

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>LEVEL 3 COMMUNICATIONS, LLC,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="text-align:center">vs.</p> <p>QWEST CORPORATION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. ARB-05-4</p>
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ORDER ON RECONSIDERATION

(Issued July 19, 2006)

SUMMARY¹

Level 3 has requested reconsideration of the Arbitration Order the Board issued in this matter on December 16, 2005. While a number of issues are raised, many of them are related to the fact that Level 3 wants to offer VNXX services in Iowa and would prefer an interconnection agreement that makes VNXX service possible on an economical basis. The Board has considered VNXX traffic in previous dockets and has consistently expressed a concern that VNXX allows a CLEC to use the ILEC's network to carry interexchange traffic without compensation to the ILEC. The Board has also indicated that VNXX service could be allowed if this intercarrier compensation issue were addressed. In this docket, Level 3 has proposed to address the compensation issue by either (1) requiring that Qwest make a payment to Level 3 for every minute of traffic delivered or (2) exchanging the traffic on a bill-and-keep basis. The Board finds that these proposals fail to properly address the Board's concerns in any meaningful way. Accordingly, the Board will not change the principle points of its Arbitration Order as a result of this reconsideration.

This order also addresses all 17 of the Tier II issues, that is, issues that have been described as being derivative of the more significant Tier I issues.

¹ This summary is provided solely for the convenience of the reader. It is not an official part of the Board's order and does not limit, alter, or affect the Board's actual decision in any way.

PROCEDURAL HISTORY

On June 3, 2005, Level 3 Communications, LLC (Level 3), filed a petition for arbitration of unresolved terms in an interconnection agreement between Level 3 and Qwest Corporation (Qwest). On June 13, 2005, the Utilities Board (Board) issued an order docketing the matter for arbitration.

On June 21, 2005, Level 3 and Qwest jointly filed a waiver of the time deadlines of 47 U.S.C. § 252(b)(4)(C) and a joint scheduling proposal. The proposed procedural schedule extended beyond the time period within which a decision would normally need to be made pursuant to 47 U.S.C. § 252(b)(4)(C). As such, the parties waived their rights to have the Board rule on the petition for arbitration within the time frame established by the federal statute. On June 30, 2005, the Board issued an order accepting the parties' joint waiver and establishing a procedural schedule.

On December 16, 2005, the Board issued an arbitration order resolving the issues identified as "Tier I issues" by adopting Qwest's proposed language. The Board directed the parties to derive the resolutions of the Tier II issues from the Board's Tier I decisions.

On January 5, 2006, Level 3 filed an application for reconsideration. Level 3 requested additional briefing and oral argument but did not request that any additional evidence be heard. Qwest filed a response on January 19, 2006, resisting Level 3's application. On February 24, 2006, the Board issued an order granting Level 3's request for additional briefing but denying the request for oral argument. Briefs were filed on March 27 and April 10, 2006.

On June 30, 2006, Level 3 made a filing which it described as "proposed settlement language." The filing consisted of a revised Disputed Points List reflecting a settlement package that Level 3 says it is now proposing. The Board has not reviewed the package in detail, but understands that Level 3 is proposing to accept Qwest's position on some issues if Qwest will accept Level 3's position on other issues. However, Qwest has not agreed to this package. Moreover, Level 3 presents its proposal only as a package; if it is not accepted in full, "Level 3 maintains its objections as set forth in the Disputed Points List that Level 3 previously offered to the Commission." (June 30, 2006, cover letter at page 2.)

Level 3 also submitted a copy of a June 9, 2006, order from the Washington Utilities and Transportation Commission² and a copy of a June 30, 2006, decision of the U.S. Court of Appeals for the D.C. Circuit.³

On July 10, 2006, Qwest filed a response to Level 3's filing, emphasizing that the parties have not reached a settlement, disputing Level 3's interpretation of the orders from the D.C. Circuit and the Washington commission, and asking the Board to strike the filing from the record.

The Board will not consider Level 3's proposed settlement offer. While the Board encourages parties to continue to negotiate even after a case has been submitted for decision, the Board is only interested in actual settlements, not

² "Order Denying Petition for Reconsideration," issued June 9, 2006, in Level 3 Communications, LLC, v. Qwest Corporation, WUTC Docket UT-053039.

³ In re: Core Communications, Inc., Case No. 04-1368.

unilateral statements and packages presented on a "take it or leave it" basis, without any indication of the other party's position. If the Board were to consider Level 3's new settlement package, it would be necessary to allow Qwest an opportunity to consider and respond to it more fully. Level 3 might then expect an opportunity to reply to Qwest, and it might even be necessary to hold additional hearings on the matter to resolve new fact issues arising from Level 3's new contract proposal. The Board cannot allow this untimely interference with its decision-making process; the record closed when the hearing ended and the issues are what they were at that time.

I. Single Point of Interconnection Issues

This issue involves three subissues. These are the right to a single point of interconnection (POI), the cost recovery associated with a single POI, and the possible use of a Relative Use Factor (RUF) to divide certain costs. Each subissue will be discussed separately.

A. Right to a single POI

1. Level 3 arguments and Qwest responses

Level 3 argues that pursuant to Federal law it has an unconditional right to a single POI at its option. Level 3 avers that Qwest's proposed language would require that Level 3 establish separate physical facilities to each tandem if there is more than one tandem per Local Access and Transport Area (LATA), leaving open the possibility of additional POIs and circumventing Level 3's right to a single POI. (Level 3 Initial Brief at page 3, hereinafter "In. Br. p. 3.") Level 3 further states that the

Board's order permits a unified interconnection arrangement only by using Feature Group D (FGD) trunks and not Local Interconnection Service (LIS) trunks. Level 3 states this confuses the single POI issue because it is not clear that Qwest would have to provide connections for traffic aggregated on trunks other than LIS trunks.

Level 3 states that the single POI that Qwest envisions will not allow Level 3 to avoid paying access charges. Level 3 will be required to have a physical presence in every Qwest local calling area (LCA).

Level 3 says that any contract language that puts pressure on Level 3 to establish multiple POIs helps enshrine Qwest's legacy network architecture to the detriment of new competitors, especially those based on IP-voice service competition. Level 3 points to the testimony of Professor Hatfield in a Wyoming arbitration hearing, asserting that the right to a single POI should not be weighted down by additional terms and conditions that would have the effect of eviscerating the right. (In. Br. pp. 4-5.)

Qwest states that Section 7.1.1 of its proposed language gives Level 3 the right to request interconnection at a single point within Qwest's network within a given LATA and imposes on Qwest the obligation to provide it, assuming it is technically feasible. Qwest says it appears Level 3 is complaining that Qwest's proposed Section 7.1.2 does not say that this right is unconditional and at Level 3's option. Qwest states that the right to single POI exists only if it is technically feasible and if the Competitive Local Exchange Carrier (CLEC) compensates the Incumbent Local

Exchange Carrier (ILEC) for the provisioning of a technically feasible, but more expensive single POI. (Qwest Reply Brief at page 1, hereinafter "Reply p. 1.")

Qwest says that Level 3 has ignored Qwest's testimony stating that not all of Qwest's access tandems are connected to each other, making it technically infeasible to interconnect and deliver traffic at one tandem if the traffic is meant for customers served by another tandem. Qwest is concerned that Level 3's language could cause Qwest to incur burdensome interconnection costs if it has to connect its tandems without compensation. (Reply p. 2.)

Qwest states that Level 3's right to a single POI per LATA does not relieve Level 3 from the obligation to pay access charges for intraLATA long distance calls. The Federal Communications Commission (FCC) has stated, "access charges are not affected by our rules implementing section 251(c)(2) ..." pertaining to interconnection.⁴

Qwest says that the testimony provided by Level 3's witness Mr. Hatfield in a Wyoming arbitration actually undermines Level 3's argument. Mr. Hatfield never reviewed either of the parties' proposed contract language in the Wyoming proceeding, so there is no connection between his general testimony and the actual language proposed by the parties. (Reply p. 3.)

Qwest says it is industry standard practice that direct end office trunking will be established when the traffic volume between a tandem and an end office reaches

⁴ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC RCD 15499, ¶176 (1996) (*Local Competition Order*).

512 Centi Call Seconds (CCS). This threshold standard is used to determine the trunking arrangements established to the point of interconnection and is necessary to prevent switch exhaust. Qwest states that Level 3, in its testimony, does not dispute this need but has deleted this requirement from Section 7.2.2.9.6, effectively eliminating the direct end office trunking requirement. Qwest states that Level 3's proposed modifications to this section should be rejected. (Reply p. 4.)

2. Qwest arguments and Level 3 responses

Qwest asserts that its proposed language is the standard language from its Statement of Generally Available Terms (SGAT) and does not contain the numerous disclaimers that were included in Level 3's proposed language. (In. Br. p. 2.)

Qwest also says that a single POI is not an absolute right under the Act. Qwest states that there are two limitations to this right. The first is that a CLEC is entitled to single POI only if it is technically feasible. Level 3's proposed language did not include this limitation. (In. Br. pp. 2-3.)

Qwest states the second limitation is that § 252(d)(1) of the Act includes an obligation to compensate the ILEC for the costs of providing a single POI. Further, the FCC held in its *Local Competition Order* that "a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of the interconnection, including a reasonable profit."⁵ Qwest states that Level 3's proposed language ignores this compensation

⁵ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC RCD 15499, ¶ 199 (1996).

requirement and instead provides that each party must bear all of the costs on its side of the point of interconnection. (In. Br. p. 3.)

Qwest also says that the rules relating to single POI and access charges are not linked. Access charges are based on the location of the parties to the call, not the location of the POI. (In. Br. pp. 3-4.)

Level 3 states that contrary to Qwest's assertion, Section 7.1.1.1 of Level 3's proposed language addresses technical feasibility: "The SPOI may be established at any mutually agreeable location within the LATA, or, at Level 3's sole option, at any technically feasible point on Qwest's network." (Reply pp. 5-6.)

Level 3 states that each party is responsible for the costs it incurs on its side of the meet point and that meet point interconnection is the only kind Level 3 wants. Level 3 says its contract language makes this clear and is consistent with 47 C.F.R. § 51.5. Level 3 says the Board issued interconnection arbitration orders in Docket Nos. ARB-05-2 and ARB-05-3 in which the Board stated that each carrier pays all of its own costs on its side of the POI. Thus, Level 3 concludes, the Board issued an inconsistent decision in this case and should reconsider Qwest's language. (Reply pp. 7-8.)

