

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

IN THE MATTER OF THE PETITION FOR
ARBITRATION OF AN INTERCONNECTION
AGREEMENT BETWEEN

LEVEL 3 COMMUNICATIONS, LLC,

AND

QWEST CORPORATION

PURSUANT TO 47 U.S.C. § 252

DOCKET No. UT-023042

**LEVEL 3 COMMUNICATIONS, LLC.,
PETITION FOR ADMINISTRATIVE
REVIEW**

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ATTORNEYS FOR LEVEL 3 COMMUNICATIONS, LLC

1 Level 3 Communications, LLC, (“Level 3”), through its undersigned counsel, pursuant to
2 WAC 480-09-780, submits this Petition for Administrative Review of the Third Supplemental
3 Order, Arbitrator’s Report and Decision, November 27, 2002 (“Decision”). The Commission
4 should reverse the Decision and grant the relief requested by Level 3 as described in the Post-
5 Hearing Brief, attached hereto as Exhibit A.

6 At issue in this arbitration proceeding is the narrow question of whether Qwest
7 Corporation (“Qwest”) should be allowed, and Level 3 required, to exclude traffic bound for
8 Internet service providers (“ISPs”) from the calculation of each party’s “relative use” of
9 interconnection facilities under a proposed interconnection agreement between the two
10 companies. The Arbitrator referred to the Commission’s decisions in Docket No. UT-003013 in
11 which the Commission ruled that Qwest’s concept of “relative use” was acceptable and ISP-
12 bound traffic should be excluded from ILEC/CLEC allocations of financial responsibility for
13 interconnection facilities. Decision at 10. The Arbitrator erred by failing to consider legal
14 distinctions and developments that require a reversal of the prior Commission decisions.

15 NATURE OF CHALLENGE

16 1. While the Commission has previously adopted Qwest’s interpretation of “relative
17 use”, it does not appear the Commission considered the law that requires the adoption of Level
18 3’s language in this arbitration. Level 3 requests that before the Arbitrator’s finding is simply
19 rubber-stamped, the Commission consider the law that requires a reversal of the Commission’s
20 previous decisions. As Level 3 explains in detail in its attached Post-Hearing Brief, there are
21 numerous factors that the Commission did not consider in Docket No. UT-003013 that require a
22 different result here.

23 First, the Commission’s earlier analysis did not consider binding FCC *interconnection*
24 rules, such as FCC Rule 51.703(b), which require Qwest to deliver its originating
25 telecommunications traffic to the POI at no charge to Level 3. FCC “rules of the road,” including
26

1 47 C.F.R. § 51.703(b),¹ permit Level 3 to select a single POI per LATA and require both Qwest
2 and Level 3 to deliver their originating traffic to that POI at no charge to the other carrier.² In
3 the *ISP Order on Remand*, the FCC explicitly affirmed that these interconnection rules continue
4 to apply to ISP-bound traffic.³ Nevertheless, Qwest attempts to avoid these rules by asserting
5 that they do not apply to Internet-related traffic. Although Qwest relies on the *ISP Order on*
6 *Remand* and FCC Rules to support its position, Qwest misapplies and misreads both and ignores
7 the important impact of the D.C. Circuit’s decision in *WorldCom v. FCC*.

8 Qwest argues that Internet-related traffic is excluded from the rules of the road by the
9 exception in FCC Rule 51.701(b)(1) for “interstate or intrastate exchange access.” Qwest,
10 however, does not even claim that Internet-related traffic is “interstate... exchange access,” but
11 asserts that Internet-related traffic must be excluded because it is jurisdictionally “interstate” or
12 “interstate access” traffic. This sleight-of-hand ignores the fact that “exchange access” is a
13 statutorily defined term and that the FCC has not concluded that Internet-related traffic is
14 “exchange access.” Qwest's argument based on the definition of “telecommunications traffic”
15 must therefore fail.

16 Second, Qwest's reliance on FCC Rule 51.709(b) is inapposite. In the first instance,
17 51.709(b) is focused primarily upon terminating compensation—not the originating

18 ¹ Hereafter, all references to 47 C.F.R. will be cited as “FCC Rule xx” or “Rule xx.”

19 ² See 47 C.F.R. § 51.703(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of*
20 *1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1042, 1062 (1996) (subsequent history omitted)
21 (“*Local Competition Order*”); *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and*
22 *Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the*
23 *Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum
24 Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) (“*Texas 271*”); *TSR Wireless, LLC et al. v. U S West Communications,*
25 *Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) (“*TSR*
26 *Wireless*”), *aff’d*, *Qwest Corp. et al. v. FCC et al.*, 252 F.3d 462 (D.C. Cir. 2001); *Developing a Unified Intercarrier*
Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001)
23 (“*Intercarrier Compensation NPRM*”); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for*
Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon
Virginia, Inc., and for Expedited Arbitration, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 52 (Wireline Comp.
Bureau, rel. July 17, 2002) (“*Federal Arbitration Order*”).

