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February 22, 2006

Via Hand Delivery

Ms. Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, Idaho 83702

Re: Case No. QWE-T-05-11

Dear Ms. Jewell:

Enclosed for filing in the above matter are (9) nine copies of the Errata Rebuttal Testimony of Timothy J. Gates with one copy designated as the "Reporter's Copy. A computer disc of the testimony is also enclosed.

This testimony is identical to the version of testimony previously filed, except that line numbers are added, as required by Commission rules. Please substitute this Errata version for the version originally filed.

Very Truly Yours,

McDevitt & Miller LLP

Dean J. Miller

DJM/lc

C: John Antonok
Parties of Record

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Attorneys for Level 3 Communications, LLC

ORIGINAL

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATE, TERMS, AND CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION	Case No. QWE-T-05-11

REBUTTAL TESTIMONY OF TIMOTHY J GATES ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC

(Errata)

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INTRODUCTION

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A. My name is Timothy J Gates. My business address is QSI Consulting, 819 Huntington Drive, Highlands Ranch, Colorado 80126.

Q. ARE YOU THE SAME TIMOTHY J GATES WHO FILED DIRECT TESTIMONY ON BEHALF OF LEVEL3 IN THIS PROCEEDING?

A. Yes, I am.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my testimony is to respond to the testimony of Qwest witnesses William R. Easton, Larry B. Brotherson and Philip Linse

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. My testimony is organized by issue and by Qwest witness being rebutted.

DISPUTED ISSUE 1: COSTS OF INTERCONNECTION

Q. PLEASE PROVIDE SOME CONTEXT FOR YOUR REBUTTAL TESTIMONY.

A. Level 3 and Qwest disagree on the network architecture for interconnection. The parties also disagree on who is responsible for the costs on each side of the POI. What Level 3 is requesting, however, is the same architecture that is in place in at least 36 other states. Level 3's proposed language was acceptable to SBC, Verizon and BellSouth. As such, Qwest's unwillingness to accept Level 3's contact language has nothing to do with technology or an unreasonable request from Level 3. Instead, Qwest simply refuses to agree to arrangements that the industry has put in place all around the country. Qwest's language and positions should be rejected because they have no basis in engineering, economics or public policy. Level 3's language and positions should be adopted because they are workable and fair.

Issue IA Interconnection Responsibilities

Q. PLEASE ADDRESS THE DIRECT TESTIMONY OF MR. WILLIAM R. EASTON.

A. At various points in Mr. Easton's testimony he states that "Qwest is allowed to recover costs that are just and reasonable and based on the cost of providing interconnection." (See, for example, Direct of Easton at 5) This statement is part of Qwest's position on Issue 1: Costs of Interconnection. As Mr. Easton correctly points out, "There is presently no dispute as to where the interconnection occurs or how many points of interconnection there will be." (Direct of Easton at 3) The dispute relates primarily to who pays for interconnection costs on each side of the POI.

Q. CAN QWEST CHARGE LEVEL 3 FOR COSTS OF GETTING QWEST ORIGINATED TRAFFIC TO THE POI FOR EXCHANGE WITH LEVEL 3?

A. No. The financial responsibilities for interconnection for the exchange of traffic should be borne solely by each carrier on its side of the POI. Carriers should not be allowed to shift their costs of transporting traffic originating on their networks to their competitors. In other words, sound economics dictate that each carrier should be responsible for the costs of delivering its traffic to interconnecting carriers for termination at a single point of interconnection per LATA. Several

Federal Circuit Courts of Appeal have specifically affirmed this. For example, as the Fourth Circuit stated in a dispute between SBC and MCI on this very point,

> In sum, we are left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that SBC seeks to impose. Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions. Although we find some surface appeal in SBC's suggestion that the charge here is not reciprocal compensation, but rather the permissible shifting of costs attending interconnection, the FCC, as noted above, has endorsed cost-shifting related to interconnection only as it relates to the one-time costs of physical linkage, and in doing so, expressly declined the invitation to extend the definition of "interconnection" to include the transport and termination of traffic.[1]

These decisions flow from the simple technical reality that interconnection simply means linking up networks. It is also consistent with the accepted economic expedient of cost-causation. Cost shifting is unnecessary, uneconomic and anti-competitive. This point is recognized by the FCC and by the federal circuit courts of appeal that have addressed the issue in the context of interconnection agreements, to wit: each carrier pays its own costs of exchanging traffic.

Q. AT PAGE FIVE OF MR. EASTON'S DIRECT, HE STATES, "IT MAKES SENSE THAT THE COST CAUSER COMPENSATE QWEST FOR INTERCONNECTION AND TRANSPORT COSTS. IF THE COST CAUSER (LEVEL 3) DOES NOT PAY, THEN QWEST END USERS WOULD HAVE TO BEAR THE COST." PLEASE COMMENT.

A. First of all, Mr. Easton is completely wrong to suggest that Level 3 is the cost causer. Never in the history of telecommunications regulation has a regulator

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[1] *MCImetro Access Transmission Services, Inc. v. SBC Telecommunications, Inc.*, No. 03-1238 2003 US App. LEXIS 25782, *24-5 (4th Cir. Dec 18, 2003).

determined that the terminating party is the cost causer. If Mr. Easton's upside down view of regulatory law and economics were accepted, Qwest would never pay a thing for calls its customers make to customers connected to other networks. Mr. Easton's suggestion that Level 3 is the cost causer because Level 3 seeks interconnection, and as such must pay for Qwest's costs on its side of the POI, is completely wrong.

Q. THE CALLS THAT QWEST ROUTES TO LEVEL 3'S POI ARE ORIGINATED BY QWEST CUSTOMERS, CORRECT?

A. Yes. These are calls originated by Qwest's local subscribers. Again, since it is the Qwest subscriber who originates the call, that subscriber is the cost causer, not Level 3. The Qwest customer pays Qwest for local service and that customer has the ability to dial an unlimited amount of local calls. One such call might be to an ISP who purchases local service from Level 3. Qwest is compensated by its customers for originating the call and getting the call to the POI. On the other side of the POI, Level 3 is responsible for terminating that call for Qwest to wherever Level 3's customer may be. Naturally, Qwest should compensate Level 3 for terminating the call.

Q. MR. EASTON STATES AT PAGE FIVE OF HIS DIRECT THAT "QWEST'S END USERS SHOULD NOT HAVE TO BEAR THE BURDEN OF PAYING FOR LEVEL 3'S ISP SERVICE." DO YOU AGREE?

A. Yes. Qwest end users do not pay for "Level 3's ISP service" and would not pay for any aspect of Level 3 service under the Level 3 proposal. First of all, Level 3 is not providing ISP service; it is providing local connectivity for an ISP so that

Qwest's customers can dial-up the ISP on a local basis. Second, Qwest's proposal would deny Level 3 any compensation for terminating calls originated by Qwest customers. As such, Qwest would get a free ride on Level 3's network for terminating these calls. Finally, in a complete reversal of sound principles of economics, FCC Rules and common carrier regulation generally, Qwest wants to impose access charges on the terminating carrier for calls originated by Qwest's customers.

Unlike traditional "interexchange services" Qwest's customers are not Level 3's customers for purposes of providing an interexchange telecommunications service. To the extent a Qwest customer places a locally dialed call that Qwest is statutorily required to hand off to Level 3 at the POI, Level 3 imposes no additional per minute of use charges for these calls. Accordingly, under no regulatory authority – save Qwest's self-serving attempt to create access charges where none could logically exist – may one carrier charge an interconnecting carrier switched access charges for calls that are not made to an IXC, and do not involve additional per minute of use charges. There is no economic relationship between the Qwest customer and Level 3 for the provision of an interexchange service, and the call is locally dialed and handed off between the parties at the POI. Moreover, it is interesting to note that prior to the FCC's *ISP-Remand Order* the vast majority of state commissions examining ISP-bound traffic determined that it was local. Thus Qwest's cost shifting is an entirely transparent grab at intercarrier compensation; it is prima facie anticompetitive and certainly not consistent with the principle of cost causation.