3. Analysis

In its arbitration order, the Board stated that each party agreed that the Telecommunications Act of 1996 (Act) allows Level 3 to interconnect with Qwest's network at a single POI per LATA at any technically feasible point. The Board noted

that Qwest's language provides for a single POI and also provides additional flexibility if there is a legitimate, reasonable need for more than one POI.

Both the language of the Act and the FCC's *Local Competition Order* indicate that Level 3 has the right to designate the location of the POI for the exchange of local traffic. The FCC's *Local Competition Order* gives competing carriers, such as Level 3, the ability to choose the most efficient point to exchange traffic with the incumbent, Qwest. Contrary to Level 3's assertions, the Board has applied consistent logic and has come to the same conclusion in each arbitration. Qwest's language is consistent with this analysis. Therefore, the Board will not change its original arbitration order with respect to single POI issues. The arbitrated interconnection agreement should use Qwest's language on all single POI issues.

Qwest also states that there may be instances where direct end office trunking should be established when the traffic volume between a tandem and an end office reaches a certain level. This threshold standard is used to determine the trunking arrangements established to the point of interconnection and is necessary to prevent switch exhaust. Level 3 never disputed this point. Thus, there may be a legitimate need for multiple POIs in some situations. Qwest's language provides the flexibility to handle these potential situations. There is no provision for these situations in Level 3's proposed language.

Level 3 wishes to interconnect in a manner that will allow it to avoid access charges. This is the underlying reason that Level 3 has opposed the use of FGD trunks for the POI, as opposed to LIS trunks. Qwest states that rules relating to

single POI and access charges are not linked. The Board finds Qwest's analysis more persuasive as Section 251(c)(2) clearly addresses local traffic, not interexchange traffic.

Level 3 relied upon the testimony of Professor Hatfield in an arbitration case in Wyoming to the effect that a single POI should not be weighed down by additional terms and conditions that would have the effect of eviscerating that right to a single POI. (In. Br. pp. 4-5.) Qwest countered that when offering that testimony, Professor Hatfield had not reviewed Qwest's proposed language to see whether it included additional terms and conditions that might have that undesirable effect. (Reply p. 3.) The Board does not find references to Professor Hatfield's testimony in another state's arbitration proceeding to be persuasive in this docket, particularly when he did not have the opportunity to review the language at issue to see if there were any terms and conditions that would be detrimental in the manner he described.

B. Cost of interconnection

1. Level 3 arguments and Qwest responses

Level 3 claims that the Board's arbitration order did not provide a clear ruling that Level 3 should not be charged for the facilities and services Qwest uses to deliver Qwest-originated traffic to the POI. Level 3 states that the Board's order discussed the different types of interconnection but not the differences in the compensation schemes. This could lead to Qwest charging Level 3 for Qwest-originated traffic, according to Level 3.

Level 3 states the Board reached a policy decision in its July 22, 2005, order in *LTDS v. Iowa Telecom*, Docket No. ARB-05-3, in which the Board ordered that each party pay 100 percent of the trunking and transport costs on its side of the POI.

Level 3 asserts that language was not limited to a certain type of interconnection and that the Board's analysis was based on defaulting to bill-and-keep arrangements.

Level 3 then says that the Board did not apply the same analysis and result in this docket. Level 3 requests the order in this docket be revised to comply with the Board's prior precedent and with the FCC's *Local Competition Order* at ¶ 553.

(In. Br. pp. 7-8.)

Level 3 takes issue with the Board's analysis stating that ISP-bound and VoIP traffic are "information access" traffic. Level 3 says this is inconsistent with the Board's "*Order in Lieu of Certificate*" issued to Level 3 in TF-05-31. Level 3 states that in that order the Board found Level 3's voice offering to be a wholesale telecommunications service. As such, Level 3 is providing telecommunications services to its customers and the traffic exchanged with Qwest is telecommunications traffic. (In. Br. p. 8.)

Qwest responds that the applicable federal rule requires that the CLEC compensate the ILEC for the costs incurred to provide interconnection. (See *Local Competition Order*, ¶¶ 199-200). Qwest says that the disclaimer Level 3 proposes, that each party would be responsible for costs on its side of the POI, is not applicable to various provisions in dispute. These include the manner of interconnection, termination of traffic, bill-and-keep arrangements, and recovery of interconnection

costs for installing or rearranging LIS trunks. None of these provisions discuss compensation for the origination of traffic. (Reply pp. 4-5.)

Qwest states that, contrary to Level 3's assertion, the only interconnection arrangement where each party bears all costs on its own side of the POI is the mid-span meet arrangement. Qwest also refers to the *Local Competition Order* at ¶ 553 and says this paragraph refers to only the costs for the facility that is built out to the point of interconnection. (Reply p. 5.) Interconnection through a mid-span meet and through collocation are not the same, as the FCC has listed them separately in the *Local Competition Order* at ¶ 553. (Reply p. 6.)

Qwest says there is a presumption of a mutual exchange of traffic through a mid-span meet point, but that presumption does not apply here, as Level 3 is focusing on serving Internet service providers (ISPs) (which tend to receive far more traffic than they originate). Qwest says that the *LTDS v. Iowa Telecom* arbitration does not support Level 3's position, as the parties to that arbitration had a pre-existing interconnection arrangement where each party agreed to pay 100 percent of the trunking and transport costs on its side of the point of interconnection. (Reply p. 6.)

Qwest states that the Board was correct to adopt Qwest's language regarding the three types of interconnection, as there is no pre-existing agreement in this case and all three interconnection arrangements may be necessary at some time. Thus, the *LTDS v. Iowa Telecom* decision does not constitute precedent that is applicable, let alone binding, in this proceeding. (Reply pp. 6-7.)

2. Qwest arguments and Level 3 responses

Qwest argues that its proposed language addresses the different types of interconnection (collocation, entrance facilities, and mid-span meet) and that each has its own compensation scheme, consistent with applicable law. Level 3's proposed language does not address these types of interconnection or the compensation schemes for each and should therefore be rejected. (In. Br. p. 4.)

Qwest also says that Level 3 has placed disclaimers of responsibility for the costs incurred by Qwest throughout its proposed language in the apparent hope that if one of the disclaimers is adopted, Level 3 would be shielded from costs for which it should be responsible. Qwest states these disclaimers are inconsistent with federal law.

Qwest further argues that the cases that Level 3 relies on make this exact point. In *U S WEST Communications v. Jennings*, 304 F.3d 950 (9th Cir. 2002) and *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3rd Cir. 2003), the Ninth Circuit and Third Circuit noted that costs could be shifted from the ILEC to the CLEC when the CLEC's desired interconnection points prove to be more expensive to the ILEC. (In. Br. pp. 5-6.)

Level 3 did not directly respond to the cost issue under a separate section but indirectly included some discussion under the Single POI issue in its brief, summarized in the preceding section.

3. Analysis

The Board's arbitration order stated that Level 3 and Qwest agreed that each party is responsible for costs on its side of the meet point if a mid-span meet point is used. The order also stated that it appeared that Level 3 applied the meet point analysis to all types of interconnection, whereas Qwest's proposed language recognized that there are other types of interconnection, that each has its own compensation scheme, and that § 251(c)(2)(b) of the Act requires Level 3 to compensate Qwest for certain interconnection costs, depending upon the type of interconnection used.

The Board will not change the arbitration order with respect to these cost responsibility issues. The arbitrated interconnection agreement should use Qwest's language on all cost responsibility issues.

Level 3 has attempted to rationalize all three different types of interconnection as variants of the mid-span meet point method. This is the only method of interconnection Level 3 addresses in its proposed language. Level 3 relies on the *Local Competition Order* at ¶ 533 for this interpretation. However, as Qwest points out, in the paragraph cited the FCC recognizes that collocation is different from the mid-span meet point method. While Level 3 may currently intend to use only the mid-span form of interconnection, the Board finds it would be prudent for the initial agreement to address the other arrangements and the corresponding cost responsibilities under each of these methods, even though they may not be used. This should help to reduce or eliminate future disagreements between the parties.

Level 3 states the Board made a policy decision in *LTDS v. Iowa Telecom* in which the Board ordered a contract provision that said each party must pay 100 percent of the trunking and transport costs on its side of the POI. (In. Br. pp. 7-8.) Qwest counters that the decision in *LTDS* was based on a pre-existing interconnection arrangement where each party agreed to pay 100 percent of the trunking and transport costs on its side of the point of interconnection, as each used 50 percent of the trunk capacity connecting their respective switches. Thus, according to Qwest, the present docket is distinguishable from *LTDS*. The Board agrees; in particular, that decision was based on the provisions of a pre-existing interconnection agreement that has no counterpart in this docket.

C. Relative Use Factor (RUF)

1. Level 3 arguments and Qwest responses

Level 3 states that with a meet point interconnection, a RUF does not apply. However, Level 3 also believes that its proposed language, which makes this point even more clear, should have been adopted. Level 3 says that the adoption of Qwest's proposed language presents two problems. (In. Br. pp. 8-9.)

First, under Qwest's language there will be disputes because Qwest may try to assess traffic origination charges, including charges imposed under the guise of the RUF, contrary to federal law, notably 47 C.F.R. §§ 51.703(b) and 709(b). The parties should be directed to establish language that clearly reflects the Board's ruling. (In. Br. p. 9.)

Second, Level 3 states, if the parties establish an interconnection where the RUF might apply, Qwest's proposed language does not comply with 47 C.F.R. § 51.709(b). Level 3 states that this FCC rule only allows Qwest to charge Level 3 based on the amount of capacity that Level 3 uses to send traffic to Qwest over those facilities. (In. Br. pp. 9-10.)

Level 3 states that the Board's analysis of this issue relied almost exclusively on an earlier ruling in Re: AT&T Communications of the Midwest, Inc., vs. Qwest Corp., Docket No. ARB-04-1, rather than any analysis of Rule 51.709(b). Level 3 argues that the Board's previous ruling does not support the Board's decision here. The previous decision concerned the application of RUF language to private lines, but Level 3 does not propose to purchase Qwest private lines to establish connections between Qwest end office switches and Qwest tandems for the purpose of accepting Qwest-originated traffic. (In. Br. pp. 10-11.)

Qwest responds that the underlying principle in this discussion is the FCC's statement that "[t]he amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility." (*Local Competition Order* at ¶ 1062.) Qwest proposed language for a RUF while Level 3 stated that a RUF should be used for shared facilities but did not propose any language. (Reply p. 7.) Qwest's language is consistent with FCC Rules 703(b) and 709(b), which are included in the rules addressing the transport and termination of "telecommunications traffic." Telecommunications traffic is defined by the FCC to exclude "interstate or intrastate exchange access" and "information access" pursuant to Rule 701(b).

