EXHIBIT C

BEFORE THE NEW MEXICO PUBLIC REGULATON COMMISSION

IN THE MATTER OF THE PETITION OF	**)**	
LEVEL 3 COMMUNICATIONS, LLC FOR	**)**	
ARBITRATION TO RESOLVE ISSUES	**)**	
RELTATING TO AN INTERCONNECTION	**)**	**Utility Case No. 3803**
AGREEMETN WITH QWEST	**)**	
COMMUNICATIONS.	**)**	
	)	

STAFF'S BRIEF

Respectfully Submitted:

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LIST OF AUTHORITES

STATUTES and RULES

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified as 47 U.S.C. § 151 et seq.

47 C.F.R. § 51.5

47 C.F.R. § 51.709(b)

47 C.F.R. § 51.701(b)(1)

47 C.F.R. § 51.701(c).

47 C.F.R. § 51. 701(e)

47 C.F.R. § 51.703(b)

CASES

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002).

Order on Remand and Report and Order, In the Matter of the Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131 (rel. Apr. 27, 2001)(ISP Remand Order); remanded WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C.Cir.2002), No. 01-1218, slip op. (D.C.Cir. May 3, 2002).

Memorandum Opinion and Order, in the Matter of TSR Wireless, LLC, v. U S West Communications, Inc. 15 FCC Rcd at1116 (June 21, 2000), aff'd sub norm., Qwest Corp. v. FCC 252 F.3d 462 (D.C.Cir. 2001)

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996).

COMMISSION CASES

Order Regarding Intercarrier Compensation for ISP-Bound Traffic, issued on May 21, 2002 in Utility Case Nos. 3269 and 3537.

Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A and Public Interest issued on October 8, 2002 in Utility Case Nos. 3269 et al.

OTHER

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications, MPUC Docket No. P-5733, 421/IC-02-1372, Arbitrator's Recommended Decision, (November 2002) (Minn. P.U.C. Recommended Decision)

In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination, Docket No. UT-003013, Thirty-Second Supplemental Order (Washington Commission rel. June 21, 2002)

Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corporation, Oregon ARB 332, Commission Decision entered September 13, 2001.

Initial Commission Decision, In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation, Dkt. No. 00B-601T (Colo. P.U.C. March 30, 2001).

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, with Qwest Corporation Regarding Rates, Terms and Conditions for Interconnection, Opinion and Order, Docket No. T-03654A-00-0992, Docket No. T-01051B-00-0882, Decision No. 63550 (Arizona P.U.C April 10, 2000)

TABLE OF CONTENTS

I. STAFF'S BRIEF

A. Introduction

The Staff of Telecommunications Bureau of the Utility Division ("Staff") of the New Mexico Public Regulation Commission ("NMPRC or Commission") respectfully submits this Brief in response to the Hearing Examiner's Order Concerning Brief issued November 7, 2002.

The only dispute in this arbitration is how the parties will calculate Level 3's rates for "Entrance Facilities," "Direct Trunked Transport" and "Trunk Nonrecurring Charges" for the Local Interconnection Service (LIS) trunks that route ISP-bound calls originated by Qwest customers over Qwest' side of the network. This dispute turns on whether ISP-bound traffic should be included in the calculation of "relative use", agreed upon by the parties, for purposes of determining these rates.[1]

This brief makes the following two arguments. First, Qwest's 11th New Mexico SGAT does not support Qwest's allegations that its proposed contract language is fair, reasonable and consistent with applicable law. Second, applicable law does not require Level 3 to pay costs of interconnection trunks that route traffic originated by a Qwest customer's on Qwest's side of the network.

Staff therefore recommends that the Commission adopt Level 3 Communications, LLC's ("Level 3's") proposed contract language. Staff is in

[1] Both parties witness's admit that they are not seeking a determination from the Commission on whether the ISP-bound traffic at issue is local or interstate in nature. See Tr. 11/6/02, p. 42, ll. 9-12; Id. at p. 24, ll. 4-9. The Commission recognized in its Order Regarding Intercarrier Compensation for ISP-Bound Traffic, issued on May 21, 2002 in Utility Case Nos. 3269 and 3537 ("Intercarrier Compensation Order") that the D.C. Circuit Court did not decide "several important, and perhaps decisive issues" in its review of the ISP Remand Order, Id. at ¶ 5, and in particular did not decide "'whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' (as those terms are defined in the Act, 47 U.S.C. §§

agreement with the recent recommended decision of the administrative law judge in the Minnesota arbitration proceedings on this same issue. In the recommending the adoption of Level 3's proposed contract language, the administrative law judge found that it was consistent with applicable law "to apply what is essentially bill-and-keep to the costs of interconnection for ISP-bound traffic.[2]