Q. SO QWEST'S PROPOSAL WOULD NOT COMPENSATE LEVEL 3 FOR TERMATING THE CALLS ORIGINATED BY QWEST CUSTOMERS AND ALSO CHARGE LEVEL 3 ORGINATING ACCESS FOR THOSE CALLS?

A. Yes. Qwest would be compensated by its own customers for the local service, but would charge Level 3 originating switched access charges for the same locally dialed calls.

Q. DOES QWEST AT LEAST AGREE TO PAY LEVEL 3 FOR TERMINATING CALLS ORIGINATED BY ITS CUSTOMERS?

A. No. As such, Level 3 would pay Qwest for calls originated by Qwest customers and receive no compensation for terminating Qwest originated traffic. This is completely unfair.

Q. DO LOCAL RATES COVER THE COST OF CARRYING THIS TRAFFIC TO THE POI OR DESIGNATED TRANSIT POINT?

A. Yes, but this does not refer just to Qwest's basic local rates. Local rates and revenues include not only the basic local rate, but other revenues from subscriber line charges, vertical services (*i.e.*, call waiting, call forwarding, anonymous call rejection and other star code features), universal service surcharges, extended area service charges and the subsidies remaining in Qwest's access charges for intraLATA and interLATA toll. Average local revenues tend to be $40 to $50 per line per month.

Q. IF LEVEL 3 PAID QWEST TO TRANSPORT QWEST'S ORIGINATED TRAFFIC TO THE STATUTORILY REQUIRED SINGLE POI, WOULD QWEST BE DOUBLE RECOVERING ITS COSTS?

A. Yes. Qwest would be paid twice for the local traffic – once by its local subscribers and again through access charges paid by Level 3. Another benefit to Qwest would be that Level 3 would be denied compensation for terminating the calls handed off at the POI. Any reasonable person would recognize Qwest's proposal as being fundamentally unfair.

Q. DO QWEST'S LOCAL RATES (BASIC RATES, VERTICAL SERVICES, ETC.) COMPENSATE QWEST FOR ITS CUSTOMERS' USE OF THE LOCAL TELEPHONE NETWORK?

A. Yes.

Q. IS QWEST DEREGULATED IN IDAHO?

A. Yes it is. In the 2005 legislative session the Idaho Legislature enacted HB 224 which gives local exchange the option to remove its retail services from price regulation by the Commission, subject to some limitations during a transition period. On July 1, 2005 Qwest filed with the Commission its notice of election, removing most or all of its retail services from price regulation. The notice became effective 30 days later, on August 1, 2005.

Q. ARE THERE OTHER ORDERS THAT SUPPORT YOUR POSITION ON WHICH PROVIDER IS RESPONSIBLE FOR GETTING ILEC ORIGINATED TRAFFIC TO THE POI?

A. Yes. I am sure there are many, but I will provide an example. In the FCC's Order in the Kansas/Oklahoma 271 proceeding, the FCC again referred to its rules for the proposition that an ILEC may not charge CLECs for traffic that originates on the ILEC network. Specifically, that order states:

> 235. Finally, we caution SWBT from taking what appears to be an expansive and out of context interpretation of findings we made in our *SWBT Texas Order* concerning its obligation to deliver traffic to a competitive LEC's point of interconnection. (Note 695) In our *SWBT Texas Order*, we cited to SWBT's interconnection agreement with MCI-WorldCom to support the proposition that SWBT provided carriers the option of a single point of interconnection. (Note 696) We did not, however, consider the issue of how that choice of interconnection would affect inter-carrier compensation arrangements. Nor did our decision to allow a single point of interconnection change an incumbent LEC's reciprocal compensation obligations under our current rules. (Note 697) For example, these rules preclude an incumbent LEC from charging carriers for local traffic that originates on the incumbent LEC's network. (Note 698) These rules also require that an incumbent LEC compensate the other carrier for transport (Note 699) and termination (Note 700) for local traffic that originates on the network facilities of such other carrier. (Note 701)[2]

Note 698 in the above quote is a specific reference to Rule 51.703(b). It is clear, from this and other rulings, that the originating carrier may not charge a terminating carrier for the cost of transport, or for the facilities used to transport that traffic to the POI. By extension, it is clear that simply because a POI might be outside a local calling area, Qwest has no right to charge Level 3 for the cost of transport, or for the facilities used to transport the traffic from the local calling area to the POI.

[2] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell* Long *Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, FEDERAL COMMUNICATIONS COMMISSION, 16 FCC Rcd 6237; 2001 FCC LEXIS 1202; 23 Comm. Reg. (P & F) 299, **RELEASE-NUMBER:** FCC 01-29, January 22, 2001 Released; * Adopted January 19, 2001. (footnotes omitted)

Q. IF THE TRAFFIC WERE ALL ISP-BOUND, WOULD THAT CHANGE QWEST'S INTERCONNECTION OBLIGATIONS?

A. No. Regardless of the type of traffic Qwest's customers originate, the rates that Qwest charges those customers compensate Qwest for delivering the traffic to the POI.

Single POI

Q. THUS FAR YOU HAVE DISCUSSED THE PROPOSALS OF QWEST AND LEVEL 3 FOR COST RESPONSIBILITY ASSOCIATED WITH GETTING THE TRAFFIC TO THE POI. HOW MANY POIS MUST LEVEL 3 ESTABLISH IN EACH LATA?

A. CLECs are only required to have a single POI in each LATA where they offer service. I discussed this at some length in my direct testimony. An example of the rulings on this important issue is found In SBC's Texas 271 proceeding, wherein the FCC stated in pertinent part,

> Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. ***This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.***"[3] (emphasis added)

A similar finding was made in the Virginia WorldCom proceeding wherein that order reads in pertinent part,

> Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. ***This includes the right to request a single point of interconnection in a LATA.***[4] (emphasis added)

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[3] Texas SBC 271 Proceeding; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78.

[4] FCC Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249, 00-251; Released: July 17, 2002; at ¶52.

There is nothing in the Act or in the FCC orders that support Qwest's position that it may charge CLECs more for interconnection (through additional transport or facilities charges) if they choose to have only one POI per LATA. Indeed, the Act and FCC orders (such as the one cited above) conclude just the opposite.

Q. DOES QWEST AGREE THAT ONLY A SINGLE POI IS REQUIRED?

A. Not really. While Qwest claims to support the idea, their contract language belies their true intent because it entirely subverts the economic effect of a single POI. Qwest would have Level 3 pay access from every Qwest "local" calling area. Viewed in the light of the law, policy and economics behind this very simple rule, Qwest's language must be rejected.

Q. WHAT IS LEVEL 3'S PROPOSAL WITH RESPECT TO SINGLE POI LANGUAGE IN THE AGREEMENT?

A. Level 3's proposed language is as follows:

> 7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging **Telecommunications Including Telephone Exchange Service and Exchange Access traffic.** Qwest will provide Interconnection at any Technically Feasible point within its network.
>
> 7.1.1.1 **Establishment of SPOI**: Qwest agrees to provide CLEC a Single Point of Interconnection (SPOI) in each Local Access Transport Area (LATA) for the exchange of all telecommunications traffic. The SPOI may be established at any mutually agreeable location within the LATA, or, at Level 3's sole option, at any technically feasible point on Qwest's network. Technically feasible points include but are not limited to Qwest's end offices, access tandem, and local tandem offices.
>
> 7.1.1.2 **Cost Responsibility.** Each Party is responsible for constructing, maintaining, and operating all facilities on its side of the SPOI, subject only to the payment of intercarrier compensation in accordance with Applicable Law. In accordance with FCC Rule 51.703(b), neither Party may assess any charges on the other Party for the origination of any

> telecommunications delivered to the other Party at the SPOI, except for Telephone Toll Service traffic outbound from one Party to the other when the other Party is acting in the capacity of a provider of Telephone Toll Service, to which originating access charges properly apply.
>
> 7.1.1.3 Facilities included/transmission rates. Each SPOI to be established under the terms of this Attachment shall be deemed to include any and all facilities necessary for the exchange of traffic between Qwest's and Level 3's respective networks within a LATA. Each Party may use an Entrance Facility (EF), Expanded Interconnect Channel Termination (EICT), or Mid Span Meet Point of Interconnection (POI) and/or Direct Trunked Transport (DTT) at DS1, DS3 , OC3 or higher transmission rates as, in that Party's reasonable judgment, is appropriate in light of the actual and anticipated volume of traffic to be exchanged. If one Party seeks to establish a higher transmission rate facility than the other Party would establish, the other Party shall nonetheless reasonably accommodate the Party's decision to use higher transmission rate facilities.
>
> 7.1.1.4 Each Party Shall Charge Reciprocal Compensation for the Termination of Traffic to be carried. All telecommunications of all types shall be exchanged between the Parties by means of from the physical facilities established at Single Point of Interconnection Per LATA onto its Network Consistent With Section 51.703 of the FCC's Rules:
>
> 7.1.1.4.1 Level 3 may interconnect with Qwest at any technically feasible point on Qwest's network for the exchange of telecommunications traffic. Such technically feasible points include but are not limited to Qwest access tandems or Qwest local tandems. When CLEC is interconnected at the SPOI. separate trunk groups for separate types of traffic may be established in accordance with the terms hereof. No separate physical interconnection facilities, as opposed to separate trunk groups within SPOI facilities, shall be established except upon express mutual agreement of the Parties.

