchange calls between their customers. Level 3’s language makes clear that they will
18 agree on a “meet point” for their signaling networks to correspond with the POIs for TDM
19 traffic. This is a reasonable concern, and Level 3’s language is a reasonable way to address it.

20
21
22 ...(note continued)

23 historical) matter, the purpose of access charges was to replace the prior, informal system in which the Bell System
24 shared toll revenues with the local companies involved in originating and terminating toll traffic. Where there was
25 (or is) no toll revenue to share, there is no economic reason to think that access charges should apply. So, if there
26 are no toll charges to share in connection with a particular type of traffic, it makes neither legal, nor economic, nor
historical sense to impose access charges on that traffic. *See Level 3 Brief* at 22-24.

⁶⁰ The agreed-to language refers to SS7 signaling in connection with LIS trunks – that is, trunks used for interconnection; the entire issue relates to what Level 3 and Qwest have to do to exchange signaling information associated with the traffic they exchange. To the extent that the language mentions purchasing SS7 signaling from Qwest, it recognizes that that would be a tariffed function, not a UNE.

1 **III. CONCLUSION**

2 For the reasons stated here and in its opening brief, Level 3 urges the Commission to
3 adopt Level 3's proposal regarding cost responsibility and intercarrier compensation for Internet
4 and VoIP traffic; adopt Level 3's proposal regarding combining traffic types on LIS trunk
5 groups; and adopt Level 3's other proposed language, as explained here and in its opening brief.

6 Respectfully submitted this 30th day of October, 2006

7 ATER WYNNE, LLP

8
9 By: /S/
10 Lisa F. Rackner, OSB #87384
11 Amie L Jamieson, OSB #05439
12 Ater Wynne, LLP
13 222 SW Columbia St., Suite 1800
14 Portland, OR 97201
15 E-mail: lfr@aterwynne.com

16 LEVEL 3 COMMUNICATIONS, LLC

17 Rick Thayer, Senior Corporate Counsel
18 Erik Cecil, Corporate Counsel
19 Level 3 Communications, LLC
20 1025 Eldorado Boulevard
21 Bloomfield, CO 80021-8869
22 E-mail: erik.cecil@level3.com

23 Christopher W. Savage
24 Cole Raywid & Braverman LLP
25 1919 Pennsylvania Avenue NW, 2nd Floor
26 Washington, DC 20006-3458
E-mail: chris.savage@crblaw.com

Attorneys for Level 3 Communications, LLC

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VIA ELECTRONIC MAIL AND US MAIL


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Oregon Public Utility Commission
550 Capitol Street NE #215
PO Box 2148
Salem, OR 97308-2148

Re: ARB 665 Level 3 Communications' Reply Brief

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket is an original and five copies of Level 3 Communications' Reply Brief. Please contact me with any questions.

Very truly yours,


Wendy L. Martin

Enclosures

cc: ARB 665 Service List

**CERTIFICATE OF SERVICE
ARB 665**

I hereby certify that a true and correct copy of **LEVEL 3 COMMUNICATIONS
REPLY BRIEF** was served via U.S. Mail on the following parties on October 30, 2006:

Thomas M. Dethlefs
Qwest Corporation
1801 California Street, 10th Floor
Denver CO 80202

Alex M. Duarte
Qwest Corporation
Suite 810
421 SW Oak Street
Portland OR 97204

ATER WYNNE LLP


Wendy L. Martin