In the alternative, if the Commission determines that ISP Remand Order[3] requires ISP bound traffic to be excluded from the calculation of relative use for the costs of interconnection facilities or preempts the Commission from reaching a decision regarding ISP bound traffic, Staff recommends that the Commission determine that Qwest can not recover from the Level 3 any costs incurred in transporting a call originated by a Qwest customer over Qwest's side of the network from Level 3 because these costs are recovered from Qwest's end-users.[4]

Either result by the Commission would be consistent with the bill and keep compensation arrangements for ISP-bound traffic endorsed by the FCC in the ISP Remand Order whereby each carrier recovers costs from its own end-users.[5] In reaching this endorsement of bill and keep, the FCC reasoned that

> "… given the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus carriers have the incentive to compete, not

153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the 'telecommunications' covered by § 251(b)(5). Id. at fn. 28.

[2] In the Matter of the Petition of Level 3 Communications, LLC for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications, MPUC Docket No. P-5733, 421/IC-02-1372, Arbitrator's Recommended Decision, (November 2002) (Minn. Recommended Decision), p. 9 citing the ISP Remand Order, ¶ 81.

[3] Order on Remand and Report and Order, In the Matter of the Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131 (rel. Apr. 27, 2001)(ISP Remand Order); remanded WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C.Cir.2002), No. 01-1218, slip op. (D.C.Cir. May 3, 2002).

[4] Level 3 Exh. 1, pp. 12-13, ll. 17-17.

[5] ISP Remand Order, ¶ 4.

> on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient use."[6]

Qwest itself has proposed to the FCC that originating carriers should be responsible for paying the costs of facilities to transport traffic to other carriers and that the Commission, carriers and end users are better served by moving to bill and keep sooner than later.[7]

Additionally, Qwest's witness admits that Qwest is making use of the interconnection facilities in dispute;[8] that its end users rates recover the total costs of completing local calls;[9] that its end users rates recover total costs of interconnection;[10] and that under Qwest's proposed contract language Qwest will realize increases revenues from Level 3 that it will not realize under Level 3's proposed contract language.[11] Moreover, and perhaps most importantly Qwest has put no evidence into the record to show that it does not recover the costs at issue from its own end users.[12] Finally, Qwest's witness admits that Qwest supports bill and keep but apparently only for "call termination."[13] It seems fundamentally unfair and inconsistent with applicable that Qwest be allowed to shift costs of its own interconnection facilities used to route its own originating traffic to Level 3 when Level 3 can recover no costs for the transport and termination of this same traffic through reciprocal compensation.[14]

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[6] Id.
[7] Level 3 Exh. 2, pp. 5-7, ll 1-3. and attachments.
[8] Tr. 11/6/02 p. 70, ll. 9-14.
[9] Tr. 11/6/02, p. 71, ll. 5-7.
[10] Tr. 11/6/02, p.72, ll. 6-24.
[11] Id., p. 73, ll. 2-17.
[12] Qwest AFOR Plan does not eliminate its obligation to recover its costs through its rates.
[13] Tr. 11/6/02, p. 74, ll. 3-10.
[14] Level 3 Exh. 1, pp. 12-13, ll. 17-17.

In the alternative if the Commission determines that applicable law requires it to exclude internet bound traffic from the calculation of relative use and permits Qwest to recover from Level 3 the costs of routing a call originated by a Qwest customer over Qwest's side of the network or if the Commission determines that it is preempted from reaching a decision regarding this dispute, the Commission should adopt Level 3's proposal that the relative use factor be applied prospectively rather than retroactively in order to simplify billing disputes which may arise between the parties.[15]

B. The Parties

Level 3 Communications, LLC is certificated by the Commission to provide competitive local exchange telecommunication services in New Mexico.[16] Level 3 does not serve any basic local exchange customers in New Mexico and therefore does not originate any traffic in New Mexico.[17] Rather, Level 3 primarily serves Internet service providers ("ISP's).[18] Therefore, at this time, Level 3's New Mexico customers are ISPs.

Qwest Communications is an incumbent local exchange provider ("ILEC") certificated by the Commission to provide local exchange telecommunication services in New Mexico. Level 3 is one of Qwest's New Mexico customers. In addition, Qwest sells services directly to ISPs in New Mexico through intrastate tariffs.[19] Therefore, Level 3 and Qwest directly compete to serve ISP customers in New Mexico.