As you can see from the language above, Level 3 clearly addresses the single POI entitlement and the associated cost responsibility on each side of the POI. Qwest's language, however, completely ignores the single POI issue, and instead discussed trunking on its side of the POI.

Q. WHAT IS QWEST'S PROPOSED LANGUAGE FOR THIS SECTION OF THE AGREEMENT?

A. The Qwest proposal is as follows:

> 7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS/Local traffic), IntraLATA Toll carried solely by local exchange carriers and not by an IXC (IntraLATA LEC toll), ISP-Bound traffic, and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Qwest will provide Interconnection at any Technically Feasible point within its network. Interconnection, which Qwest currently names "Local Interconnection Service" (LIS), is provided for the purpose of connecting End Office Switches to End Office Switches or End Office Switches to local or Access Tandem Switches for the exchange of Exchange Service (EAS/Local traffic); or End Office Switches to Access Tandem Switches for the exchange of IntraLATA LEC Toll or Jointly Provided Switched Access traffic. Qwest Tandem Switch to CLEC Tandem Switch connections will be provided where Technically Feasible. New or continued Qwest local Tandem Switch to Qwest Access Tandem Switch and Qwest Access Tandem Switch to Qwest Access Tandem Switch connections are not required where Qwest can demonstrate that such connections present a risk of Switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any Affiliate's End User Customers.

By requiring Level 3 to pay for facilities on the Qwest side of the POI, Qwest completely eliminates the purpose and benefits of the single POI entitlement. The single POI allows CLECs to enter the market without having to duplicate the ILEC legacy network technology or structure. Of course, this does not preclude the parties from voluntarily agreeing to establish whatever additional POIs they may choose in particular situations.

Q. DOES THE SINGLE POI ENTITLEMENT CHANGE YOUR UNDERSTANDING OF THE FCC'S MEANING OF LOCAL CALLING AREA?

A. Yes. By only requiring a single POI per LATA, the FCC has effectively defined the local calling area for interconnecting CLECs to be a LATA. From a competitive perspective this makes sense because it ensures that the incumbent cannot force upon the competitor costs that would make retail competition impossible. For

CMRS providers, the local calling area is an MTA (major trading area) which in some cases is larger than a state. For instance, in Idaho we have two LATAs and two MTAs (MTA 42 and MTA 36) although they are not coterminous. This is not to say that the single POI entitlement has changed the local calling areas established by the Commission, which are set for purposes of retail services - to the extent those services are still regulated. To constrain a competitor to retail service areas prescribed during a period of monopoly regulation of a single technology incumbent when the competitor wishes to offer larger local calling areas ensures that Iowa consumers will continue to pay higher, not lower rates, for the telecommunications services they purchase.

Issue 1D Transport Facilities

Q. AT PAGE 12 OF HIS TESTIMONY, MR. EASTON STATES THAT LEVEL 3 "...HAS AN OBLIGATION TO COMPENSATE QWEST FOR PROVIDING SERVICES WHICH ALLOW LEVEL 3 TO SERVE ITS ISP END USERS." PLEASE COMMENT.

A. Mr. Easton is wrong to suggest that Level 3 is responsible for Qwest's network on the Qwest side of the POI. This seems to be a recurring theme throughout Qwest's testimony. It is true that carriers share the cost of interconnection by bringing their originated traffic to the POI. It is not Level 3's responsibility, however, to pay Qwest for getting its originated traffic from Qwest end users to the POI. That is Qwest's responsibility. As the FCC has repeatedly stated and as affirmed by federal courts nationwide Rule 51.703(b) requires that each carrier bear its costs on its side of the POI:

> (b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

This language is very straight forward. We are talking about traffic that originates on Qwest's network. Qwest may not charge Level 3 for getting this traffic to the POI.

Q. DOES LEVEL 3'S PROPOSED LANGUAGE REFER TO RULES 703(B) AND 709?

A. Yes. Level 3's proposed language is as follows:

> 7.2.2.1.2.2. CLEC may order transport services from Qwest or from a third-party, including a third party that has leased the private line transport service facility from Qwest for purposes of network management and routing of traffic to/from the POI. Such transport provides a transmission path for the LIS trunk to deliver the originating Party's Exchange Service EAS/Local traffic to the terminating Party's End Office Switch or Tandem Switch for call termination. This Section is not intended to alter either Party's obligation under Section 251(a) of the Act or under Section 51.703 or 51.709 of the FCC's Rules.

As noted above, Mr. Easton suggests that this language indicates that "Level 3 refuses to acknowledge is that it has an obligation to compensate Qwest for providing the services which allow Level 3 to serve its ISP end users." Mr. Easton further complains about Level 3 language because "Compensation issues do not belong in this section ...." but Qwest's language specifically refers to the CLEC "purchasing" transport services from Qwest. Qwest's attempts to misconstrue economic principles and sound public policy simply belie their pecuniary motives.

Each of Qwest's propositions regarding single POI simply amount to requesting that the Commission protect Qwest from competition by forcing Qwest's competitors to mimic Qwest's network designs and costs. Qwest's positions are especially ironic when considered in light of the fact that the FCC relieved Qwest (and other ILECs) of the obligation to unbundle local switching because of the availability and use of newer more efficient technologies, such as that deployed by Level 3. To wit:

> As the Commission found in the Triennial Review Order, there has been a significant increase in competitive LEC circuit switch deployment over time, growing approximately 71 percent from 700 switches in 1999 to approximately 1,200 switches in 2003. Incumbent LEC data indicate that competitive carriers are serving over 3 million mass market lines with those switches. Further, pursuant to our "reasonably efficient competitor" standard, we consider competitive LECs' deployment of newer, more efficient switching technologies, such as packet switches. Incumbent LECs cite evidence that, in the time following the Triennial Review Order, ***competitive LECs have focused on deploying softswitch technology and packet switches. These switches are less expensive than traditional circuit switches and are more scalable.*** This evidence indicates that competitive LECs are not impaired in the deployment of competitive switches. As discussed below, we also find that competitive LECs are able to use switches, once deployed, to serve the mass market. (206)
>
> In addition, pursuant to the "reasonably efficient competitor" standard discussed above, we evaluate impairment based on the technology a reasonably efficient competitive LEC would deploy. ***Competitive LECs can rely on newer, more efficient technology than incumbent LECs (whose networks have been deployed over decades), such as packet switches. Further, the ability of competitive circuit switches to serve wider geographic regions reduces the direct, fixed cost of purchasing circuit switching capability and allows competitive carriers to create their own switching efficiencies. (207)***
>
> 224.We also conclude that an absence of sufficient collocation space does not hinder competitive LECs' ability to deploy competitive switches to a degree that gives rise to operational impairment. With respect to packet switches, the Commission found in the Triennial Review Order "that any collocation costs and delays incurred by requesting carriers to provide packet switched services do not rise to a level" of demonstrating impairment because such disadvantages "***are likely outweighed by [competitive LECs'] advantage in relying solely on newer, more efficient technology.***" Similarly, we note that a reasonably

> efficient competitor does not have to be collocated in every incumbent LEC central office in order to serve customers in that wire center, ***reducing*** the likelihood that lack of collocation space will truly result in impairment in the absence of unbundled switching.[5] (emphasis added)

To think that the FCC relieved ILECs of significant unbundling requirements based upon those competitor's abilities to deploy newer, more efficient technology, only to turn around and require those very same competitors to mimic as an architectural or monetary matter the network architecture of their incumbent competitors strains credulity. There can be no intermodal competition of any sort if the Commission allows this sort of ILEC protectionism.