Qwest says ISP traffic is “information access” and VNXX traffic is “interstate or intrastate exchange access.” (Reply pp. 7-8.)

Qwest says that the exclusion of ISP traffic from the definition of “telecommunications traffic” allows the cost of Internet service to be borne by the customers who make calls to ISPs. Qwest says the Colorado Public Utilities Commission recognized that when a caller dials his or her ISP, the caller is acting primarily as a customer of the ISP.⁶ Qwest states that virtually all of the exchanged traffic is one-way traffic from ISP customers on Qwest’s network to ISPs on Level 3’s network. Qwest believes the ISPs should bear the full cost of providing Internet service and the proposed RUF makes the terminating carrier responsible for ISP traffic so that the costs of providing service to ISPs is ultimately borne by the cost-causing customers of the ISPs. Qwest believes Level 3’s proposed language will cause it or its ratepayers to bear these costs. (Reply pp. 8-9.)

2. Qwest arguments and Level 3 responses

Qwest says that proposed RUF language is necessary and appropriate because at some time during the term of this agreement Level 3 may desire a form of interconnection to which the RUF properly applies. The proposed language is

⁶ In its Arbitration Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, the Colorado Commission stated the following in ¶ 20:

We find Qwest’s ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and

substantially identical to the language in Qwest's SGAT. Qwest says that while Level 3 may not currently intend to use forms of interconnection to which the RUF would apply, its witness testified that a direct trunk group between an end office and Level 3 may be established when traffic reaches a reasonable volume and that the cost of those facilities would be split based on relative use. (Tr. 32-34.)

Qwest also takes issue with Level 3's assertion that the RUF language contravenes FCC Rule 709(b). Qwest states that Rule 709(b) does not apply, as the traffic at issue is ISP traffic and ISP traffic does not fall under the FCC's definition of "telecommunications traffic." (In. Br. p. 7.) According to Qwest, the FCC found that ISP-related traffic "falls under the rubric of 'information access'" in its *ISP Remand Order*.⁷ Qwest further states that information access is specifically excluded from the definition of telecommunications traffic. (In. Br. p. 7.)

Qwest further states that the Colorado federal district court has held that the term "traffic" in Rule 709(b) refers only to telecommunications traffic and that this point was reaffirmed last year.⁸ (In. Br. p. 7.)

Level 3 responds that the basic rule, 47 C.F.R. § 51.703(b), is that one carrier cannot charge to send traffic to an interconnected carrier and that the Board followed

Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.

⁷ "Order on Remand and Report and Order," *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

⁸ *Level 3 Communications v. Colorado Pub. Util. Comm'n*, 300 F. Supp.2d 1069, 1078 (D. Colo. 2003) (*Level 3 Decision*) and *AT&T v. Qwest Corporation*, Civil Action No. 04-cv-00532-EWNOES, at 22-26 (D. Colo. 2005).

this rule in the recent Sprint arbitration decision in Docket No. ARB-05-2, et al.

Level 3 says this rule also applies to the physical facilities and trunking used to send traffic back and forth. (See 47 C.F.R. § 51.709(b).)

Level 3 describes Qwest's position as follows: (1) the FCC defined "telecommunications traffic" in a way that excludes ISP-bound traffic; (2) the rule banning charges for facilities used for outbound traffic – 47 C.F.R. § 51.709(b) – is in the same part of the rules as the definition of "telecommunications traffic"; (3) the ban on charging for facilities used to carry outbound traffic does not apply to ISP-bound traffic; and (4) a charge should therefore be made for those facilities when they carry ISP-bound traffic. Level 3 argues that points (3) and (4) are wrong. Level 3 argues that Rule 709(b) applies to "traffic" without limitation and that a proper reading is that Qwest cannot charge Level 3 for inter-network facilities, except to the extent that Level 3 uses them to send traffic to Qwest. Level 3 also states that the Colorado district court is simply wrong on this point. (Reply pp. 9-10.)

Level 3 also states that Qwest's interpretation is in conflict with the *ISP Remand Order* at ¶ 90, where the FCC said there was no reason to impose different rates for ISP-bound and voice traffic and that the FCC was unwilling to take actions resulting in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic. Level 3 states that Qwest never showed that it incurred any costs or provided factual, economic, or legal justification for the Board to change the concept of "calling network pays" in arbitrations involving Level 3, but not for other carriers. (Reply pp. 10-11.)

3. Analysis

In the arbitration order, the Board noted that the parties agree that RUF does not apply to a mid-span meet point but that a RUF can be used to allocate the cost of jointly-used facilities, entrance facilities, and direct-trunked transport. The order also stated that ISP traffic should be excluded from RUF calculations as there is nothing in this record to change the Board's previous determination on this point, made in Docket No. ARB-04-1.

Level 3's argument centers on two claims. The first is that Qwest and the Board have misinterpreted federal law. The second is that the Board's decision regarding the RUF is not consistent with the decision reached in Docket No. ARB-04-1. Level 3 states that Qwest has misinterpreted FCC Rule 709(b) when Qwest says that the ban on charging for facilities used to carry outbound traffic does not apply to ISP-bound traffic and a charge should therefore be made for those facilities when they carry ISP-bound traffic. (Reply pp. 9-10.)

The Board's review of the FCC rules shows Rule 701 to be the first rule under the caption "Subpart H—Reciprocal Compensation for Transport and Termination of telecommunications Traffic." This section excludes interstate or intrastate exchange access and information access from the definition of telecommunications traffic. Rules 703(b) and 709(b) follow under the same Subpart H. It is reasonable to conclude that references to telecommunications traffic in subsequent paragraphs under the same subpart should have the same definition. This construction is consistent with Qwest's interpretation and proposed language. Contrary to Level 3's

assertion, this construction is also consistent with the decision the Board made in Docket No. ARB-04-1.

Even though Level 3 does not currently propose to use any form of interconnection that would trigger the RUF, the RUF language should be included in the agreement because the parties may use different forms of interconnection in the future. The inclusion of the RUF should help avoid future compensation problems if one of the other interconnection methods is used. For this reason, the Board will not change its original arbitration order with respect to the inclusion of RUF language. The arbitrated interconnection agreement should use Qwest's language on all RUF language issues.

II. Commingling of switched access traffic with local traffic

A. Level 3 arguments and Qwest responses

Level 3 says it wants to avoid wasteful duplication of facilities and combine both access and local traffic on LIS trunks. Level 3 says the Board's decision to approve Qwest's language that allows for combined traffic over FGD trunks is wrong for at least three reasons.

First, interconnection under Section 251(c)(2) exists for the purpose of exchanging both "telephone exchange service" and "exchange access" traffic. Level 3 states that Qwest has an obligation to make changes in its network to recognize changes in the industry. (In. Br. pp. 12-13.)

Second, FCC Rule 51.305(c) states that interconnection is technically feasible in networks employing substantially similar facilities. Level 3 testified that it reached

agreement in 36 states to exchange all traffic over a single set of interconnection trunks and that the burden is on Qwest to show why LIS trunks are infeasible.

Third, Qwest's SGAT in several states shows language quite similar to Level 3's proposals for allowing exchange of traffic over LIS trunks. (In. Br. pp. 14-15.) Qwest should be required to explain why the SGAT language does not present the same problems as Level 3's proposed language.

Finally, Level 3 states its recently-completed arbitration in the state of Washington allows for the use of LIS trunks.⁹ If there really are billing problems with LIS trunks, Level 3 maintains there are several solutions. Level 3 states that testimony from Re: Transit Traffic, Docket No. SPU-00-7, identified three methods by which commingled traffic for the rural LECs can be identified.¹⁰ (In. Br. pp. 13-14.) Qwest should be required to show why the same alternatives will not work here.

Qwest responds that Level 3 can terminate all traffic types over FGD interconnection trunks. Qwest states that LIS trunks cannot properly record switched access traffic and this is a particular concern in this case because Level 3 has just purchased Wiltel, a major interexchange carrier. Qwest believes that this purchase will substantially increase the volume of interexchange traffic Level 3 delivers to Qwest.

Qwest argues that Level 3's interconnection rights under § 251(c) are limited to "telephone exchange service" or "exchange access" and do not include

⁹ *Level 3 Communications, LLC v. Qwest Corp.*, Dk. UT-053039, Order No. 5, Order on Interlocutory review (WUTC, Feb. 10, 2006).

interexchange traffic the CLEC wishes to terminate on the ILEC's network. Qwest states that if Level 3 wants to include all traffic on one type of trunk, then the trunk should be one that can record all types of traffic. (Reply pp. 9-10.)

Qwest argues that Section 251(g) governs interconnection for the purpose of originating or terminating long distance calls. This section requires Qwest to provide interconnection to IXCs on a nondiscriminatory basis. (Reply pp. 10-11.)

Qwest avers that Rule 51.305 parallels § 251(c)(2) and addresses only whether interconnection at a particular point is technically feasible. It does not give a CLEC the right to deliver switched access traffic over LIS trunks. (Reply p. 11.)

Qwest states that the reason behind Level 3's request is Level 3's desire to avoid access charges. Level 3 claims that all VoIP traffic is exempt from such charges and that access charges should not apply to long distance calls made to ISPs.

In response to Level 3's claim that it combines traffic in 36 other states, Qwest argues that Level 3 did not provide any evidence that the interconnection trunks Level 3 has established in those states lack the capability to properly record switched access traffic. (Reply p. 12.) In other words, Qwest says those trunks may have measurement capabilities that LIS trunks do not offer; the record is, at best, unclear on this question, so the situation in the other states is not shown to be comparable to this one.

¹⁰ Those methods are direct trunking, the use of the JIP parameter, and the use of category 11-05-21 records.

Qwest also disagrees with the three solutions Level 3 proposes to implement if LIS trunks are used and measurement is not possible, as derived from the record in the Transit Traffic case. Qwest states direct trunking is not viable because Level 3 has not committed to establishing direct trunking with every independent telephone company to which traffic would be delivered. Qwest argues that industry standards do not require the jurisdictional identification parameter (JIP parameter) to be populated, so it may not always provide the necessary information, and that category 11-05-21 records are not useful for this purpose because Qwest develops these records from FGD trunks. (Reply pp. 12-13.) Without FGD interconnection, the input necessary to develop the records will be unavailable.

Qwest states that Level 3 has erroneously interpreted Qwest's SGATs from other states. Qwest says that Section 7.2.2.9.3.1 of the SGAT refers to LIS trunks and is the same language as Qwest proposed in this arbitration; Section 7.2.2.9.3.2 does not refer to LIS trunks; and Section 7.2.2.9.3.2 allows for traffic to be combined on the same trunk group but this is done using FGD interconnection trunks throughout Qwest's territory. (Reply p. 13.)