C. The Disputed Interconnection Agreement (ICA) Provisions

[15] Level 3 Exh. 1, pp. 14-15.
[16] Petition of Level 3 Communications, LLC for Arbitration ("Petition"), filed herein on August 6, 2002, at ¶ 1.
[17] Tr. 11/6/02, p. 14, ll. 8-14.
[18] Id.
[19] Tr. 11/6/01, pp. 51-54.

The disputed contract provisions fall under the specific heading "Interconnection Facility Options."[20] The ICA provides that the parties can establish two-way Local Interconnection Service (LIS) trunks to exchange traffic between their respective networks. *The only dispute in this arbitration is how the parties will calculate the rates for "Entrance Facilities," "Direct Trunked Transport" and "Trunk Nonrecurring Charges" for the LIS trunks.*[21] The ICA provides that Level 3 is obligated to pay Qwest monthly rates for entrance facilities (EF)[22] and direct trunked transport facilities (DTT)[23] provided by Qwest in addition to a one-time rate for the installation of these facilities.[24] The disputed contract provisions obligate Level 3 to pay Qwest rates for its use or "lease" of Qwest EF and DTT interconnection facilities that are located on Qwest's side of the network[25]

The ICA also provides that Level 3's monthly charges for these interconnection facilities ("bill") will be offset by Qwest's "relative use" of the interconnection facilities at issue ("reduction").[26] Under these terms, after the first quarter of use, each parties "relative use" of the facilities will be determined by "actual minutes of use data." (The ICA provided for relative use factor or 50/50 for the first quarter.) Therefore, if Qwest originated 75% of the traffic and Level 3 originated 25% of the traffic on a direct trunk transport facility, Level 3 would be responsible for 25% of the charges of the facility and

[20] See Petition, Exhibit B at pp. 50-53.
[21] Id.
[22] Petition, Exh. B. §§ 7.3.1.1.3 and 7.3.1.1.3.1.
[23] Id. at §§ 7.3.2.1 and 7.3.2.2.1.
[24] Id. at §7.3.3.1.
[25] Qwest Reply, pp. 3-4.
[26] The parties have not agreed, however, that the nonrecurring trunk charges should be offset by the calculation of relative use. Qwest proposes a flat nonrecurring trunk charge for installing the trunk and Level 3 proposed that this charged should be based on relative use. See Petition, Exh. B § 7.3.3.1 disputed contract provisions for "Trunk Nonrecurring Charges."

Qwest would be responsible for 75% of the charges. The parties' ICA provides that Level 3's payments to Qwest will be offset by reductions or credits to Level 3's bills.[27]

Qwest's proposed contract language seeks to except Internet related traffic from the calculation of relative use that will determine how rates will be set for the EF, DDT and installation of the LIS trunks.[28] Under Qwest's proposed contract language, Qwest will not be obligated to credit Level 3 any amount of the monthly charges billed by Qwest for the use of the EF and DDT facilities because 100% the traffic is ISP-Bound traffic, which would be exempted from the calculation of relative use.[29] Under Level's 3's proposal, Qwest will be obligated to credit Level 3 the total amount of monthly charges billed by Qwest for the use of the EF and DTT facilities because Qwest customers will be originating 100% of the traffic. [30]

In addition, the ICA provides for a one-time installation charge to Level 3 for the LIS trunks.[31] Qwest's contract language proposes that this charge should be a one-time flat rate while Level 3's contract language proposes that this charge should be based on the relative use in effect for that facility at the time that the charge is incurred. Because Level 3 proposes a prospective relative use factor and the interconnection agreement provides for an assumed 50/50 relative use factor for the first quarter's use of each facility,[32] under Level 3's proposal, the nonrecurring trunk charge would be divided in half between each party.

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[27] Petition, Exh. B. §§ 7.3.1.1.3.1. and 7.3.2.2.1.
[28] Id.
[29] Tr. 11/6/02, p. 27, ll. 14-22, p. 28, l. 19-22.
[30] Id., pp. 28-29, ll. 25-7.
[31] Id. § 7.3.3.1
[32] Id.

Lastly, Qwest's proposed contract language provides that the relative use factor will be applied retroactively while Level 3 proposed that the relative use factor should be applied prospectively. Therefore, under Qwest's proposal, the parties would be required to "true-up" past payments already made for each quarter based on a relative use factor derived from the actual minutes of use data for the applicable quarter. Under Level 3's proposal, the parties would apply the relative use factor, derived from actual minutes of use data from the past quarter, to the next quarter payments.