Q. IS RULE 51.703(B) CONSISTENT WITH ECONOMIC THEORY?

A. Yes. This rule is the embodiment of the "cost causer" economic principle – cost causers should pay the cost they impose on society. In this case, when a Qwest subscriber makes a call to a Level 3 customer, Qwest is responsible for the cost of getting that traffic to the POI. As such, the language to "order" transport facilities is correct since there is no requirement to "purchase" facilities for the transport of Qwest originated traffic on the Qwest side of the POI.

Level 3 Is Not the Cost Causer

Q. WHY DOES QWEST RAISE THE ISSUE OF "COST CAUSER" WHEN THE RULES REQUIRE EACH PARTY TO BEAR ITS COSTS OF ORIGINATING AND TRANSPORTING TRAFFIC ON ITS NETWORK TO THE POI?

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5 In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers), WC Docket No. 04-313, CC Docket No. 01-338; *Order On Reman;*, ¶¶206, 207, and 224 (Released: February. 4, 2005).

A. It appears that Qwest's approach is largely characterized by imposing upon Level 3 classifications that have more to do with their retail classifications than with the exchange of traffic between interconnecting LECs. In this sense, Qwest uses the term "VNXX" or "FX" to create a false distinction between FX terminated by ILECs and FX provided by incumbent LECS.

Q. SO YOU DISAGREE WITH MR. EASTON'S SUGGESTION THAT LEVEL 3 IS THE COST CAUSER FOR ALL ISP-BOUND AND VNXX TRAFFIC?

A. Absolutely. As I stated earlier, Qwest's customers – who are subscribers to Qwest's local service plans – are originating these calls to Level 3 customers. It is their choice to employ the Qwest service to contact a Level 3 customer. Qwest customers are paying Qwest to complete those calls and to get that traffic to Level 3. Level 3 is not the cost causer, and should not have to pay the cost of getting this traffic to the POI.

Q. DO YOU AGREE WITH QWEST'S POSITION ON FX/VNXX TRAFFIC?

A. No. Simply because a call may terminate in a different or adjacent exchange does not mean that it should be treated differently than other locally dialed calls. As I noted in my direct testimony, Qwest's responsibilities and costs are absolutely identical regardless of the location of the Level 3 customer. In each case, a locally dialed call is routed to the POI for termination. All that Qwest does is determine that the dialed telephone number is a Level 3 number and route the call to Level 3 on an appropriate trunk group. What Level 3 does is the same in both cases: it recognizes the incoming traffic as bound for one of its customers and sends the traffic on to that customer. The only difference is whether the ISP's gear receiving the call is at the end of a short circuit (close to Level 3's switch, and thus often not in the calling party's retail local calling area) or a long circuit (far away from Level 3's switch, and thus, possibly, in the calling party's retail local calling area). Regardless of the distance, it is Level 3's responsibility to complete the call. It makes no economic sense whatsoever to make any distinction in Qwest's financial or operational obligations depending on whether Level 3 uses a long or short circuit to connect its customers to its switch.

FX/VNXX traffic is simply a competitive response to traditional foreign exchange service which Qwest stated in discovery it has been providing in Iowa since 1954.[6] That functionality is now being used by ISPs to efficiently provision service throughout the United States. Qwest's foreign exchange, Wholesale Dial and OneFlex™ services provide a similar functionality.

Q. ARE THERE CIRCUMSTANCES UNDER WHICH LEVEL 3 HAS AGREED TO PAY FOR FACILITIES ON THE QWEST SIDE OF THE POI?

A. Yes. As Mr. Ducloo explains, Level 3 typically adds direct trunks when traffic volumes reach 512 BHCCS. There may, however, be circumstances when traffic should be allowed to increase beyond this point for a period of time. This is consistent with Level 3's practices with Qwest as well as with every other major ILEC. In fact, Mr. Linse noted in his testimony that "Level 3 has historically been very cooperative when working with Qwest's trunk administration group." (Direct of Linse at 28) Level 3 has historically been very proactive in its relationships with Qwest and other ILECs to ensure that traffic is properly engineered to avoid tandem exhaust and blocking that might impact service

[6] Qwest has yet to provide a response to Level 3 Request No. 25; however, it has stated that in other states including Iowa and Colorado that it has offered such services from 1954 or so I would expect their AZ response to be the same.

quality. Parenthetically, as Mr. Ducloo has noted, Qwest's insistence upon a duplicative FGD architecture is somewhat confusing as this requirement would accelerate tandem exhaust throughout Qwest's network.

Issue 1G Dispute Over Traffic Types

Q. AT PAGE 16 OF HIS TESTIMONY, MR. EASTON DISCUSSES LANGUAGE FOR SECTION 7.3.1.1.1 (ENTRANCE FACILITIES). QWEST PROPOSES LANGUAGE THAT WOULD HAVE THE "TERMINATING" CARRIER RESPONSIBLE FOR THE ISP-BOUND AND VNXX TRAFFIC. IS THIS CONSISTENT WITH COST CAUSATION?

A. Absolutely not. As discussed above, the originating carrier is responsible for getting traffic to the POI for termination by the interconnected provider. Qwest turns this economic principle on its head by suggesting that the "terminating" carrier is responsible for ISP-bound traffic and for VNXX traffic.

Q. WHAT LANGUAGE HAS QWEST PROPOSED?

A. Qwest's proposed language for Section 7.3.1.1.3 is as follows:

> 7.3.1.1.3 If the Parties elect to establish LIS two-way trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the LIS two-way facilities shall be shared among the Parties by reducing the LIS two-way entrance facility (EF) rate element charges as follows:
>
> 7.3.1.1.3.1 Entrance Facilities - The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor (RUF) of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. ***If a CLEC's End User***

Customers are assigned NPA-NXXs associated with a rate center different from the rate center where the Customer is physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling NPA-NXXs, involving those Customers is referred to as "VNXX traffic". For purposes of determining the RUF, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with non-ISP-bound traffic data that actual minutes of use during the first quarter justify a new relative use factor, that Party will send a notice to the other Party. Once the Parties finalize a new factor, the bill reductions and payments will apply going forward, from the date the original notice was sent. ISP-bound traffic or traffic delivered to Enhanced Service providers is interstate in nature. Qwest has never agreed to exchange VNXX Traffic with CLEC. (emphasis added)

Q. WHAT LANGUAGE DOES LEVEL 3 PROPOSE?

A. Level 3 proposes the following:

> 7.3.1.1.3 Each party is solely responsible for any and all costs arising from or related to establishing and maintaining the interconnection trunks and facilities it uses to connect to the POI. Thus, neither party shall require the other to bear any additional costs for the establishment and operation of interconnection facilities that connect its network to its side of the POI.
>
> 7.3.1.1.3.1 Intercarrier compensation. Intercarrier compensation for traffic exchanged at the SPOI shall be in accordance with FCC Rule 51.703 and associated FCC rulings. For avoidance of doubt, any traffic that constitutes "telecommunications" and that is not subject to switched access charges, including without limitation so-called "information access" traffic, shall be subject to compensation from the originating carrier to the terminating carrier at the FCC-mandated capped rate (as of the effective date hereof) of $0.0007 per minute. Any dispute about the appropriate intercarrier compensation applicable to any particular traffic shall be resolved by reference to the FCC's rule and associated orders.

Level 3's language is simple and consistent with the FCC rules regarding who bears responsibility on each side of the POI. Qwest's language, on the other hand, creates an artificial and unconventional distinction for traffic based on the physical location of customers.

Q. ARE THE VNXX AND ISP-BOUND CALLS ORIGINATED BY QWEST

CUSTOMERS, AND DIALED ON A LOCAL BASIS?