Qwest also addressed the Washington commission's decision. Qwest argues that the Washington commission declined to address the propriety of VNXX and reserved that issue for a separate proceeding. There was no decision to allow the use of LIS trunks in that state. (Reply p. 13.)

B. Qwest arguments and Level 3 responses

Qwest recognizes that Level 3 would like to be allowed to combine all traffic types, including switched access traffic, over the same interconnection trunks. Qwest has offered FGD interconnection trunks to handle this request, while Level 3 insists on using LIS trunks. Qwest says LIS trunks cannot record switched access traffic, whereas FGD trunks can, because of the software in the switch.

Qwest argues there are two reasons to send switched access traffic over FGD trunks. First, it would allow Qwest to provide industry-standard terminating records to independent telephone companies and CLECs. This would allow these companies to bill Level 3 for traffic delivered to them. Qwest states that Level 3's proposal of a new system of billing factors would force all other parties to rework their billing systems. Qwest also states that all other carriers use FGD trunks for this switched access traffic. (In. Br. p. 9.)

Second, Level 3 will achieve the trunk efficiencies it seeks by using the FGD trunks and this will negate Level 3's attempt to evade access charges applicable to switched access traffic. (In. Br. pp. 9-10.)

Level 3 states the use of FGD trunks is more expensive or would cause Level 3 to set up a dual-trunked network with both LIS and FGD trunks. (Reply p. 12.) Either option would force Level 3 to incur greater expense.

Level 3 states other large ILECs handle combined traffic on one trunk and if detailed records are not available, traffic allocation factors can be developed. Level 3

states that the burden should be on Qwest to prove it is technically infeasible to use LIS trunks.

Level 3 states that § 251(c)(2)(A) says that an ILEC has to offer interconnection for both “telephone exchange service” and “exchange access” traffic. Level 3 states that the way Qwest interprets this section, a carrier like AT&T or MCI could not go to Qwest and connect using LIS trunks instead of FGD trunks for toll traffic. (Reply p. 13.)

C. Analysis

In its arbitration order, the Board found that Level 3 wants to commingle all forms of traffic on LIS trunks, including switched access traffic that is subject to access charges. Qwest argued that LIS trunks do not provide the functions required for proper rating and for generating billing reports that it supplies to rural LECs; that LIS trunks are not set up to handle switched access service; certain types of VoIP traffic would be difficult to handle; and costly overhauls to Qwest’s and other’s billing systems would be required. The Board’s decision was to approve Qwest’s proposed language.

Level 3 states that billing problems related to using LIS trunks could be resolved by one of three methods discussed in the record of In Re: Transit Traffic, Docket No. SPU-00-7. These methods were direct trunking, use of the JIP parameter, and the use of 11-05-21 reports. Qwest countered that Level 3 has not committed to direct trunking with every independent company, that there was no

industry standard for populating the JIP parameter, and that Qwest uses the FGD trunks for deriving the 11-05-21 reports.

Based on this record, the Board is persuaded that Level 3's proposed solutions to the LIS trunk measurement problems will not work in these circumstances. Level 3 has not committed to use direct trunking in all circumstances where it would be required or appropriate. The use of the JIP parameter would require that all affected companies populate and use the JIP parameter for this purpose, even if they are not parties to this proceeding. It also appears that Qwest's LIS trunks are not capable of deriving the information required to prepare the 11-05-21 reports, so the reports would not be useful for this purpose.

Level 3 says that interconnection under § 251(c)(2) exists for the purpose of exchanging both "telephone exchange service" and "exchange access" traffic. (In. Br. p. 12.) Qwest counters that Level 3's interconnection rights under § 251(c) are limited to "telephone exchange service" or "exchange access" traffic and do not include interexchange traffic the CLEC wishes to terminate on the ILEC's network. (Qwest Reply p. 9.) Qwest cites the following FCC language in support of its argument:

[A]ll carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls).

We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of

telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).

(*Local Competition Order* ¶¶ 190-91.) Thus, the FCC has recognized a clear separation between interexchange and non-interexchange traffic for purposes of § 251(c)(2).

Qwest also argues that § 251(g) governs interconnection for the purpose of originating or terminating long distance calls and that section requires Qwest to provide interconnection to IXCs on a nondiscriminatory basis. That section states:

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

The Board finds this language supports Qwest's position that it is required to provide interconnection to interexchange carriers (IXCs) on a nondiscriminatory basis and charge Level 3 the same charges applicable to other IXCs. Based on the record, this commingling of traffic on LIS trunks and the subsequent billing and recordkeeping cannot be done if LIS trunks are used for interconnection; that means that if Level 3 intends to commingle traffic, it will have to do so on FGD trunks, as other CLECs do.

Level 3 argued that it has agreements in 36 other states where LIS trunks are used to commingle all types of traffic, including switched access traffic, showing that it is technically feasible to do so. Qwest countered that Level 3 did not show whether those LIS trunks have capabilities that allow them to handle the proper recording of switched access traffic. The issue here is whether Qwest's LIS trunks have those capabilities, not whether some other ILEC's LIS trunks (or equivalent) have them.

The Board will make no change in the Board's original arbitration order with respect to commingled traffic on Feature Group D trunk issues. The arbitrated interconnection agreement should use Qwest's language on all commingled traffic issues.

III. VNXX Traffic Issues

A. Level 3 arguments and Qwest responses

Overall, Level 3 is arguing that VNXX service should be permitted under this interconnection agreement and the traffic should be treated like local calls and handled either pursuant to the FCC's ISP Remand Order (in which case Qwest will pay Level 3 \$0.0007 for each minute Qwest delivers to Level 3) or under the Board's bill and keep rule. Qwest responds that VNXX should not be permitted in Iowa. Various arguments and sub-arguments are presented, as identified by the headings below.

Relationship to Qwest's "OneFlex" service. First, Level 3 argues that Qwest's "OneFlex" service, a VoIP-based service, is actually VNXX service, so if VNXX is not allowed in Iowa, OneFlex should be shut down. (In. Br. p. 16.) Level 3 admits its

proposed service is not technically identical to Qwest's OneFlex, but argues the services are "parallel." (Id.)

Qwest responds that its OneFlex service is not VNXX service. According to Qwest, VNXX involves the improper assignment of telephone numbers in the public switched telephone network (PSTN), giving a customer a telephone number for a place where the customer does not have local service, such that a customer in Chicago gets a Des Moines telephone number, for example. OneFlex does not involve virtual numbers of this nature; a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. (Reply pp. 14-15.)

Effect of the FCC's ISP Remand Order. Next, Level 3 recognizes that the Board has previously expressed two concerns with VNXX service, relating to waste of telephone numbers and intercarrier compensation. (In. Br. p. 16.) Level 3 argues telephone number efficiency is no longer an issue with thousands-block number pooling, so the Board's focus should be on intercarrier compensation. Further, Level 3 argues that intercarrier compensation is no longer an issue for the Board to decide because the FCC addressed it in the ISP Remand Order, which applies to all ISP-bound traffic and requires that Qwest pay Level 3 \$0.0007 per minute to terminate these calls. In support of its interpretation of the ISP Remand Order, Level 3 cites a recent decision of the Washington Utilities and Transportation

Commission¹¹ (WUTC) and an amicus brief the FCC filed in a case before the First Circuit Court of Appeals involving a company called Global NAPs. The WUTC order says that the ISP Remand Order should be interpreted to apply to all ISP-bound traffic, including VNXX traffic. In the Global NAPs brief,¹² the FCC's general counsel says that the ISP Remand Order can be read to support either interpretation (Level 3's or Qwest's, in this case); given this ambiguity, Level 3 believes the Board should choose Level 3's interpretation, which Level 3 characterizes as pro-competitive.

Qwest responds that the Board properly interpreted the ISP Remand Order as being limited to calls to an ISP located in the same local calling area. Qwest says this interpretation is supported by the decision in WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002) and by recent decisions from the Minnesota Public Utilities Commission,¹³ the South Carolina Public Utilities Commission,¹⁴ and several recent Oregon Public Utilities Commission (PUC) orders.¹⁵ (Reply pp. 15-17.) Qwest argues that the WUTC decision lacks analysis of key issues and relies on a "flawed" decision in Southern New England Tel. V. MCI WorldCom Communications, 359 F.Supp.2d 229 (D. Conn. 2005).

¹¹ Level 3 Comm. LLC v. Qwest Corp., Dk. UT-053039, Order No. 5, "Order on Interlocutory Review" (WUTC 2/10/06), attached to Level 3's Initial Brief on Rehearing as Attachment A.

¹² Brief for Amicus Curiae Federal Communications Commission, Global NAPS, Inc., v. Verizon New England, Inc., No. 05-2657 (1st Cir.) filed March 13, 2006.

¹³ Recommendation on Motions for Summary Disposition, *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, 3-2500-16646-2 P-421/C-05-721 (Minn. PUC Office of Admin. Hearing, January 18, 2006), adopted by the Minnesota Commission on April 6, 2006.

¹⁴ "Order," *Petition of MCImetro Access Transmission Services, LLC, for Arbitration with Horry Telephone Cooperative, Inc.*, 2006 SCPUC LEXIS 2 (SC PUC, January 11, 2006).

Relationship to earlier Board actions. Level 3 also argues that the Board's ruling in this docket effectively reverses the Board's actions in two earlier dockets. The first of these is In re: Level 3 Communications, Inc., Docket No. TF-05-31, in which the Board issued an "Order in Lieu of Certificate" to Level 3. Level 3 argues that the order implicitly authorizes the use of VNXX for VoIP services because it explicitly prohibits the use of VNXX for non-voice calls and does not mention voice services.

The second Board action that Level 3 says is being reversed is the settlement the Board entered into in late 2005 in connection with the appeal of the Board's decision in Re: Sprint Communications Company LLC and Level 3 Communications LLC, Consolidated Docket Nos. SPU-02-11 and SPU-02-13, which Level 3 calls the "Managed Modem" case. That case involved a Board order denying Level 3's request for telephone numbering resources for use in providing VNXX services in Iowa. Level 3 sought judicial review of the Board's decision and the matter was pending before the courts when the parties settled. As a part of the settlement, the Board agreed that Level 3 could have numbers for providing VNXX service "upon future approval of an appropriate interconnection agreement in which the compensation issues are addressed." (In. Br. p. 21 and Attachment B thereto.) Level 3 argues that when the Board entered into the settlement, the Board must have

¹⁵ Ruling, *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Oregon PUC, ALJ Petrillo, August 16, 2005), affirmed, Order No. 06-037 (Oregon PUC, January 30, 2006).

known it would be resolving the compensation issue in this docket and VNXX would be permitted.