D. The Parties' Positions

The central issue to be determined by the Commission is whether the law requires interstate traffic to be excluded from the parties agreed upon "relative use" calculation for the apportionment of financial responsibility of local interconnection trunks.[33] In addition, Level 3 also requests that the Commission reject Qwest's proposed contract language for a pay-and-credit structure whereby the parties would be required to retroactively true-up charges.[34] In place of this structure, Level 3 proposes that the relative use factor be applied prospectively.

Qwest and Level 3 agree that they should share the costs of the trunks that interconnect their networks and that their respective financial responsibility should be determined by each party's "relative use" of the trunks that interconnect their networks.[35] Each party therefore agrees to assume financial responsibility for the trunks and facilities to the extent to which each party is originating traffic flowing over these trunks, except

[33] Qwest Corporation's Motion to Dismiss, or in the Alternative, for Summary Determination ("Qwest Motion to Dismiss"), filed herein on October 1, 2002, p. 1.
[34] Level 3 Exh. 1, pp. 14-15.
[35] Qwest Response, p. 2.

for the origination of interstate traffic.[36] Qwest and Level 3 also agree that based on the service that Level 3 currently provides in New Mexico, all of the traffic flowing over the LIS trunks at issue is one-way, Internet-bound traffic for Level 3's ISP customers.[37] Qwest therefore requests that the Commission create an exception to the parties' agreed upon "relative use" rule for the interstate traffic its customer's originate for determining how to calculate the rates or EF, DDT and installation of LIS trunks.

It is Staff's position that applicable law does not require Level 3 to pay the costs of interconnection trunks that carry traffic originated by Qwest Customer's on Qwest's side of the network. Additionally, it is Staff's position that Qwest's 11th New Mexico SGAT which was approved in Qwest's 271 proceedings does support Qwest's allegations that its proposed contract language is has been repeatedly reviewed by Staff and is fair, reasonable and consistent with applicable law in the factual circumstances presented by this arbitration.

E. Qwest's SGAT Arguments Should be Rejected

Qwest's SGAT arguments as grounds for denying Level 3's requested relief are without merit because, as conceded by Qwest, the SGAT is not dispositive of the issue in dispute in this arbitration.[38] Qwest argues and testifies that the Commission should adopt Qwest's proposed contract language because it is "virtually identical" to that which is contained in Qwest's New Mexico SGAT and "neither the Commission, nor Staff, nor participating CLECs" raised concerns regarding this language in the course of reviewing

[36] Tr. 11/6/02, pp. 12-14, ll. 21-5.
[37] Tr. 11/6/02, pp. 15-17.
[38] Qwest Reply, pp. 18-19.

Qwest's New Mexico SGAT in Qwest's 271 proceedings.[39] Further Qwest's argues that Commission approval of parallel SGAT language "strongly supports Qwest's contention that this language is fair and reasonable and fully conforms with applicable law" because this language was *repeatedly reviewed by the New Mexico Staff and other CLECs*.[40] These SGAT arguments mischaracterize the SGAT review process that was undertaken by Staff in the 271 proceedings. Further, it is Staff's position that the SGAT language provides little probative value in determining whether Qwest's proposed contract language is fair, reasonable and consistent with applicable law under the facts presented by this arbitration.

There is no evidence in the record that the Commission, Staff or any other CLECs have ever reviewed the specific, proposed contract language in dispute or any parallel SGAT language in the 271 proceedings in the specific context provided by this arbitration prior to this proceeding. In addition, there is no evidence in the record that the Commission, Staff or any CLEC has determined or recommended that the specific, proposed contract language in dispute or any parallel SGAT language is fair, reasonable and consistent with applicable law under the facts presented by this arbitration. Moreover, Qwest cites no Commission order to support its assertion that the Commission has previously reviewed the specific proposed contract language in dispute in this case or that it has previously reviewed parallel SGAT language to determine whether this language is just, fair and consistent with applicable law under the circumstances presented in this case.

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[39] Id.; Qwest Motion to Dismiss,, pp. 10-14; and Direct Testimony of Larry B. Brotherson on Behalf of Qwest Corporation, filed herein on October 15, 2002 ("Brotherson Direct"), p. 3, ll. 8-14.

[40] Qwest Corporation's Reply to the Response of Level 3 Communications, LLC to Qwest's Motion to Dismiss, or, in the Alternative, for Summary Determination ("Qwest Reply") filed herein on , pp. 18-19.