A. Yes.

Q. QWEST REFERS TO RULE 51.709(B) TO SUPPORT ITS POSITION ON THE RUF CALCULATION. SPECIFICALLY, MR. EASTON SUGGESTS THAT LEVEL 3 MUST BE RESPONSIBLE FOR THE ISP-BOUND AND VNXX TRAFFIC. (DIRECT OF EASTON AT 19-20) IS THAT A CORRECT INTERPRETATION OF RULE 51.709(B)?

A. No. Rule 51.709(b) states:

> (b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportion may be measured during peak periods.

This rule is again consistent with the economic principle of cost-causation in that it calculates the proportion to be paid based on the originating traffic as a proportion of total traffic. That proportion is then used to allocate the cost of the facilities between the two providers. The ISP-bound and VNXX traffic is originated by Qwest subscribers and assuming a relative use factor is appropriate for calculating costs, then the ISP-bound and VNXX traffic must be included in Qwest's proportion of the cost, and not in Level 3's proportion of the cost.

Q. IS THERE ANY COST BASIS FOR TREATING THE ISP-BOUND AND VNXX TRAFFIC ANY DIFFERENTLY THAN OTHER LOCAL TRAFFIC?

A. No. In Level 3 Request No. 20, Level 3 asked the following question:

> Does Qwest contend that the costs it incurs in originating a call to a Level 3 customer differ in any respect whatsoever based upon the physical location of the Level 3 customer? If Qwest responds to

> the above question with anything other than an unequivocal "no," please provide a detailed explanation of how the location of Level 3's customer on Level 3's side of the POI could affect Qwest's costs. Include in that explanation all cost studies and any other documentation in your possession that you believe provides support for your position.

Qwest's response in pertinent part was, "The costs Qwest incurs do not vary based upon the physical location of the Level 3 customer."

Q. AT PAGE 20 OF HIS TESTIMONY, MR. EASTON ARGUES THAT RULE 51.703(B) REFERS TO TELECOMMUNICATIONS TRAFFIC AND NOT ISP-BOUND TRAFFIC. PLEASE COMMENT.

A. Subpart H of the FCC Rules does refer to telecommunications traffic and Section 51.703(b) refers to reciprocal compensation obligations. The FCC – in its *ISP Remand Order* – carved out federal authority to set intercarrier compensation rates for ISP-bound traffic, under one particular subsection of Section 251. But the FCC was crystal clear in stating that it was *not* changing the scope of how ISP-bound traffic is exchanged between carriers under the other subsections of Section 251, or to limit the state commissions' jurisdiction beyond the issue of setting intercarrier compensation rates. Specifically, the FCC emphasized in footnote 149 of its *ISP Remand Order* that its establishment of the interim regime "affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection." (emphasis in original) Thus, the *ISP Remand Order* does not relieve Qwest of its interconnection obligations under rule 51.703(b). Finally, no matter what the Commission rules on compensation for ISP-bound traffic, such traffic will be going over the interconnection trunks and facilities and therefore should be included in determining relative use of the trunks and facilities to originate traffic.

Q. ARE THE CALLS ORIGINATED BY QWEST CUSTOMERS THAT ARE ULTIMATELY DETERMINED TO BE ISP-BOUND OR VNXX, IMPOSING ANY ADDITIONAL COSTS ON QWEST?

A. No. As noted above, Qwest has admitted that these calls do not increase its costs. The calls are dialed and routed like any other local call and Qwest cannot distinguish the ISP-bound or VNXX calls from other local calls. As such, Qwest's responsibilities and costs for delivering this traffic to the POI are the same as for any other local call. Contrary to Mr. Easton's suggestion, Rule 51.703(b) does apply to the exchange of ISP-bound and VNXX traffic. The only difference is that Level 3 will receive the lower FCC mandated rate of $0.0007 per minute instead of the standard reciprocal compensation rate for terminating the traffic.

Q. ARE THERE ANY FEDERAL ORDERS THAT ADDRESS THE COST OF ISP-BOUND TRAFFIC AS OPPOSED TO OTHER LOCALLY DIALED TRAFFIC?

A. Yes. Paragraph 90 of the *ISP Remand Order* addresses the cost of ISP-bound and voice traffic:

> This is the correct policy result because we see no reason to impose different rates for ISP-bound and voice traffic. The record developed in response to the *Intercarrier Compensation NPRM* and the *Public Notice* fails to establish any inherent differences between the

> costs of any one network of delivering a voice call to a local end-user and a data call to an ISP. Assuming the two calls have otherwise identical characteristics (e.g., duration and time of day), a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP. We therefore are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic. To the extent that the record indicates that per minute reciprocal compensation rate levels and rate structures produce inefficient results, we conclude that the problems lie with this recovery mechanism in general and are not limited to any particular type of traffic. (emphasis in original)

It is clear from Qwest's admissions and the FCC's findings that there is no difference in cost for delivering a local voice call or an ISP-bound call to the POI. Since these calls are dialed in the same manner, handled in the same manner from a network perspective, and – not surprisingly – have the same cost, there is no justification for treating these calls differently from all other locally dialed calls. Indeed, this is precisely what the FCC found in paragraph 92 of the *ISP Remand Order*, "Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5)."

Issue 1H Relative Use Formula

Q. AT PAGES 21 AND 22 OF MR. EASTON'S TESTIMONY HE DISCUSSES THE PROPOSED LANGUAGE OF THE TWO PARTIES WITH RESPECT TO DIRECT TRUNKED TRANSPORT. QWEST AGAIN DEFINES VNXX TRAFFIC AND STATES THAT "FOR PURPOSES OF DETERMINING THE RUF, THE TERMINATING CARRIER IS RESPONSIBLE FOR ISP-BOUND TRAFFIC AND FOR VNXX TRAFFIC." PLEASE COMMENT.

A. For all the economic reasons stated above, ISP-bound and VNXX traffic must be included in the RUF calculation. These locally dialed calls are originated by Qwest local service subscribers who pay Qwest to complete the calls.

Q. **IN THAT SAME SECTION REGARDING ISSUE NO. 1H, QWEST STATES, "ISP-BOUND TRAFFIC IS INTERSTATE IN NATURE. QWEST HAS NEVER AGREED TO EXCHANGE VNXX TRAFFIC WITH CLEC." IS THAT CONSISTENT WITH ITS OTHER POSITIONS?**

A. No. In this instance Qwest again attempts to apply its retail calling area distinctions to locally dialed traffic exchanged between interconnected LECs. In testimony and other statements, Qwest misconstrues the ESP exemption to apply only when the calling and called parties are in the same local calling area. This is completely inconsistent with the FCC's treatment of this traffic. The FCC has pre-empted the Commission on intercarrier compensation for this traffic, but Qwest is still required to route this traffic to the POI per the state approved interconnection agreement.

Issue 1J NRCs for LIS Trunking

Q. **AT PAGES 23 OF HIS TESTIMONY MR. EASTON STATES THAT LEVEL 3'S LANGUAGE FOR SECTION 7.3.3.1 DENIES QWEST COMPENSATION FOR WORK PERFORMED ON BEHALF OF LEVEL 3. DO YOU AGREE?**

A. No. Level 3's language is consistent with economic principles in that "neither" party may charge for trunking on its side of the POI. This is consistent with the FCC mandate that each party pays for the facilities on its side of the POI. Qwest's language would have Level 3 pay for facilities on both sides of the POI.

Qwest's proposal is anticompetitive, unreasonable, internally contradictory when viewed in light of unbundling relief granted to them, and against sound public policy in light of the fact that local rates in Iowa are going up, not down. Qwest is trying to change the rules and that is unfair.

DISPUTED ISSUE 2: ALL TRAFFIC ON INTERCONNECTION TRUNKS

Q. PLEASE INTRODUCE THIS ISSUE.

A. This issue is a dispute as to whether Level 3 should be allowed to combine all types of traffic on a single interconnection trunk group. Qwest wants Level 3 to use different trunk groups for different types of traffic ostensibly for billing purposes.