Finally, Level 3 argues that the Board has failed to resolve the VNXX issue in this docket even though it was identified in the original filings as an issue to be arbitrated, as required pursuant to §§ 252(b)(4)(c) and 252(c)(1). (In. Br. p. 17.) This failure to resolve the issue is alleged to create an unreasonable barrier to competitive entry, in violation of § 253(a). (In. Br. p. 18, n. 9.) All of this ties to Level 3's position regarding the settlement of the Managed Modem case; Level 3 argues it would not have settled if it had not been confident that the Board would address the compensation issues in this docket.

B. Qwest arguments and Level 3 responses

Has the Board banned VNXX? Qwest begins by arguing that in this docket, the Board has "properly continued its ban on VNXX." (In. Br. p. 10.) Qwest argues that a ban on VNXX is consistent with the decisions of the Vermont Public Service Board (upheld by the federal district court in Global NAPs, Inc., v. Verizon New England, Inc., 377 F.Supp.2d 290 (D. Vt. 2004)), and a recent order from an administrative law judge (ALJ) for the Oregon Public Service Commission, "Arbitrator's Decision," In the Matter of Qwest Corporation's Petition For Arbitration, etc., Docket ARB 671, issued February 2, 2006, in which the arbitrator ordered that Qwest and the CLEC "shall not exchange VNXX traffic."

Level 3 responds that it was an error to ban VNXX in Iowa because the Board had a statutory obligation to decide the issue when it was raised in Level 3's petition

for arbitration. Level 3 also argues that the Board lacks authority to ban VNXX service because ISP-bound calls are jurisdictionally interstate in nature. (Reply p. 15, n. 14.)

Effect of other Iowa laws. Qwest says the FCC has recognized that defining local calling areas for wireline traffic (and therefore drawing the line between local and long distance calls) is a matter for state commissions, not the FCC, citing the FCC's Local Competition Order at ¶ 1035. With that in mind, Qwest analyzes Iowa law to conclude that VNXX service is prohibited. First, Qwest relies on Iowa Code § 477.10(1), which defines "local exchange" in terms of a limited geographic area. Next, Qwest notes that 199 IAC 22.1(3) defines "Local Services" as telephone service furnished between users "within an exchange area," while "interexchange service" is defined as the provision of telecommunications services "between local exchanges" Further, Qwest notes that the Board's local exchange competition rules prohibit carriers from delivering calls as local traffic if it is really long distance traffic that should be subject to access charges, see 199 IAC 38.6(4).

Qwest also argues that the Board's decision in this docket is consistent with the decision in Re: AT&T Communications of the Midwest, Inc., vs. Qwest Corp., Docket No. ARB-04-1. In that arbitration case, the Board adopted Qwest's proposed language relating to VNXX service, rejecting AT&T's language that would have required reciprocal compensation for VNXX traffic. (In. Br. pp. 12-13.) Qwest argues that the Board's decision in the AT&T arbitration directly supports Qwest's position in this case.

Level 3 responds that Qwest's arguments based on Iowa law and prior Board rulings prove too much, because the same strict analysis would mean that Qwest's OneFlex service is banned. (Reply p. 15.) Further, Level 3 argues that the link between telephone numbers and geography is no longer the norm, noting that wireless carriers use NPA-NXXs within an entire Major Trading Area (MTA), leading the FCC to declare all calls between a wireless carrier and an ILEC within an MTA to be "local" and subject to reciprocal compensation, not access charges. (Reply pp. 16-17, citing ¶ 1036 of the Local Competition Order.)

Level 3 also argues that its proposal is supported by the access charge rules of the FCC and the Communications Act, which control over state law provisions. 47 USC § 153(16) defines "exchange access" as using local exchange facilities and services to originate or terminate "telephone toll service." That term, in turn, is defined as a call between two exchange areas for which the end user receives a "separate charge," over and above the charge for exchange service. (Section 153(48).) Level 3 concludes that as long as no separate charge is made to the end user, access charges do not apply. (Reply pp. 25-27.) Therefore, because Level 3's customers are expected to sell flat-rated service for essentially all calls, Level 3 concludes that access charges do not apply to this traffic.

Effect of the FCC's ISP Remand Order. Next, Qwest argues that the Board correctly interpreted the FCC's ISP Remand Order as applying only to ISP-bound traffic that originates and terminates in the same local calling area. Qwest notes that

recent decisions by the Oregon PUC and a Minnesota ALJ agree with the Board's decision.¹⁶

In response, Level 3 re-summarizes its arguments regarding the proper interpretation of the ISP Remand Order, saying it is possible to read the FCC's order to support either outcome and therefore possible to read it to apply to *all* ISP-bound traffic, not just ISP-bound calls that are within a single local calling area. (Reply p. 23.)

Level 3 also argues that the issue of how to read the ISP Remand Order is less significant if the Board adopts Qwest's theory regarding its OneFlex service. Level 3 characterizes that theory as follows: Qwest "basically says that if there is a direct trunk connecting the affected originating end office to the interconnected network, such connectivity should count as 'local' enough for call rating purposes." (Reply pp. 23-24.) Level 3 then says it expects it will have direct trunks to many Qwest end offices, so if that is what it takes to make a call "local," then most of Level 3's calls will be "local."

Finally, Qwest argues that with respect to ISP-bound traffic that originates and terminates in a single local calling area, the Board correctly applied its bill-and-keep policy, rather than the default rate of \$0.0007 per minutes specified in the ISP

¹⁶ Qwest cites the "Ruling," *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC*, IC 12 (Ore. PUC, ALJ Petrillo, August 16, 2005), *affirmed*, Order No. 06-037 (Ore. PUC, Jan. 30, 2006); and the "Recommendation on Motions for Summary Disposition," *In the Matter of the Complaint Of Level 3 Communications, LLC, against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, 3-2500-16646-2 P-421/C-05-721 (Office of Admin. Hearing, Jan. 18, 2006).

Remand Order. Qwest asserts the FCC rate is a cap, not a mandatory rate, citing paragraph 80 and footnotes 150 and 152 of that order.

C. Analysis

When the Board first considered the issues presented by VNXX service (in Docket Nos. SPU-02-11 and SPU-02-13), the Board expressed two concerns about them: First, it is potentially wasteful of telephone numbering resources, and second, because VNXX service effectively results in a CLEC (like Level 3) using Qwest's network to carry calls from one exchange to another for free, the Board was concerned with the intercarrier compensation aspects of the service, that is, that Qwest should not be required to carry interexchange traffic for a CLEC without reasonable compensation.

Since that order was issued, the Board's numbering efficiency concerns have been substantially reduced by the implementation of thousands-block number pooling in Qwest exchanges. However, the intercarrier compensation concerns remain and Level 3's proposals in this arbitration proceeding do not address those concerns.

As far as reconsideration is concerned, the Board will make no change in the original arbitration order with respect to VNXX issues. The arbitrated interconnection agreement should use Qwest's language on all VNXX issues. However, the Board does not agree that this is a "ban" on VNXX service, as characterized by Qwest. Instead, it represents a continuation of the Board's position that VNXX services present special problems that must be solved before VNXX is offered in Iowa.

As to the specific issues raised, the Board offers the following analysis and findings:

OneFlex is not VNXX. Qwest's offering of OneFlex service is fundamentally different from Level 3's VNXX proposal in at least one way: Level 3 has not cited any evidence in this record that Qwest's system uses another carrier's network in Iowa to carry interexchange calls without compensation to that other carrier. This has been the Board's primary concern with VNXX service from the time it was first presented to the Board; Level 3's proposal does not offer an answer to this problem, while Qwest's service avoids it altogether. There may be other features that distinguish OneFlex from VNXX, but this one, by itself, appears to be sufficient.

Moreover, as Qwest points out, a OneFlex customer cannot get a telephone number in a particular local exchange unless the customer purchases local service in the local calling area with which that number is associated. According to Qwest, when structured this way the service has no impact on the public switched telephone network (PSTN). This also differentiates OneFlex from VNXX.

Level 3's compensation proposals do not address the Board's concerns. Level 3 argues that the FCC's ISP Remand Order resolved the VNXX compensation issues by requiring that the originating carrier pay the terminating carrier at the default rate of \$0.0007 per minute. Qwest argues, and the Board found, that the ISP Remand Order applies only to ISP-bound traffic in situations where the calling party and the ISP are physically located in the same local calling area. In a decision

issued after the briefs were filed in this docket, the First Circuit reaches the same general result, as described below.

In support of its preferred interpretation, Level 3 relies, in part, on an amicus brief the FCC filed in Global NAPs, Inc., v. Verizon New England, Inc., a proceeding before the First Circuit Court of Appeals. In that brief, counsel for the FCC said that the ISP Remand Order is ambiguous and could be read to support either interpretation, that is, it might mean that the default reciprocal compensation rate applies to VNXX or it might mean that the rate does not apply to VNXX. Level 3 argues that to the extent the ISP Remand Order is ambiguous, the Board should interpret it in a manner that allows Level 3 to offer VNXX service.

After the briefs were filed in this docket, the First Circuit issued its decision.¹⁷ Qwest filed the decision with the Board on April 26, 2006, as supplemental authority. After reviewing the procedural history of the Global NAPs case and the ISP Remand Order, the Court found that the FCC's order does not preempt state regulation of access charges as applied to VNXX traffic. The Court says:

We find that there is a lack of clarity about whether the *ISP Remand Order* preempts state regulation of the access charges at issue here. Given the requirement of a clear indication that the FCC has preempted state law, the *ISP Remand Order* does not have the broad preemptive effect that Global NAPs seeks to assign to it.

¹⁷ Global NAPs v. Verizon New England, Inc., ___ F.3d ___, 2006 WL 924035 (C.A. 1 (Mass.))

(2006 WL 924035, page 13.) The Court therefore affirmed an order from the Massachusetts Department of Telecommunications and Energy that required Global NAPs to pay access charges to Verizon for VNXX traffic.

In the end, the Board finds that Level 3's proposed solutions do not address the Board's compensation concerns in any meaningful manner. The Board's concern with VNXX has always been that a CLEC like Level 3 would be using Qwest's network to carry interexchange calls for free; any logical response to that concern would require some payment from Level 3 to Qwest. Instead, Level 3 claims that Qwest should make a payment to Level 3 or, at best, that the Board's bill-and-keep policy should apply, such that neither party would pay the other. Neither of these proposals addresses the problem identified by the Board.