A review of the Commission's Order Regarding Inter-carrier Compensation for ISP-Bound Traffic issued on May 21, 2002 in Utility Case Nos. 3269 and 3537, which is cited by Qwest to support its unfounded allegations that the SGAT provisions at issue in this arbitration have been *repeatedly reviewed by New Mexico Staff and CLECs* for conformance with the Commission's order and 271 proceedings,[41] reveals that this Order only addresses inter-carrier compensation in the context of costs of reciprocal compensation and not in the context of relative use and costs of interconnection.[42] Moreover, as reflected in the Intercarrier Compensation Order, none of the facts presented by this arbitration were at issue before the Commission in the 271 proceedings. In addition, the provisions Qwest was ordered to incorporate into its SGAT as a result of that review are not the provisions in dispute in this arbitration. Therefore, the evidence in the record and the Commission determination cited by Qwest to support its conclusion that the Qwest's proposed contract are fair and reasonable and consistent with applicable law, actually support the conclusion that the Commission has not reviewed these provisions and has not determine whether the proposed contract provisions are fair, reasonable and consistent with applicable law under any circumstances including the circumstances presented by this arbitration.

Staff basically concurs with Level 3's characterization of the SGAT review process that is set forth in its response to Qwest's Motion for Summary Determination.[43] Qwest's New Mexico SGAT has been revised eleven times by Qwest since it was first

[41] Qwest Reply, pp. 18-19.
[42] See generally Order Regarding Intercarrier Compensation for ISP-Bound Traffic, issued on May 21, 2002 in Utility Case Nos. 3269 and 3537 ("Intercarrier Compensation Order").
[43] Response of Level 3 Communications, LLC to Qwest Corporation's Motion to Dismiss or, in the Alternative, for Summary Determination ("Level 3 Response"), filed herein on October 16, 2002, pp. 14-15.

filed in New Mexico and consists of hundreds of pages that relate to hundreds of highly technical issues that were negotiated, in part, throughout the multi-state 271 proceedings.[44] For example, the Commission adopted consensus language between Qwest and AT&T in the Inter-Carrier Compensation Order[45] and adopted a multitude of consensus language between and Qwest and CLECs in the 271 process. Moreover, the Commission in its Final 271 Order, explicitly recognized that all compliance issues were not addressed or resolved in Qwest's New Mexico 271 proceedings.[46] In the Final 271 Order, the Commission found that

> "[d]ue to the limited resources, the necessarily voluminous nature of the SGAT, and the substantial changes from SGAT version to SGAT version, it became necessary to create a procedural plan to review whether Qwest's SGAT was compliant with Commission's Order. The purpose of the proposed SGAT review was to provide participating parties a forum for identifying and resolving SGAT compliance issues in reliance on Qwest's affidavit. Further, as asserted by Staff, the integral party of this SGAT compliance review process is that it leaves open the door for the Commission, Staff or other parties in the future to address and resolve compliance issues that have not been resolved by the parties or otherwise considered by the Commission in the review process.[47]

The Communications Act, as amended,[48] provides that Bell operating company, like Qwest, may prepare and file with the Commission an SGAT.[49] The SGAT is Qwest's standard contract offering in New Mexico that any competitor can adopt into in whole or in part.[50] The SGAT, therefore, is the starting point for negotiations for individual interconnection agreements. The Commission has continuing jurisdiction to

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[44] See Qwest's 11th New Mexico SGAT filed in Utility Case Nos. 3269 and 3567.
[45] Inter-Carrier Compensation Order at ¶ 8.
[46] Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A and Public Interest issued on October 8, 2002 in Utility Case Nos. 3269 et al.,¶ 26.
[47] Id.
[48] The Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified as 47 U.S.C. § 151 et seq. ("Telecom Act.)
[49] 47 U.S.C. § 252(f)(1).

review Qwest's SGAT and the Commission throughout the 271 process has repeatedly recognized that it has the authority to exercise continuing jurisdiction over the SGAT.[51]

The Telecom Act further requires Qwest to negotiate interconnection agreements with competitors and permits any party to a negotiation to file a petition for arbitration before a state commission.[52] Further, it delegates the authority to the Commission to arbitrate disputed interconnection agreements between competitors.[53] Qwest's argument that Level 3's proposed contract language should be rejected and that Qwest's proposed contract language should be accepted because almost parallel language is contained in Qwest's SGAT, if accepted by the Commission, would have the effect of rendering the negotiation/arbitration scheme of the Telecom Act a nullity regarding SGAT provisions. The SGAT, rather than being the starting point for negotiations for individual interconnection agreement provisions, would be the end of negotiations for individual interconnection agreement provisions. As a result, competitors would be forced to change the terms of Qwest's SGAT rather than arbitrate disputed individual interconnection agreement provisions.