Q. FROM AN ECONOMIC PERSPECTIVE, WHAT IS THE IDEAL SOLUTION TO THIS DISPUTE?

A. The correct solution would be to route all traffic over a single interconnection trunk group. This solution is the most efficient solution from an engineering perspective as discussed by Mr. DuCloo, but it is also the most efficient solution from an economic perspective. By not allowing Level 3 to route all traffic on its interconnection trunks it is denying Level 3 the efficiencies that it could obtain otherwise. In other words, Qwest is forcing Level 3 to purchase additional trunks and facilities that are not necessary given the level of traffic. Artificially increasing the cost of an incumbent's competitors is a common tactic, but is not in the public interest.

Q. MR. EASTON STATES AT PAGE 28 THAT "QWEST HAS NO OBLIGATION TO PERMIT LEVEL 3 TO COMMINGLE SWITCHED

ACCESS TRAFFIC WITH OTHER TYPES OF TRAFFIC ON THE INTERCONNECTION TRUNKS CREATED UNDER THE AGREEMENT." DO YOU AGREE?

A. No. Qwest should allow Level 3 to interconnect in the most efficient manner possible so long as it is technically feasible. Though Qwest refuses to admit in Idaho that there is no technical reason that would prohibit Qwest from combining all types of traffic on interconnection trunks (Level 3's Motion to Compel is pending), Qwest did admit to this in other states (such as Iowa) and I would expect the same answer in Idaho.

Q. **DOES QWEST COMBINE ALL TRAFFIC TYPES ON FGD TRUNK GROUPS FOR OTHER CLECS?**

A. Yes. Qwest allows CLECs, who have a preponderance of FGD traffic, to combine all other types of traffic on those trunks as well.[7] Level 3 has a preponderance of local traffic, and should be allowed to combine what little FGD traffic it might have on its interconnection trunks. This solution is workable and fair.

Q. **WHAT THEN IS QWEST'S OBJECTION TO COMBINING ALL TRAFFIC ON A SINGLE INTERCONNECTION TRUNK GROUP?**

A. Qwest is willing to combine all traffic on a single trunk group, as long as it is a FGD trunk group. Indeed, Qwest will allow all traffic types, with the exception of switched access traffic, to be carrier over interconnection trunks. (Easton Direct at 25) The impact of Qwest's proposals is to increase Level 3's costs. For instance, Qwest says that it is willing to allow the exchange of differently rated

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7 See Qwest Response to Level 3 Request No. 3. (Exhibit 112)

traffic over FGD trunk groups, but Qwest's proposal again is nothing more than an attempt to obtain more money wrapped in the enigma of contradictory requirements. Mr. Ducloo speaks to those issues at length. The economics of the situation, however, are clear: Qwest imposes unnecessary costs upon its competitor - Level 3 – for no other reason than to force upon Level 3 billing "solutions" that already are unworkable in the real world. Instead, as Level 3 already does with Verizon, BellSouth and SBC, the parties should exchange traffic over a single set of interconnection trunks and apply factors – which Qwest itself already applies to both the interconnection trunks (to allocate billing for "locally" rated traffic and "intraLATA Toll" traffic) and on the FGD trunks (to allocate billing for "InterLATA interstate" and "InterLATA intrastate").

Q. WHY DOES QWEST OPPOSE LEVEL 3'S PROPOSAL TO USE BILLING FACTORS?

A. Mr. Easton argues that Level 3's proposal to use billing factors would not result in accurate bills. His argument lacks rational foundation as the telecommunications industry – and as I note above -- Qwest itself not only has used billing factors for decades. Requiring separate trunk groups, as suggested by Qwest, results in a deadweight economic loss to society.

Q. IF BILILNG ACCURACY IS AN ISSUE IN THIS PROCEEDING, WOULD THAT SAME ISSUE BE PERTINENT FOR THE COMBINED TRAFFIC ON FGD TRUNKS?

A. Yes. Qwest is apparently concerned about incentives to misreport traffic since different traffic is subject to different rates. If that were truly a concern, then

Qwest would not have allowed other CLECs to combine all traffic on FGD trunks. Qwest allows other CLECs to combine all traffic on FGD trunks, so it is only fair to allow Level 3 to combine all traffic on interconnection trunks.

Q. WHAT IS LEVEL 3'S PROPOSAL FOR THE USE OF BILLING FACTORS?

A. The billing factors would be based on actual traffic data and adjusted as new data becomes available. Level 3 would provide updates for the factors quarterly or perhaps more often. Level 3's proposal is certainly preferable to forcing a carrier to use FGD trunks in addition to interconnection trunks.

Q. PLEASE SUMMARIZE YOUR POSITION ON COMBINING TRAFFIC ON TRUNK GROUPS.

A. Qwest and Level 3 agree that there is no technical reason that would prohibit Qwest from combining all types of traffic on interconnection trunks. So the only issue to resolve is whether it is more efficient to use billing factors or to force Level 3 to incur the additional and unnecessary costs of the FGD trunks. Unless and until Qwest can show that billing factors are not appropriate, there is no economic justification for forcing these additional costs on Level 3. As such, the Commission should order Qwest to route all traffic to the interconnection trunks and allow Level 3 to provide billing factors that allow for the appropriate pricing of the traffic.

ESP EXEMPTION

Q. MR. BROTHERSON ADDRESSES THE ESP EXEMPTION IN HIS TESTIMONY AT PAGES 15—17. DO YOU AGREE WITH HIS DISCUSSION?

A. No. Mr. Brotherson is correct that the exemption has a long history, but his interpretation of the exemption assumes that it was created solely for the benefit of Qwest and that it applies solely according to a pre-Act view of the world. Qwest's interpretation would force ISPs to purchase services only from ILECs since they would be the only provider with facilities in every local calling area. This is completely inconsistent with the wording of the exemption and with the pro-competitive intent of the Act.

Q. HAS THE PURPOSE OF THE EXEMPTION CHANGED SINCE ITS INCEPTION?

A. No. The ESP exemption is the cornerstone of the policy of the United States "to promote the continued development of the Internet and other interactive computer services and interactive media...[and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1)-(2).

Q. WHAT IS MR. BROTHERSON'S POSITION ON THIS EXEMPTION?

A. Mr. Brotherson says the effect of the exemption is to allow ESPs to avoid access charges when making calls within a local calling area. (Brotherson Direct at 22) This makes no sense. If the ESP is making local calls, then access charges would not apply in any case. In fact, the FCC has noted that access charges do not apply to ISPs providing what appear to be long distance calls. As the FCC noted there are exceptions, "...(*e.g.*, long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption)." [8] Using Qwest's application of the exemption, ESPs would be exempt from access charges for local calls and would pay access charges for calls outside the local calling area; in effect, Qwest's application of the exemption renders it useless.

Q. WHAT IS YOUR INTERPRETATION OF THE ESP EXEMPTION?

A. ESPs – including ISPs – are treated as end users, rather than carriers, for purposes of the FCC's interstate access charges. ISPs are allowed to purchase their services from local tariffs and are not subject to access charges. As such, ESPs are "exempt" from access charges, and obtain service from their local telephone companies under intrastate local tariffs.[9]

Q. MR. BROTHERSON STATES THAT QWEST'S LANGUAGE IS ESSENTIAL TO AVOID ESPS FROM PROVIDING CALLS "...TO ANOTHER LCA IN THE LATA, TO ANOTHER LATA, TO ANOTHER STATE, OR TO

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[8] See, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; Notice of Proposed Rulemaking; Released April 27, 2001; at para. 6. See, also, the *ISP Remand Order* at para. 60.

[9] *See MTS and WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*) ("the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired"); *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16133 (1997) (*1997 Access Charge Reform Order*), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998 ("[m]aintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry.")).

ANOTHER COUNTRY..." (BROTHERSON DIRECT AT 22) IS THAT A RELEVANT CONCERN?

A. No. It is commonly recognized that ESPs and ISPs provide services that cross local calling boundaries, LATA boundaries and even state boundaries. The FCC has recognized that since the inception of the ESP exemption. For instance, the FCC stated in 1997 that, "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[10]

Q. AT PAGE 22 OF HIS TESTIMONY MR. BROTHERSON STATES THAT LEVEL 3'S INTERPRETATION OF THE ESP EXEMPTION WOULD "...GIVE IT ACCESS TO QWEST'S ENTIRE NETWORK ESSENTIALLY FREE OF CHARGE TO TERMINATE IXC TRAFFIC." IS THAT A CORRECT STATEMENT?