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier*
Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151, n.149 (2001) (“*ISP Order on*
Remand”), *remanded WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

1 responsibilities at issue here. By its express terms, the rule makes clear that Level 3 must pay for
2 two-way facilities only to the extent that Qwest uses the facilities to *terminate* traffic that is
3 originated by Level 3’s customers. Nothing indicates that FCC Rule 51.709(b) was intended to
4 override FCC Rule 51.703(b)'s prohibition on charges for facilities Qwest uses to carry traffic
5 originated by its customers.

6 Even if, as Qwest argues, FCC Rule 51.709(b) governs pricing for facilities used to
7 originate traffic from Qwest's end offices to its POI with Level 3, it does not require that
8 Internet-related traffic be excluded from a relative use calculation. First, it refers to “traffic,” not
9 “telecommunications traffic,” so the scope of traffic to be included in 51.709(b)’s relative use
10 calculation is not limited by the exceptions to the definition of “telecommunications traffic.”
11 However, even if “traffic” were equated with “telecommunications traffic,” after *WorldCom v.*
12 *FCC* there is no longer any basis for excluding Internet-related traffic from “telecommunications
13 traffic.” Because all of the traffic (or telecommunications traffic) at issue in this case is being
14 generated by Qwest’s customers when they make local calls to connect to ISPs, this rule, when
15 applied correctly, does not support Qwest’s position. The only circumstance under which Level
16 3 could be required to pay for a portion of these facilities would be if a Level 3 local customer
17 was initiating the calls and Qwest used the facilities to *terminate* Level 3’s traffic. The
18 Commission should adopt Level 3’s position and find that Internet-related traffic must be
19 included in the relative use calculation.

20 Third, other arbitration decisions not considered by the Commission, including the
21 *Federal Arbitration Order*, decisions by the Arizona,⁴ New York,⁵ and Minnesota⁶ regulatory

22 ⁴ *Petition of Level 3 Communications, LLC, for Arbitration Pursuant to Section 253(b) of the Communications Act of*
23 *1934, as Amended by the Telecommunications Act of 1996, with Qwest Corporation Regarding Rates, Terms and Conditions for*
24 *Interconnection*, Docket Nos. T-03654A-00-0882, T-01051B-00-0882, Decision No. 63550, Opinion and Order (Ariz. Corp.
Comm’n Apr. 10, 2001). The Arizona decision is attached as Exhibit B.

25 ⁵ *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to*
26 *Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006 (N.Y.P.S.C. May 22, 2002). The New York
decision is attached to the Post-Hearing Brief as Exhibit 2.

⁶ *Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement*
with Qwest Communications, Docket 3-2500-15076-2 MPUC P5733,421/IC-02-1372, Arbitrator’s Recommended Decision

1 commissions, and a recommendation by New Mexico staff,⁷ support Level 3's position. Further,
2 in Docket No. UT-003013, the Commission stated, "We may revisit our decision excluding ISP-
3 bound traffic as further judicial and federal regulatory review occurs."⁸ The Commission should
4 do that in this proceeding, and grant the relief requested by Level 3 as described in the attached
5 Post-Hearing Brief.

6 RESPECTFULLY SUBMITTED this 23rd day of December, 2002.

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23 (Minn. PUC). The Minnesota recommended decision, which was subsequently adopted by the Minnesota Commission, was
attached to the Post-Hearing Brief as Exhibit 1.

24 ⁷ *Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement*
with *Qwest Communications*, Utility Case No. 3803 (N.M. P.R.C.) The New Mexico Staff Recommendation is attached as
25 Exhibit C.

26 ⁸ *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013,
Thirty-Second Supplemental Order; Part B Order; Line Splitting, Line Sharing Over Fiber Loops; OSS; Loop Conditioning;
Reciprocal Compensation; and Nonrecurring and Recurring Rates for UNES, June 21, 2002, at 37.

1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that the original and nineteen (19) copies of the foregoing LEVEL 3
4 COMMUNICATIONS, LLC PETITION FOR ADMINISTRATIVE REVIEW in WUTC Docket No. UT-
5 023042, including diskette of same in Word and Adobe format, was sent via electronic, facsimile
6 and ABC Legal Messenger on this 23rd day of December, 2002, addressed to the following:

7 CAROLE J. WASHBURN
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12 MARJORIE R. SCHAEER
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17 And that a true and correct copy of same has been served via electronic, legal messenger and/or
18 FedEx Priority Overnight on this 23rd day of December, 2002, properly addressed to the
19 following:

20 LISA A. ANDERL
21 QWEST CORPORATION
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DATED at Seattle, Washington this 23rd day of December, 2002.

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