F. Level 3's Proposed Contract Language is Consistent with Applicable Law

Qwest argues that the ISP Remand Order unequivocally requires that interstate traffic be excluded from the agreed upon relative use factor in the parties' interconnection agreement because the FCC has decided that interstate traffic be excluded from the reciprocal compensation requirements of Section 252 (b)(5) of the Telecom Act.[54] In

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[50] Id.; Qwest New Mexico SGAT Eleventh Revision, October 11, 2002, § 1.8.
[51] See for example, the Final 271 Order, at ¶¶ 4 and 26 and footnote 23.
[52] 47 U.S. C. § 252 (a).
[53] Id.
[54] ISP Remand Order, ¶ 3, "Accordingly we affirm our conclusion that in the Declaratory Ruling that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b). Id.

Qwest's words the "entire issue in dispute is whether Internet-bound traffic is "telecommunications traffic" for the purposes of the FCC's reciprocal compensation rules.[55] It is undisputed that the ISP Remand Order concluded that ISP-bound traffic is not subject to reciprocal compensation obligations of section 252(b)(5).[56] It also is undisputed that 47 C.F.R. § 51.701(b)(1) defines telecommunications traffic to exclude interstate traffic. The rule which Qwest cites as the source of the relative use principal, 47 C.F.R. § 51.709(b), however, refers to "traffic" rather than "telecommunications traffic." Therefore based on ordinary principals of statutory construction, this rule could be read to include, rather than exclude, interstate traffic.[57]

Staff does not dispute that the ISP Remand Order requires that interstate traffic be excluded from the reciprocal compensation requirements of Section 252 (b)(5); that the Commission recognized and adopted this rule in its Intercarrier Compensation Order; and that the FCC has defined telecommunications traffic to exclude interstate traffic. The issue in dispute in this arbitration, however, relates to the costs of interconnection; rather than the costs of reciprocal compensation. Neither the ISP Remand Order nor the Intercarrier Compensation Order addresses the cost recovery structure for interconnection contained in the principal of relative use. In addition, Qwest's witness admits that there is a distinction between intercarrier compensation for transport and termination of ISP-bound traffic and the obligation to carry traffic to the point of interconnection.[58]

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[55] Qwest Reply, pp. 8-9.
[56] ISP Remand Order at ¶ 3.
[57] With respect to defined terms, when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) (citations omitted).
[58] Tr. 11/6/02, p. 75, ll.6-24.

"Interconnection" is the linking of two networks for the mutual exchange of traffic. It is defined in the parties' interconnection agreement to refer to the "connection between networks for the purpose of transmission and routing of telephone Exchange Service traffic, Exchange Access, ISP-bound traffic and Jointly Provided Switched Access traffic.[59] Interconnection does not include the transport and termination of traffic.[60]

Reciprocal compensation, on the other hand, is an arrangement between two carriers in which each receives compensation from the other for the transport and termination on each other's network facilities of telecommunications traffic that originates on the network of the other carrier. "Transport" is the transmission and any necessary tandem switching of telecommunications traffic "from the interconnection point between the two carriers to the terminating carrier's end office switch that directed serves the called party.[61] "Termination" is the switching of telecommunications traffic "at the terminating carrier's end office switch, or equivalent facility, a delivery of such traffic to the called party's premises.[62]

As a general rule, the Telecom Act provides that a LEC (Qwest) is responsible for the costs associated with routing traffic from its customer to the point where the traffic is handed over to another LEC (Level 3). 47 C.F.R. § 51.703(b) provides that

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

[59] Petition, Exh. A., § 4.
[60] 47 C.F.R. § 51.5
[61] 47 C.F.R. § 51. 701(e).
[62] 47 C.F.R. § 51.70 (c).

The FCC, in its First Report and Order on Local Competition concluded that section 252(b)(5) of the Telecom Act does not address charges payable to a carrier to originates traffic by stating:

> Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic.[63]

Moreover, in the TSR Wireless case, the FCC interpreted the First Local Competition Order to require a "carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates."[64] The FCC reasoned that the costs the ILEC incurs to bring its traffic to the point of interconnection should be absorbed by the ILEC because the originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.[65] The record in this case supports the conclusion that Qwest recovers the costs of local call completion and interconnection from its end users.