A. No. Qwest's only responsibility is to route Qwest originated traffic to the POI for termination by Level 3. Level 3 has agreements with IXCs such that they do pay access charges for IXC traffic. As it has stated repeatedly, Level 3 is willing to pay access charges for IXC traffic.

Q. FROM AN ECONOMIC PERSPECTIVE, WHAT WOULD BE THE IMPACT OF QWEST'S INTERPRETATION OF THE ESP EXEMPTION?

A. Qwest's interpretation would not only eliminate the intended benefits of the exemption, but would actually force ESPs to deploy facilities in every local calling area in the nation. As with the single POI discussed above, forcing competitors to

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10 *Id.* at para. 342.

duplicate decades-old network architectures according to the retail designs of the incumbent (which retail regulation the incumbent is only partially subjected to) is ridiculous where a state seeks promotion of effective competition. The FCC never intended this result nor should any state commission. Instead, ESPs should be able to purchase local services from LECs without paying access charges and without placing equipment (a VoIP POP per Brotherson's LBB1) in every local calling area. Qwest's proposal disadvantages Level 3 and ESPs, and provides a distinct advantage to Qwest's affiliates who provide similar services.

Q. HOW WOULD QWEST'S POSITION BENEFIT QWEST AND ITS AFFILIATES?

A. Under Qwest's proposed language, there would have to be a VoIP POP in every local calling area where a call was originated; or, the called and called parties would have to be physically located within the same local calling area. Assuming Qwest could make such a determination, the only party that could comply with this proposal would be Qwest. Other parties would have to essentially duplicate Qwest's network by placing facilities in every Qwest local calling area. What this means in simplest terms is that only an ILEC would benefit from the ESP exemption and all other providers would not only have to forfeit intercarrier compensation, but would have to pay access charges as well. Not only would such a result be contrary to the Act's goal of creating competition, but it would be contrary to the fundamental purpose of the ESP exemption. If Qwest's language were adopted, ISPs would only purchase services from ILECs – since CLEC service would have access charges on top of the actual cost of providing service. Qwest's position is unreasonable, anticompetitive and should be rejected.

VNXX TRAFFIC

Q. MR. BROTHERSON SPENDS CONSIDERABLE TIME IN HIS TESTMONY ADDRESSING VNXX TRAFFIC. PLEASE COMMENT.

A. Qwest evidently considers VNXX traffic to be an improper scheme to convert toll calls to local calls. (Brotherson Direct at 51) But this service has been around for decades and it provides an important service to consumers and especially to the ISP industry. Qwest is offering services that provide the very same functionality, so it must recognize the demand and benefits of such an offering. In response to Level 3 Request No. 01-025, Qwest indicated that it does offer FX service in Iowa.

Q. AT PAGE 45 OF HIS TESTIMONY MR. BROTHERSON STATES THAT "...VNXX IS AN ARRANGEMENT THAT PROVIDES THE FUNCTIONALITY OF TOLL OF 8XX SERVICE, BUT AT NO EXTRA CHARGE." IS THAT CORRECT?

A. No. From the consumer's perspective VNXX, FX and 800 services offer similar results – dial-up access to the Internet without the imposition of additional per minute of use charges. But the similarity ends there. Mr. Brotherson is wrong to suggest that Level 3 is providing toll or 8XX functionality. Toll calls and 8XX calls use the familiar 1+ dialing pattern and consumers expect the calls to be routed to an IXC of their choosing for completion. They also know, because of the 1+ dialing, that they will pay toll charges for the call. VNXX calls are locally dialed calls, without the use of the 1+ dialing pattern and without the services of an IXC. In other words, the so called "VNXX" which is nothing more than an ILEC invented term that attempts to pull competitors back into the ILEC cost structures and retail offerings, makes no use of the interexchange carrier access network. Mr. Ducloo explains in great detail why 8XX services are not similar to VNXX calls in his rebuttal.

Q. AT PAGE 56 OF HIS TESTMONY, MR. BROTHERSON STATES THAT "LEVEL 3 WANTS THE CALL ROUTED OVER THE PSTN, BUT FEELS NO RESPONSIBILITY FOR PROVIDING THE TRANSPORT TO THE DISTANT LOCATION." IS THAT A CORRECT STATEMENT?

A. No. Level 3 is completely responsible for the termination of the call regardless of the location of the Level 3 subscriber. All Qwest is required to do is to deliver the call to the POI. Mr. Brotherson's statement completely misstates the way these calls are routed. He suggests that Level 3 uses Qwest's "toll network", and that is likewise incorrect. It is Level 3 – not Qwest – that is transporting these "Qwest originated" calls to their destination.

Q. MR. BROTHERSON SAYS THERE IS NO EXTRA CHARGE FOR THE VNXX CALL. IS THAT CORRECT?

A. No. From the perspective of the Qwest customer, the "VNXX" call is no different from any other locally dialed call and no per minute of use charges are imposed upon the Qwest end user, unlike a 1+ call to an IXC or 8XX service. From the perspective of Qwest, the VNXX call imposes no additional costs. From Level 3's perspective, the call is picked up at the POI and delivered over Level 3's network to its customers. Level 3 imposes no additional charge to Level 3's customers for these calls, but even if it did, such fact would not convert the call to a "toll' call nor would it impose any additional costs upon Qwest.

Q. AT PAGES 45 THROUGH 47, MR. BROTHERSON DISCUSSES HIS UNDERSTANDING OF VNXX AND THE USE OF NUMBERING CODES. AT PAGE 47 HE STATES THAT THIS "...IS AN UNINTENDED AND INAPPROPRIATE USE OF THE ASSIGNED NXX." DO YOU AGREE?

A. No. Nor is Mr. Brotherson able to cite to any rules which support his proposition. Rather, he mixes retail regulation with interconnection requirements in ways that are enormously beneficial to Qwest resulting in windfall profits, but cites to nothing that would require interconnecting carriers to mimic ILEC architecture for purposes of routing locally dialed calls to the parties' single point of interconnection within the LATA. Moreover, based upon my review of carrier offerings throughout the industry, the use of VNXX codes is not only common but intended, as previously indicated. To find otherwise would impose the exact kinds of regulatory and economic constraints upon competitors that the FCC and state commissions nationwide intend to lift. Thus the issue of "physical location of the end user" is a red herring developed by an incumbent wireline provider seeking desperately to protect toll revenues in an age where intermodal competition means competing upon the basis of the best technology without the constraints of economic regulation common in a period of single technology monopoly regulation.

Q. DO THE CODE ASSIGNMENT GUIDELINES ALLOW FOR VNXX OR FX NUMBERS TO BE ASSIGNED?

A. Yes. In fact Section 2.14 of the Numbering Guidelines specifically identifies foreign exchange services as being eligible for number assignment:

> It is assumed from a wireline perspective that CO Codes/blocks allocated to a Wireline Service Provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO Codes/blocks are assigned. **Exceptions exist, for example tariffed services such as foreign exchange service.** [11] (emphasis added)

If it were improper or a violation of the guidelines to use virtual NXX codes then all ILECs currently providing FX and FX-type services would be in violation today.

Q. MR. BROTHERSON STATES THAT "...LEVEL 3 WANTS TO SHIFT ALL OF THE COSTS OF THIS ARRANGEMENT TO QWEST." (BROTHERSON DIRECT AT 51) IS THAT A CORRECT STATEMENT?

A. No. There is no additional cost for VNXX calls over and above the cost for a traditional local call. Qwest's obligations and costs are the same in delivering a call originated by one of its customers, regardless of whether the call terminates at a so-called "virtual" or "physical" NXX behind the CLEC switch. Qwest systems and network route these calls in exactly the same way they route other local calls. In response to Level 3 Request No. 01-024, Qwest stated in pertinent part, "The costs Qwest incurs do not vary based upon the physical location of the Level 3 customer."