Effect of this decision on prior Board actions. Level 3 claims that the Board's decision in this proceeding is inconsistent with the Board's actions in two prior matters, specifically the "Order In Lieu Of Certificate" issued in TF-05-31 and the settlement the Board entered into in the "Managed Modem" appeal. The Board disagrees with Level 3 on these points.

First, Level 3 argues the "plain language" of the Board's order in lieu of certificate "authorizes the use of VNXX for VoIP services." (In. Br. p. 20.) Level 3 says the order defined (and prohibited) VNXX in terms of non-voice, dial-up, ISP-bound traffic. Level 3 then concludes that all other uses must be permitted. However, the Board's order was based on the Board's understanding that VNXX is limited to dial-up services (as opposed to broadband) and that dial-up service offers

inadequate speeds for VoIP service. In other words, at the time the order was issued the Board understood that VNXX could not be used for VoIP services. This record does not contain any evidence that this understanding is incorrect; it appears Level 3 is trying to create an exception for a non-existent service, perhaps in order to open the door to the services it actually proposes to offer.

Further, Level 3's argument is logically incorrect. Level 3 says, in effect, that because the Board described VNXX in terms that do not involve VoIP, VNXX must be permitted when it involves VoIP. This is not a logical interpretation of the Board's order. The Board defined VNXX in terms of its understanding of the service as it existed at that time and clearly indicated that VNXX would not be permitted until the intercarrier compensation issues are resolved to the Board's satisfaction. Thus, if VNXX has now evolved to include features that were not a part of VNXX at the time of the order that does not mean that these new features are automatically permitted. Instead, logic dictates that as long as the new features present the same intercarrier compensation issues as the original form of VNXX, then those new features also are not permitted until the issues are resolved.

Second, Level 3 argues that when the Board settled the Iowa Supreme Court appeal of the "Managed Modem" case, the Board actually "authorized VNXX for ISP-bound traffic in areas where thousand-block number pooling was in place." (In. Br. p. 21.) The Board finds this is a mischaracterization of the settlement agreement. In the settlement, the Board agreed that Level 3 could "obtain number resources and utilize VNXX architecture consistent with this Stipulation pursuant to or upon future

approval of an appropriate interconnection agreement in which the compensation issues are addressed." (Settlement, page 3, section 4.a, emphasis added; attached to Level 3's In. Br. at Attachment C.) Thus, the settlement is perfectly consistent with the Board's decision in this case; the Board's one remaining concern with VNXX is the intercarrier compensation issue, and once that issue is addressed in an agreement approved by the Board, VNXX will be permitted. The problem in this case is that Level 3's proposed solutions fail to address the Board's intercarrier compensation concerns in any meaningful manner.

IV. VoIP and Intercarrier Compensation Issues

This issue concerns VoIP calls and the potential application of access charges to some of those calls. The issue is related to the VNXX issue, above, in the sense that adopting Level 3's proposed language would potentially allow Level 3 (and its ISP customers) to offer voice communications services over large geographic distances without charging per-minute toll charges or paying access charges. In the arbitration order, the Board rejected Level 3's position and instead ruled that a voice call between separate local calling areas (LCAs) is a toll call and must be treated as such, regardless of the technology used, such that access charges would apply. (Arb. Order at 33.) Further, the Board agreed that the VoIP provider's point of presence (POP) is the relevant point to consider when determining whether a call is "between separate LCAs," because that is the point at which the call enters or leaves

the public switched telephone network (PSTN) and because the VoIP provider's POP is treated as the end user under the FCC's "ESP Exemption."¹⁸

A. Level 3 arguments and Qwest responses

Level 3 argues that the Board's decision on this issue is in error in two respects. First, Level argues that a telephone call is not a "toll call" just because it is made between local calling areas, and second, Level 3 argues that the FCC's ESP exemption does not require that the VoIP provider's POP be considered an end-point of the telephone call. (In. Br. p. 22.)

In support of its first argument, Level 3 says that under Federal law a call is not "telephone toll service" unless the call is both "long distance" (i.e., a call between separate LCAs) and "toll" (that is, subject to a separate charge other than a local service charge), citing 47 USC §§ 153(16) and (48) and 47 CFR § 51.701(b). Level 3 asserts that VoIP will not meet the second test. [The Board assumes this is because VoIP is typically offered on a flat-rate basis for all calls in the lower 48 states, although Level 3 does not go into detail. (In. Br. p. 23.)]

Qwest responds that the Act's definition of "telephone toll service" is unrelated to the question of whether access charges apply, noting that Level 3 cites no authority to establish this connection. Further, Qwest notes that under the FCC's rule 51.701(b)(1), VoIP calls that fall within the category of "interstate or intrastate

¹⁸ Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) (the "ESP Exemption Order").

exchange access, information access, or exchange services for such access" do not constitute "telecommunications traffic" that is subject to reciprocal compensation.

In support of its second argument, Level 3 says that the ESP exemption does not apply in the manner described in the Board's order. The exemption allows ESPs to obtain connections to the PSTN on the same terms as any business customer, but that does not control the intercarrier compensation between two LECs involved in carrying calls to and from that ESP, according to Level 3. Level 3 cites the FCC's first ISP-bound traffic order,¹⁹ in which the FCC said: "The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs." (Id.)

Qwest responds that the FCC has clearly stated, "ESPs, including ISPs, are treated as end-users for the purpose of applying access charges." (ISP Remand Order, ¶ 11.) Level 3's argument ignores this FCC statement and confuses the concept of "termination" with the end user status of the VoIP provider. Qwest has not argued, and the Board did not find, that a VoIP call "terminates" for jurisdictional purposes at the ESP's POP. Instead, the ESP exemption simply treats the VoIP providers as an end point for access charge purposes.

Level 3 also points out that Qwest's position on this issue has the potentially absurd effect of changing some local calls into toll calls. This could happen if, for

¹⁹ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) at ¶ 16, *vacated on other grounds*, Bell Atlantic v. FCC, 206 F.3d 1 (2000).

example, an end-user in Des Moines chooses to take local service from a VoIP provider with a POP in Ames. If that customer's next-door neighbor were to call that end-user, under Qwest's proposed language the call would be treated as a long-distance, or toll, call because the end points would be considered to be in Des Moines and Ames, even though the customers were actually next door to each other in Des Moines. (In. Br. pp. 22-23; Tr. 890-91.)

Qwest responds that, while it is true that Qwest's position could cause a local call to be treated as long distance, Level 3's position does the opposite, causing some long distance calls to be treated as local calls. Moreover, it is entirely within the control of the VoIP provider to avoid the local-to-long-distance conversion, because the VoIP provider has control over how it delivers calls to the PSTN. A reasonable VoIP provider would use Level 3's language to turn long distance into local (to avoid access charges), but would never use it to convert traffic the other way. Thus, Level 3's absurd outcome is not a realistic concern.

Finally, Level 3 states that it does not object to using bill-and-keep for this traffic, but asserts that Qwest should not be permitted to apply access charges "when the record shows that Qwest's costs are *de minimus* (see Tr. at 511)" (In. Br. p. 24.)

Qwest disagrees with Level 3's claim that Qwest's costs are *de minimus*. (Reply p. 21, n. 20.) Qwest points to its TELRIC-based transport costs as evidence that Qwest incurs real costs to transport interexchange traffic around Iowa. Bill and

keep is intended to apply only to the exchange of local calls and these calls are not local.

B. Qwest's arguments and Level 3's responses

Qwest argues that the Board's VoIP ruling properly reflects federal law, which provides that for purposes of applying access charges, an ESP is to be treated like an end user with the calls rated on the basis of the location of the ESP's POP. (ESP Exemption Order at ¶¶ 2, n. 8, and 20, n. 53.) According to Qwest, Level 3's proposed language for the interconnection agreement is an attempt to avoid the FCC's rulings and allow Level 3 to terminate traffic throughout the LATA without access charges, converting interexchange calls to "local."

Level 3 responds by repeating its earlier argument that access charges do not apply to a call if there is no extra charge to the customer to complete the call. (Reply pp. 27-28.) Accordingly, VoIP service, "where end users normally get unlimited calling for a flat fee," should not be subject to access charges.

Level 3 also argues that the ESP exemption only governs what the ESP can be charged; it does not control the issue of intercarrier compensation. As a result, Level 3 argues, the Board is not legally required to impose access charges on VoIP traffic. "The very most Qwest has shown is that might be permissible for the Board to do so." (Reply p. 29.) Level 3 says this is really a policy decision, not a legal issue, and the Board should prefer Level 3's pro-competitive policy.

C. Analysis

The Board will not change its arbitration decision on this issue. Level 3 basically admits that the Board's decision is permissible, i.e., is not in violation of federal law. Moreover, Qwest cites the Board to language in the FCC's ESP Exemption Order that makes it clear that ESPs are to be treated as end users for access charge purposes:

Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. ... Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.

* * *

Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.

(ESP Exemption Order at ¶¶ 2, n. 8, and 20, n. 53.)

Moreover, Level 3's argument that VoIP calls are not "toll telephone service" because VoIP providers typically provide unlimited calling for a flat rate simply proves too much. Under that analysis, any interexchange carrier could charge a flat monthly rate for unlimited calling and avoid paying access charges. Level 3 has not shown any legal connection between the definition of "toll telephone service" and the application of access charges, and it seems clear there is no such connection. The alternative would be the end of access charges.

The Second Circuit Court of Appeals agrees with this conclusion. In a decision issued after briefing was completed in this docket²⁰, Global NAPS made the same argument regarding the "separate charge" language in the statutory definition of "telephone toll services." The Second Circuit rejected the argument, saying it "attributes far too much significance to the term 'separate charge.'" (Slip op. at 12.)

The Court goes on to say

It seems likely that the "separate charge" language in the statute was written to underscore that "tolls" applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers. Thus, Global's argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point.

(Slip op. at 13.) In other words, the statutory definition is directed to the relationship between a carrier and its customers, not to relationships between carriers.

The Second Circuit's Global NAPS decision is relevant to this order in other respects, as well. The Court was reviewing a district court decision that affirmed two rulings by the Vermont Public Service Board to the effect that (a) state-determined local calling areas continue to control whether a call is a toll call or a local call and (b) prohibiting Global NAPS from offering VNXX service. The Court affirmed the district court, finding that the Vermont Board properly exercised jurisdiction and properly applied federal law. In doing so, the Court concluded that state commissions continue to have the authority to determine what geographic areas should be

²⁰ Global NAPS, Inc., v. Verizon New England, Inc., et al., ___ F.3d ___, ___ WL ___, Docket No. 04-4685-cv (July 5, 2006).

considered local call areas (slip op. at 11-13); that state-commission-determined local calling areas should be allowed to govern intercarrier compensation (slip op. at 14); that the FCC's ISP Remand Order did not preempt states with respect to all ISP-bound traffic issues (slip op. at 17); and that the Vermont Board did not violate any federal rules or act arbitrarily or capriciously when it prohibited Global NAPs from using VNXX in Vermont (slip op. at 19). In particular, the Court held that the Vermont decision does not constitute a general barrier to entry as proscribed by 47 U.S.C. § 253 because a prohibition of VNXX does not prevent a CLEC from entering the market. (Slip op. at 20.)