Qwest cites 47 C.F.R. § 51.709(b) as the source of the relative use rule which, in relative part, states:

> The rate 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.[66]

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[63] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), ¶ 1042. (First Local Competition Order)

[64] Memorandum Opinion and Order, in the Matter of TSR Wireless, LLC, v. U S West Communications, Inc. 15 FCC Rcd at1116 (June 21, 2000), aff'd sub norm., Qwest Corp. v. FCC 252 F.3d 462 (D.C.Cir. 2001) ("TSR Wireless"), ¶ 25.

[65] Id. at ¶ 34.

[66] Qwest Motion to Dismiss; p. 5; Qwest Response, p. 5; and Qwest Reply, p. 10.

This rule, by its express terms relates to cost sharing between carriers when an interconnecting carrier (Level 3) sends traffic to the providing carrier's (Qwest) network to "terminate." This reciprocal compensation rule does not apply to the cost sharing of routing traffic originated by Qwest over the Qwest network to the point of interconnection. It is undisputed that the traffic at issue originates as a local call,[67] that 95% of the traffic is routed locally;[68] that Qwest service allows its end users to make the calls which generates the traffic at issue;[69] and that Qwest advertises local products that promotes access to the Internet through a locally dialed call."[70]

Moreover, it is Staff's concurs with Level's testimony that Level 3 would be at a competitive disadvantage if Qwest were allowed to charge it costs for routing traffic originating by Qwest customers over the Qwest network to the point of interconnection with Level 3.[71] Qwest directly competes with Level 3 for ISP customers and is not required to charge ISP's the costs of routing its own traffic over its own network to the point of interconnection with ISPs.[72] If Qwest is permitted charge Level 3 for the costs of routing traffic originating by Qwest customers over the Qwest network to the point of interconnection with Level 3's network, Qwest would be recovering a rate for this service from both its own end-user and from Level 3. Level 3, on the other hand, would only be allowed to recover rates from its ISP customers. Therefore, Qwest could charge its ISP customers less than Level 3 or other carriers could charge ISP customers for the same services.

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[67] Tr. 11/6/02, p. 31, ll. 7-10.
[68] Id. at p. 18-21.
[69] Id. at pp. 47-48, ll. 25-3.
[70] Id. at p. 48, ll. 12-25.
[71] Level 3 Exh. 2, pp. 26-27.

The Arizona,[73] Colorado[74], Oregon[75] and Washington[76] state commissions, and an administrative law judge in Minnesota have reached determinations regarding the central issue in dispute in this arbitration. The Colorado, Oregon and Washington commission have adopted language that parallels Qwest's proposed contract language for relative use.[77] The Arizona commission, on the other hand, adopted language that parallels Level 3's proposed contract language for relative use. The Minnesota decision recommends adoption of language that parallels Level 3's proposed contract language. The Arizona decision and Minnesota recommended decision are based on rules that require Qwest to pay the costs of interconnection trunks that carry traffic originated by Qwest Customer's on Qwest's side of the network, rather than rules for reciprocal compensation.

Qwest's argument that the Arizona decision is not applicable because it was decided before the ISP Remand Order is not applicable because, contrary to Qwest's assertions, the ISP Remand Order did not conclusively determine that ISP bound traffic is excluded from the calculation of relative use. Staff agrees with the recommended decision in Minnesota that "there is no suggestion in the text or the rationale of the of the

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[72] Id.

[73] In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, with Qwest Corporation Regarding Rates, Terms and Conditions for Interconnection, Opinion and Order, Docket No. T-03654A-00-0992, Docket No. T-01051B-00-0882, Decision No. 63550 (Arizona P.U.C April 10, 2000) ("Arizona Decision")

[74] Initial Commission Decision, In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation, Dkt. No. 00B-601T (Colo. P.U.C. March 30, 2001). ("Colorado Decision").

[75] Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corporation, Oregon ARB 332, Commission Decision entered September 13, 2001 ("Oregon Decision").

[76] In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination, Docket No. UT-003013, Thirty-Second Supplemental Order (Washington Commission rel. June 21, 2002) ("Washington Decision").