It is clear that Level 3 is providing a service to Qwest in terminating the traffic originated by Qwest customers. If Level 3 or some other provider did not

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[11] Alliance for Telecommunications Industry Solutions; Sponsor of Industry Numbering Committee; Central Code (NXX) Assignment Guidelines; Released May 28, 2004; hereinafter referred to as "Numbering Guidelines".

terminate those calls, Qwest would need to deploy facilities and capacity sufficient to terminate those calls. As such, Qwest should be economically indifferent as to whether it pays Level 3 for terminating those calls, or whether it transports and terminates the traffic itself.

Q. DOES QWEST OFFER SERVICES OTHER THAN FX AND WHOLESALE DIAL THAT WOULD ENABLE A CUSTOMER PHYSICALLY LOCATED IN THE BOISE LOCAL CALLING AREA TO HAVE A TELEPHONE NUMBER IN A DISTANT QWEST EXCHANGE, SO THAT CALLS TO AND FROM THAT PERSON BY LOCAL SUBSCRIBERS IN THE DISTANT EXCHANGE WOULD BE TREATED AS LOCAL CALLS.? (BROTHERSON DIRECT AT 55-57)

A. Yes. In my direct, I noted that Qwest offers a service called OneFlex™ which permits subscribers to have as many as five virtual numbers. (See Gates Direct at 48-49) I called Qwest's customer service number (1-866-283-0043) to discuss the characteristics and capabilities of this service. The customer service representative (Lisa) was quick to tell me that a subscriber can get up to five virtual numbers of his or her choice so friends and relatives can call without toll charges. I asked her if I could get a local number in Bend, Oregon, and I was told that I could. When I asked how the system works, she said I would be assigned a local number for Bend, Oregon and when my Mother in Bend dials that number she will be connected to me in Denver on a local basis with no toll charges. On Qwest's website, it describes the virtual numbers as follows:

> Virtual Numbers are alias phone numbers that can be associated with your OneFlex™ phone number. Your friends and family can

> dial your Virtual phone number and avoid incurring long-distance charges.
> For example, if you live in Denver and your primary # is 303.xxx.xxxx and your family lives in Omaha, your family has to call long-distance. With OneFlex, you can get a virtual phone number assigned to your account with an Omaha area code, so your family doesn't have to pay long-distance charges.
>
> You can have up to 5 Virtual Phone Numbers attached to one primary OneFlex phone number.

As such, Qwest is selling a service that does exactly what Level 3's service accomplishes – provides a virtual presence for a customer that does not have a physical presence in the exchange. It is disingenuous for Qwest to object to Level 3's service when it offers the same capability to its customers.

Q. ONEFLEX™ IS A VOIP PRODUCT, CORRECT?

A. Yes. But the point is the same; whether it's an FX service, VNXX service or a VoIP service, the consumer is able to purchase a virtual presence in an exchange where he or she has no physical presence. This is the purpose of Level 3's proposed language regarding geographically independent telephone numbers. Mr. Brotherson's statement that "ISP, VoIP or circuit based VNXX calls do not change a toll call into a local call" evidently only applies to Level 3 services and not to Qwest services. (Brotherson Direct at 53)

Q. DOES QWEST HAVE FACILITIES IN EVERY LOCAL CALLING AREA WHERE THEY OFFER VIRTUAL NUMBERS?

A. I don't know. But even if it did, it would be because of its historical network development, not because of a technical necessity. Any ruling by this Commission on VNXX and ISP-bound traffic should be technologically and competitively neutral. A ruling requiring physical facilities in every local calling area is not technologically or competitively neutral in that it reflects only Qwest's network topology.

Q. DOES QWEST'S WHOLESALE DIAL SERVICE PROVIDE LOCAL NUMBERS FOR ACCESSING THE INTERNET ON A DIAL-UP BASIS?

A. Yes, it does. Further, one of the benefits Qwest identifies for its Wholesale Dial customers is that the customer "Incurs no cost of building and maintaining a dial network" and "Can reduce substantial costs associated with network build-out, operations, maintenance and monitoring."[12]

Q. IS MR. BROTHERSON CORRECT TO STATE THAT LEVEL 3'S LANGUAGE WOULD CHANGE THE COMMISSION'S DEFINED LOCAL CALLING AREAS?

A. No. Nothing in Level 3's proposed language would change the Commission's defined local calling areas. Level 3 assigns numbers associated with local calling areas for its customers. That assignment process does nothing to change the established boundaries of the local calling areas. If that were true, then Qwest's foreign exchange service has been guilty of changing Commission defined local calling areas since at least 1954.

Q. MR. BROTHERSON RAISES CONCERNS ABOUT NUMBERING RESOURCES. DOES VNXX IMPACT THE NUMBERING RESOURCES ANY DIFFERENTLY THAN OTHER SERVICES?

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[12] See Qwest's Website for Large Business Internet Solutions; http://www.qwest.com/pcat/large_business/product/1,1016,2098_4_28,00.html

A. No. The Commission has given Level 3 authority to get numbers for its VoIP services, and those same number blocks can be used to offer VNXX services. Offering additional services allows Level 3 to make even more efficient use of the number blocks.

Q. **MR. BROTHERSON SUGGESTS THAT LEVEL 3'S USE OF NUMBERS THAT ARE NOT ASSOCIATED WITH A PHYSICAL LOCATION OF A CUSTOMER IS SOMEHOW IMPROPER. DO YOU AGREE?**

A. No. As noted above, this type of number assignment is common and accepted. The FCC's Number Utilization Report states, "Carriers use other types of non-geographic numbering resources as well: millions of numbers are used to provide toll-free services using non-geographic area codes such as 800, 888, 877 and 866."[13] Other non geographic numbers include 500 and 900 area codes. Area code 500 is used for "follow me" service and area code 900 is used for information services. Millions of wireless numbers are also assigned without reference to geographic location. The fact that a few numbers are also used for VNXX applications should not be of concern to NANPA or the Commission.

Q, **ARE CARRIERS RETURNING NUMBERS TO THE ADMINISTRATOR?**

A. Yes. In the first half of 2004, carriers returned 5.1 million telephone numbers to the numbering administrator. In the second half of 2004, carriers returned 4.8 million telephone numbers to the NANPA.[14]

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13 Id. at page 5.

14 Id. at page 3.

Q. PLEASE SUMMARIZE YOUR POSITION ON THE ECONOMIC IMPACT OF QWEST'S POSITIONS ON VNXX AND OTHER IP-ENABLED SERVICES?

A. Qwest's positions that require a physical presence (i.e., VoIP POP) or a call definition that is based on the physical location of the calling and called parties, are a fabrication designed to accommodate it's deployed network, not an efficient forward looking network. The physical presence requirement would result in uneconomic duplication of the Qwest network design. The requirement for physical locations of the calling and called parties has **never** been an industry standard and is being used by Qwest to redefine local calling, for the single purpose of denying competitors compensation for terminating calls originated by Qwest customers. Not only do these positions deny compensation, but they impose unwarranted costs on Qwest's competitors and harm the efficient operation of the market. Qwest's positions should be rejected.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2006, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 jjewell@puc.state.id.us	Hand Delivered U.S. Mail Fax Fed. Express Email	☑ ☐ ☐ ☐ ☐
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Thomas M. Dethlefs Senior Attorney Qwest Services Corporation 1801 California Street - 10th Floor Denver, CO 80202 Telephone: (303) 383-6646 Facsimile: (303) 298-8197 Thomas.Dethlefs@qwest.com	Hand Delivered U.S. Mail Fax Fed. Express Email	☐ ☐ ☐ ☐ ☑

Idaho
Case No. QWE-T-05-11
L3C 01-003A

INTERVENOR: Level 3 Communications, LLC

REQUEST NO: 003A

Qwest currently has interconnection agreements with one or more CLECs in Idaho under which those CLECs are permitted to carry mixed intraLATA interexchange, and interLATA interexchange traffic on the same trunk groups.

RESPONSE:

Admitted. Qwest currently has interconnection agreements with one or more CLECs in Idaho under which those CLECs are permitted to carry mixed intraLATA interexchange, and interLATA interexchange traffic. That traffic, however, is transported on the same Feature Group D trunk groups, and not on Local Interconnection Service (LIS) trunks.