Finally, the Court distinguished between VNXX and FX services on the basis that a retail customer purchasing FX service pays the costs associated with providing the service, while VNXX customers "rely on the terminating carrier to provide the service without cost. The prohibition of virtual NXX does not necessarily prevent users from obtaining nongeographically correlated numbers; the ban simply requires that someone pay Verizon for use of its infrastructure." (Slip op. at 22.) This statement precisely matches the Board's position on VNXX in Iowa; it is not permanently banned, but it will not be allowed until it can be done in a manner that appropriately compensates Qwest (or some other ILEC) for use of its infrastructure.

V. Tier II Issues

In its petition for arbitration, Level 3 identified five "Tier I" issues and 17 "Tier II" issues, saying that "Level 3 ranks only the most fundamental interconnection

issues as 'Tier I issues'" and that "most [of the Tier II issues] are derivative of fundamental points of business, law and policy presented by Tier I issues." (Petition, pp. 6-7.) In the arbitration order, the Board said it understood this to mean that once the Tier I issues were decided, the appropriate resolution of the Tier II issues could be derived from those decisions, so the Board decided the Tier I issues and directed the parties "to determine the outcome of the Tier Two issues based on the Board's determinations in this order." (Arbitration Order, p. 2.)

Level 3 now argues that the Board failed to decide the Tier II issues, in violation of § 252. Level 3 says a substantial number of the Tier II issues involve definitions for which the arbitration order provides little, if any, insight as to the proper resolution. (In. Br. p. 25.) Further, the arbitration order leaves many terms undefined (such as "VoIP POP") and the Board should proceed to decide the Tier II issues, identified as Issue Nos. 6 through 22.

Qwest responds that Level 3 mentions only two of the Tier II issues in its initial brief and is now seeking definitions of terms that were never identified as issues in the first place. Qwest says it is too late to raise new issues, citing § 252(b)(4). Moreover, in many cases Level 3 does not offer a definition, but instead just complains that a term is undefined, without showing why it might be a problem. Qwest says Level 3's arguments regarding the Tier II issues are without merit.

In general, Qwest argues that most of the Tier II issues involve definitions of terms that are used in connection with the Tier I issues. Because most of the Tier I issues were decided by adopting Qwest's proposed language, the Board should

decide the definition issues with Qwest's proposed language, as well, so that the definitions will match the language adopted in the Tier I resolutions. Qwest then addresses each of the Tier II issues in turn.

Level 3's response is somewhat difficult to track. Level 3 fails to identify its arguments with the issue numbers that it assigned to the issues in its petition; in other words, Level 3 fails to use its own issue identification system. Moreover, Level 3's general response begins with the statement that "We have addressed some of Qwest's 'Tier II' issues in footnotes above," without identifying the footnotes or the issues that Level 3 believes it has addressed. It appears that Level 3 is referring to footnote 12, which appears to be addressed to Issue 18, and to footnote 37, which is not tied to any specific Tier II issue but addresses the subject in general. The Board has not identified any other footnotes in Level 3's reply brief that address Tier II issues and will not be responsible for Level 3's failure to do so.

Finally, it appears that Level 3 has not submitted any specific argument at all on some of the Tier II issues, as shown below. To the extent Level 3 has addressed these issues, it has not referred to them in its briefs on reconsideration; the Board does not believe it is required to search the record for arguments a party may believe it has hidden there.

Issue 6, AMA Switch Technology. Qwest says it agreed to remove a phrase from this definition that Level 3 found objectionable, so this should no longer be an issue. (In. Br. p. 21.) The Board will not address it further.

Issue 7, "Basic Exchange Telecommunications Service." Qwest proposes to use the same definition that has been approved by every state in Qwest's region as a part of Qwest's SGAT proceedings. (In. Br. p. 21.) Level 3 has not proposed an alternative definition, so Qwest's language should be adopted, according to Qwest.

Level 3 does not specifically respond to this issue.

Issue 8, "Call Record." The parties propose different definitions.

Qwest proposes:

"Call Record" means a record that provides key data about individual telephone calls. It includes originating telephone number, terminating telephone number, billing telephone number (if different from originating or terminating number), time and date of call, duration of call, long distance carrier (if applicable), and other data necessary to properly rate and bill the call.

Level 3 proposes:

"Call Record" shall include identification of the following: charge number, Calling Party Number ("CPN"), Other Carrier Number ("OCN"), or Automatic Number Identifier (ANI), Originating Line Indicator (OLI). In the alternative, a "Call Record" may include any other information agreed upon by both Parties to be used for identifying the jurisdictional nature of the calling party or for assessing applicable intercarrier compensation charges.

Qwest says its definition is consistent with the Board's decisions on the Tier I issues and provides the information necessary to properly rate and bill each call. Level 3's definition would not provide all of the necessary information and would require other information that is not required by the industry today. (Tr. 1103-06.)

Level 3 responds that Qwest's definition would require information that "may not always be available for VoIP-originated calls." (Reply p. 30.) However, Level 3 says this difference will not matter if the Board adopts Level 3's proposal to apply the default rate from the ISP Remand Order, or the Board's bill-and-keep policy, to all ISP-bound traffic, since at that point all of these minutes will be subject to the same rate and detailed call rating information will be unnecessary.

Issue 9, "Exchange Access." Qwest has agreed to Level 3's proposal, subject to one condition, that the term "IntraLATA LEC toll" should be used in Section 7 of the Agreement in lieu of the term "Exchange Access (IntraLATA Toll carried solely by local exchange carriers)." (In. Br. p. 22.)

Level 3 did not respond on this issue.

Issue 10, "Interconnection." The parties propose different definitions.

Qwest proposes:

"Interconnection" is as described in the Act and refers to the connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, IntraLATA Toll carried solely by local exchange carriers, ISP-Bound traffic and Jointly Provided Switched Access traffic.

Level 3 proposes:

"Interconnection" is the linking of two networks for the mutual exchange of Telecommunications Including Telephone Exchange Service and Exchange Access traffic. Telecommunications includes, but is not limited to Section 251(b)(5) Traffic, which is defined as Telephone Exchange Service, Exchange Access Service, Information Service, and Telephone Toll Service (including but not limited to IntraLATA and InterLATA Toll) traffic and is also defined to include ISP-

Bound traffic, VoIP traffic. Interconnection also includes the exchange of Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Section 251(b)(5) traffic does not include Jointly Provided Switched Access traffic.

Qwest says its definition is used in other Qwest interconnection agreements and SGATs, uses standard industry terminology, and is consistent with the Board's Tier I decisions. Qwest says Level 3's proposal is wrong as a matter of federal law because it would include services for which there is no right of interconnection under § 251(c) and it would include services that are not subject to reciprocal compensation under § 251(b)(5). Qwest says Level 3's proposal is part of a scheme to receive favorable regulatory treatment and to avoid applicable access charges. (In. Br. p. 24.)

Level 3 did not specifically respond on this issue.

Issue 11, "Interexchange Carrier."

Qwest proposes:

"Interexchange Carrier" or "IXC" means a Carrier that provides ***InterLATA or IntraLATA Toll services.*** (Emphasis added)

Level 3 proposes:

"Interexchange Carrier" or "IXC" means a Carrier that provides ***Telephone Toll Service.*** (Emphasis added)

Qwest says that its proposed definition uses standard interconnection agreement language that has been approved by every state in Qwest's region.

Level 3 did not respond on this issue.

Issue 12, "IntraLATA Toll Traffic."

Qwest proposes:

IntraLATA Toll Traffic describes IntraLATA Traffic outside the Local Calling Area.

Level 3 proposes:

IntraLATA Toll Traffic describes IntraLATA Traffic that constitutes Telephone Toll Service.

Qwest argues its proposed definition is consistent with the Board's decision on the Tier I issues; the Board said that "a voice call between separate LCAs is a toll call and must be treated as such." (Arbitration Order at 33.)

Qwest also says Level 3's proposed definition is an attempt to avoid paying access charges for calls that are between different LCAs. (Tr. 648-49.)

Level 3 does not specifically respond to this issue.

Issue 13, "Local Interconnection Service or 'LIS' Entrance Facility."

Qwest proposes:

"Local Interconnection Service or "LIS" Entrance Facility" is a DS1 or DS3 facility that extends from CLEC's Switch location or Point of Interconnection (POI) to the Qwest Serving Wire Center. An Entrance Facility may not extend beyond the area served by the Qwest Serving Wire Center.

Level 3 did not propose alternative language.

Qwest says that Level 3 objects to Qwest's definition because Level 3 believes it will shift costs of Qwest's network to Level 3. Qwest points out that the definition does not contain any language that determines who should bear the cost of the

facility; it merely defines an interconnection facility. Accordingly, Qwest argues, it is a defined term that should be included in the Agreement.

Level 3 did not specifically respond to this issue.

Issue 14, "Exchange Service."

Qwest proposes:

Exchange Access as used in the Agreement shall have the meaning set forth in the Act.

Exchange Service or Extended Area Service (EAS)/Local Traffic means traffic that is originated and terminated within the Local Calling Area as determined by the Commission.

Level 3 proposes:

Telephone exchange service - The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Qwest proposes to define "Exchange Service" as "traffic that is originated and terminated within the Local Calling Area as determined by the [Board]." (Tr. 649.)

Level 3 proposes to define the similar, but not identical, term "telephone exchange service" using the definition from the Act. (Tr. 650.) Qwest points out that the term it is defining is used hundreds of times throughout the Agreement, while Level 3's proposed term is not. Further, Level 3's proposed definition uses the word

"subscriber," which is not a defined term, while Qwest's proposed definition uses the term "end user," which is.

Level 3 does not specifically respond to this issue.

Issue 15, "Telephone Toll Service."

Qwest did not file a proposal.

Level 3 proposes:

Telephone toll service - the term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Level 3 proposes a definition for this term; Qwest does not believe one is necessary. (Tr. 651.) Qwest says that Level 3 only wants this definition to support Level 3's argument that as long as Level 3's VNXX service does not involve a separate charge for each interexchange call, the service is not subject to access charges. Qwest describes this as an "erroneous conclusion" that was recently rejected by an ALJ for the Oregon PUC in the Oregon Universal ALJ Order. Qwest concludes that the Board should reject Level 3's proposed definition.