ISP Remand Order that the FCC intended to change the rules concerning costs of interconnection, as opposed to reciprocal compensation for ISP-bound traffic." The ISP Remand Order does not refer to section 709(b) all. As argued by Level 3, the ISP Remand Order specifically clarifies in a footnote that "[i]t does not alter carriers obligations under Part 51 rules, 47 C.F.R. 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection."[78]

The Colorado and Oregon determinations are based on the underlying rationale that the ILEC end user is acting primarily as the customer of the ISP when connecting to an ISP served by a CLEC and therefore is the "cost causer" in the facts presented by this arbitration. The Oregon Commission adopted the following rationale of the Colorado decision:

> When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. [79]

Both decisions found that based on this rational, that ISP bound traffic should be excluded when determining relative use of EF and DTT facilities. This commission opted for a compensation regime in which the ILEC (Qwest) shifts it costs of interconnection to the CLEC (Level 3), which shifts its costs to the ISP, which recovers its costs from its end users without analyzing whether the ILEC (Qwest), in the first instance, recovers its costs of interconnection from its own end-users. The record reflects

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[77] Colorado Decision at ¶ C.8; Oregon Decision at pp. 3-5; Washington Decision at pp. 35-37.
[78] ISP Remand Order at ¶ 82, n. 149.
[79] Colorado Decision at ¶ D.8.

that Qwest advertises local dial up access to the internet as a product of its local exchange service;[80] that it advertises second lines for internet access and that it local rates[81] cover costs of interconnection.[82] In addition, under Qwest's proposal Qwest would be able to charge its ISP customers less than any other competitor in the market, including Level, under its proposal.[83]

Lastly, neither the Oregon nor the Colorado decisions distinguish between interconnection and reciprocal compensation. The arbitrator in Oregon concluded that section 252(b)(5) applies to both the transport and termination of traffic without analyzing the FCC's conclusion that Section 252(b)(5) "does not address charges payable to a carrier that originates traffic."[84] The Oregon arbitration additionally found that "[i]n light of the FCC's findings set forth in the ISP Remand Order , the Commission's authority in this area has been preempted" and found that Qwest's proposed language "most closely reflects the policies of the FCC and the Commission."[85] The Colorado commission, citing one of its own prior decision, determined that the Qwest's end-user acts "primarily" as an ISP customer when it connects to the ISP through Level 3 and that the ISP as the "cost causer" should compensate both the Qwest and Level 3 for the costs incurred in originating and transporting the ISP-bound call.

The Washington decision does distinguish between costs of interconnection and costs of reciprocal compensation and concluded that both Qwest and Level 3 should share the costs of interconnection. The Washington Commission found that because ISP

[80] Tr. 11/6/02, p. 47-48.
[81] Id.
[82] Id. at p. 72.
[83] Level 3, Exh. 2, pp. 26-27.
[84] Local Competition First Report and Order at ¶ 1042.
[85] Oregon Decision, Recommended Decision at p. 8.

bound traffic is interstate traffic, this traffic should be excluded from the consideration of EF and DDT interconnection facilities cost-sharing.[86] This decision, however, does not analyze the facts presented by this arbitration in which 100% of the traffic at issue is ISP-bound traffic originated by Qwest's customers on Qwest's network and that therefore, in fact, there will be no cost sharing of EF or DDT interconnection facilities under either parties proposal. In addition, this decision did not address the fact that Qwest is already recovering the total costs of interconnection from its own end-users.[87]

Staff is not persuaded that applicable law requires ISP-bound traffic to be excluded from the calculation for determining costs of interconnection. If this were the case, Qwest would be able to recover costs from Level 3 of traffic it originates and routes over its own network but Level 3 would not be able to recover from Qwest costs of transporting and terminating this same traffic on its own network. The results of such a payment scheme would put Level 3 at a competitive disadvantage because Qwest could recover costs for the same services from rates charged to both its own end-users and to Level 3, whereas Level 3 could only recover these costs from rates charged to its own customers. Moreover, such a payment structure would be contrary to the "bill and keep" structure endorsed by the FCC in the ISP Remand Order and supported by Qwest before the FCC.

For these reasons, if the Commission determines that ISP Remand Order requires the exclusion of ISP bound traffic from the calculation of relative use, or if the Commission determines that federal law has preempted it, Staff recommends that the Commission find that Qwest can not recover from Level 3 any costs incurred in

[86] Washington Decision at p. 37.
[87] Id. at p. 72.

transporting a call originated by a Qwest customer over Qwest's network from Level 3 because Qwest recovers these costs from its own end users.

In the alternative if the Commission determines that applicable law requires it to exclude internet bound traffic from the calculation of relative use and permits Qwest to recover from Level 3 the costs of transporting a call originated by a Qwest customer over Qwest's network, the Commission should adopt Level 3's proposal that the relative use factor be applied prospectively rather than retroactively in order to simplify billing disputes which may arise between the parties if the parties have to true-up past payments which they have already made to each other.[88]

CONCLUSION

For the foregoing reasons, Staff respectfully requests that the Hearing Examiner issue a recommended decision that is consistent with Staff's recommendations contained herein.

Submitted by:

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[88] Level 3 Exh. 1, pp. 14-15.