Level 3 does not offer any response on this issue.

Issue 16, "VoIP."

Qwest proposed the following definition of "VoIP":

7.2.2.12 VoIP Traffic. VoIP traffic as defined in this agreement shall be treated as an Information Service, and is subject to interconnection and compensation rules and treatment accordingly under this Agreement based on treating the VoIP Provider Point of Presence ("POP") is an end user premise for purposes of determining the end points

for a specific call.

7.2.2.2.12.1 CLEC is permitted to utilize LIS trunks to terminate VoIP traffic under this Agreement only pursuant to the same rules that apply to traffic from all other end users, including the requirement that the VoIP Provider POP must be in the same Local Calling Area as the called party.

Level 3 proposes:

7.2.2.12 Left blank

The first issue is that Level 3 proposes to remove two phrases from Qwest's proposed definition, "at the premises of the party making the call" and "end user premises," both of which were included by Qwest to emphasize that VoIP calls must originate in Internet Protocol (IP). Otherwise, Qwest argues, the call is originating in traditional time division multiplexing (TDM) format and being converted to IP at some later point. In other words, nearly every call would arguably become "VoIP" if it is converted to IP at some point in its transmission path, even though the customer/end user was just using traditional telephone service. Qwest's proposed definition limits the descriptor "VoIP" to calls that originate in IP, according to Qwest. (In. Br. p. 28.)

The second issue is that Qwest's language requires that a VoIP call be "transmitted over a broadband connection to the VoIP provider." Level 3 proposes to modify that to say the call must be "transmitted over a broadband connection to or from the VoIP provider." (Emphasis added.) Level 3 proposed this definition to reflect its position that a call that starts in TDM and finishes in IP format should be included as a VoIP call. (Tr. 419.) Qwest responds that this argument is inconsistent with other language proposed by Level 3, which defines VoIP traffic as "traffic that

originates in IP Protocol using IP Telephone handsets." Thus, says Qwest, Level 3's language and its stated position "are hopelessly inconsistent" and "incomprehensible." (In. Br. p. 28.)

Level 3 does not offer any specific response to this issue.

Issue 17, Forecasts.

Qwest proposes:

7.2.2.8.4 The Parties agree that trunk forecasts are non-binding and are based on the information available to each respective Party at the time the forecasts are prepared. Unforecasted trunk demands, if any, by one Party will be accommodated by the other Party as soon as practicable based on facility availability. Switch capacity growth requiring the addition of new switching modules may require six (6) months to order and install.

7.2.2.8.5 In the event of a dispute regarding forecast quantities, where in each of the preceding eighteen (18) months, trunks required is less than fifty percent (50%) of forecast, Qwest will make capacity available in accordance with the lower forecast.

Level 3 did not file a proposal.

Qwest proposes that the agreement should include language requiring that CLECs provide Qwest with forecasts of their expected trunking needs. (Tr. 938.) Qwest says the forecasts are necessary to enable Qwest to plan for CLEC demands on its network. (In. Br. p. 29.) Qwest is concerned that a CLEC might have an incentive to overstate its expected needs, in order to cause Qwest to build capacity that is adequate to handle the CLEC's most optimistic needs.

To offset this incentive, Qwest originally proposed that Level 3 would have to back up its forecasts with deposits. After Level 3 objected to that, Qwest proposed language that would allow Qwest to adjust Level 3's forecasts downward if experience showed that Level 3 tended to overstate its projected needs. (Tr. 937-40.) Qwest says that Level 3 has not disputed the need for forecasts or Qwest's most recent forecasting proposal. Accordingly, Qwest urges the Board to adopt Qwest's language for paragraphs 7.2.2.8.4 and 7.2.2.8.5.

Level 3 does not offer any response on this issue.

Issue 18, Jurisdictional Allocation Factors.

This issue relates to Issue 2, regarding commingling of traffic on LIS trunks or use of Feature Group D trunks. The Board adopted Qwest's position on Issue 2 and required the use of Feature Group D trunks for commingled traffic in order to allow for proper identification and measurement of various types of traffic. (Arbitration order at 17.) Qwest asserts that this issue, involving proposed allocation factors for use when commingled traffic cannot be identified and measured, is now moot. (In. Br. p. 30.)

Notwithstanding that position, Qwest takes issue with Level 3's proposed allocation factors because, according to Qwest, they are based on Level 3's incorrect interpretation of the existing intercarrier compensation rules. For example, Level 3 does not propose a factor for traffic that is subject to intrastate switched access charges, apparently based on Level 3's belief that none of its traffic will be subject to intrastate access charges. Qwest offers other examples that demonstrate Level 3's alleged intent to improperly apply the ESP exemption and to improperly rate traffic

and concludes that Level 3's proposed jurisdictional allocation factors should be rejected.

Level 3 responds that its proposed factors "would clearly result in the application of access charges versus reciprocal compensation in a manner consistent with Level 3's substantive compensation proposals." (Reply p. 12, n. 12.) In other words, Level 3 agrees that its proposed factors are consistent with its position as to which traffic should, and should not, be subject to access charges or reciprocal compensation.

Issue 19, ISP-Bound Traffic.

Level 3 proposes language for identification of ISP-bound traffic. Qwest says it is willing to accept the language proposed by Level 3 with the exception of the last sentence. That sentence reads "Traffic exchanged that is not ISP-Bound traffic will be considered to be section 251(b)(5) traffic." Qwest says this sentence is inconsistent with federal law and would convert a number of different categories of traffic into § 251(b)(5) traffic when they should not be. Qwest says that 47 CFR § 51.701(b)(1) specifically excludes interstate or intrastate exchange access, information access, and exchange services for such access from the category of telecommunications traffic that is included within § 251(b)(5). Accordingly, Qwest urges that the last sentence of Level 3's proposed paragraph 7.3.6.2 be rejected.

Level 3 does not offer any specific response on this issue.

Issue 20, Signaling Parameters. Both Qwest and Level 3 have proposed language for paragraph 7.3.8. (Tr. 1110-12.) Qwest says its language includes

industry-defined terms (Tr. 1112-27), while Level 3's language uses undefined terms that do not have an accepted meaning in the industry, such as "CRI." (Tr. 1112.) Qwest says that Level 3's language would excuse Level 3 from providing calling party information that is essential to properly rate and bill a call. (Tr. 1116-17.) Qwest says Level 3's language also requires the use of signaling parameters that are not used in standard industry practice, requiring that Qwest provide additional special information for Level 3. (Tr. 1114.) Qwest believes the Board should adopt Qwest's language, which requires the information the industry uses to properly rate and bill calls and does not require the use of information that other carriers do not use.

Level 3 responds that this issue relates to Issue 8, the definition of "Call Record." Level 3 says Qwest's language "does not embrace the broader scope of information that SS7 signaling can contain" (Reply p. 30.) Level 3 argues its proposed language is more flexible and will be more useful as IP services become more prevalent.

Issues 21 and 22, Cost Responsibility Disclaimers, LIS and Special Construction.

Qwest does not propose any specific language for Issues 21 and 22. Level 3 proposes the following with respect to Issue 21:

7.4.1.1 Nothing in this section 7.4 shall be construed to in any way affect the Parties' respective obligations to pay each other for any activities or functions under this Agreement. All references in this section 7.4 to 'ordering' shall be construed to refer only to the administrative processes needed to establish interconnection and trunking arrangements and shall have no effect on either Party's financial obligations to the other.

For Issue 22, Level 3 proposes:

19.1.1. Nothing in this section 19 shall be construed to in any way affect the Parties' respective obligations to pay each other for any activities or functions under this Agreement. All references in this section 19 to construction charges be construed to refer only to those Level 3 requests for construction that are outside the scope of what is needed to establish interconnection and trunking arrangements and shall have no effect on either Party's financial obligations to the other.

Qwest says that these two issues should be considered together, as they involve language proposed by Level 3 disclaiming any obligation on the part of Level 3 to pay for interconnection services that it orders or for special construction that it orders. (Tr. 944-46.) Qwest says this language is inconsistent with the Board's decision on Issue 1 regarding the use of a single POI.

Level 3 responds that its language would make it clear that merely ordering trunks from Qwest would not mean that Level 3 is responsible for paying for those trunks. (Reply p. 31.) Instead, cost responsibility would be addressed by the sections of the Agreement that are specifically addressed to cost responsibility. Level 3 says the correct interpretation of those sections "should not be clouded by which party has to take on the administrative task of 'ordering' trunks needed to keep traffic flowing." (Id.)

C. Analysis of Tier II Issues

Overall, the Board agrees with Qwest's argument that the Board should adopt Qwest's proposed language (or Qwest's position, where Qwest has not proposed

language) on each of the Tier II issues in order to ensure uniformity with the Tier I decisions. Application of this principle is enhanced by the lack of any specific evidence or argument from Level 3 on many of these issues. Beyond that general principle, there are a few Tier II issues that are deserving of further comment because Level 3 submitted specific responses to Qwest's arguments or for other reasons.

Issue 6, AMA Switch Technology. It appears the parties have agreed on this language, so there is no issue to decide.

Issues 8 and 20, Call Records and Signaling Parameters. Qwest's proposed language relating to these issues requires that all of the information necessary to rate and bill calls must be provided. The Board finds that this is appropriate. Level 3 argues that Qwest's language requires Level 3 to provide information that "**may** not always be available for VoIP-originated calls." (Reply p. 30, emphasis added.) Level 3 does not cite to any evidence in the record to support its assertion and offers no explanation as to when the information might be unavailable or why that might occur. Under these circumstances, the Board finds Level 3's claim unpersuasive. Accordingly, the Board will approve Qwest's proposed language, at least until such time as Level 3 can demonstrate the required information is truly unavailable for VoIP-originated calls, at which time the parties should try to negotiate alternative arrangements.

Issue 18, Jurisdictional Allocation Factors. Allocation factors of some type would be required if the parties were commingling traffic on LIS trunks that cannot

adequately identify the various types of traffic. Because the Board has rejected Level 3's position regarding the appropriate application of access charges to VNXX and VoIP traffic, the Board will also reject Level 3's proposed jurisdictional allocation factors.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Request for Reconsideration" filed in this docket on January 5, 2006, by Level 3 Communications, LLC, is granted, as explained in the body of this order. The arbitration order issued in this docket on December 16, 2005, is affirmed as modified by the discussion in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 19th day of July, 2006.