BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996, WITH QWEST CORPORATION REGARDING RATES, TERMS, AND CONDITIONS FOR INTERCONNECTION	**Docket No. UT-023042** **QWEST CORPORATION'S ANSWER TO LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ADMINISTRATIVE REVIEW**

Pursuant to the Third Supplemental Order – Arbitrator's Report and Decision[1] issued by the Arbitrator in this case on November 27, 2002, Qwest Corporation submits this answer to Level 3 Communications, LLC's ("Level 3") Petition for Administrative Review ("Level 3's Petition"). For the reasons set forth below, and those discussed in Qwest's post-hearing brief and briefing on Qwest's motion to dismiss,[2] the Commission should reject Level 3's Petition.

I. Introduction

This proceeding involves an interconnection arbitration between Qwest and Level 3 conducted under section 252 of the Telecommunications Act of 1996 (the "Act"). The sole issue presented in the arbitration concerns the extent of Level 3's obligation to pay for the interconnection trunks it obtains from Qwest to interconnect with Qwest's Washington network. Qwest and Level 3 agree that their financial responsibility for these trunks will be determined based on each party's "relative use" of the trunks, with relative use being determined by the amount of telecommunications traffic each party originates over the trunks. However, Level 3 takes the position that the traffic used to determine each

[1] *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. Section 252*, Docket No. UT-023042, Third Supplemental Order – Arbitrator's Report and Decision (Nov. 27, 2002) ("Arbitrator's Report and Decision").

[2] *See* Qwest Corporation's Motion To Dismiss Or, In The Alternative, For Summary Determination (filed Sept. 17, 2002); Qwest Corporation's Reply In Support Of Its Motion To Dismiss Or, In The Alternative, For Summary Determination (filed Oct. 16, 2002); Qwest Corporation's Post-Hearing Brief (filed Nov. 8, 2002).

party's relative use of these *local* interconnection trunks should include *interstate* Internet traffic. Under this position, Level 3 would pay nothing for the interconnection trunks it obtains from Qwest.

As the Arbitrator's decision properly recognizes, Level 3's position directly contravenes conclusive rulings from this Commission establishing that Internet traffic must be excluded from relative use calculations. Level 3 offers nothing new in its Petition warranting the reconsideration of those rulings or the Arbitrator's decision here. Accordingly, for the reasons set forth in the Arbitrator's Report and Decision and those set forth in Qwest's briefing on its motion to dismiss and Qwest's post-hearing brief, which are incorporated herein by reference, the Commission should deny Level 3's Petition.

II. Discussion

A. The Commission Has Already Decided The Relative Use Issue Presented Here.

In its Thirty-Second Supplemental Order in Docket No. UT-003013 issued last June, this Commission ruled that because Internet traffic is interstate, it must be excluded from the relative use calculations that determine financial responsibility for local interconnection trunks.[3] The Commission reached this result after considering detailed testimony and arguments on the issue in that docket. Competitive local exchange carriers ("CLECs") participating in Docket No. UT-003013 petitioned the Commission for reconsideration of its ruling and, in an order issued just over three months ago, the Commission again ruled that Internet traffic must be excluded from the relative use calculation.[4] Consistent with these rulings, the Commission has approved language in Qwest's statement of generally available terms ("SGAT") that excludes Internet traffic from relative use calculations.[5]

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[3] 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, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 113 (June 21, 2002) ("Thirty-Second Supplemental Order").

[4] Thirty-Eighth Supplemental Order; Final Reconsideration Order, Part B, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 64 (Sept. 23, 2002).

[5] In its *Thirty-Ninth Supplemental Order* in Docket Nos. UT-003022 and UT-003040, the Commission approved Qwest's SGAT and found that it complies with Qwest's obligations under Sections 252 and 271 of the Act. The language Qwest proposed in this case relating to relative use is identical in all material respects to the language in Qwest's Washington SGAT that the Commission approved.

In light of clear and well-reasoned Commission precedent, the Arbitrator correctly concluded that Internet traffic should be excluded from the calculation of each party's "relative use" of interconnection facilities under the parties' proposed interconnection agreement.[6] In reaching this decision, the Arbitrator expressly relied upon the Commission's ruling in Docket No. UT-003013, concluding that "[i]n considering and reconsidering this issue in Docket No. UT-003013, the Commission ruled unequivocally that because the FCC has ruled that Internet traffic is interstate, not local, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities."[7] Based on the Commission's unequivocal rulings, the Arbitrator recommended that the Commission grant Qwest's dispositive motion and "determine as a matter of law that Qwest's proposed language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 is consistent with Commission and FCC rulings."[8] Level 3's claim that "[t]he Arbitrator erred by failing to consider legal distinctions and developments that require a reversal of the prior Commission decisions"[9] is unfounded and should be rejected.

B. The Commission Need Not Reconsider Its Prior Rulings On This Issue, And The Arbitrator's Report and Decision Should Be Adopted.

The target of Level 3's petition is not so much the Arbitrator's ruling but, instead, is the Commission's rulings in Docket No. UT-003013.[10] Thus, Level 3 argues that the Commission erred in that docket by failing to consider law that, according to Level 3, requires the inclusion of Internet traffic in relative use calculations.[11] This challenge is flawed, both procedurally and substantively.

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[6] *See* Arbitrator's Report and Decision at 10-11, ¶¶ 28-30.

[7] *Id.* at 10, ¶ 28.

[8] *Id.* at 10, ¶ 29.

[9] Level 3 Petition at 1.

[10] *See, e.g.*, Level 3 Petition at 1, 4 (asserting that "there are numerous factors that *the Commission* did not consider in Docket No. UT-003013 that require a different result here" and urging the Commission to "revisit" its prior rulings "in this proceeding").

[11] *See, e.g.*, Level 3 Petition at 1.

Procedurally, it is improper for Level 3 to collaterally attack the Commission's rulings in the cost docket in this single arbitration between just two parties. The cost docket proceeding in which the Commission issued its earlier rulings involved multiple parties and was open to full participation by all interested carriers, including Level 3. For reasons known only to it, Level 3 elected not to participate in that docket. Having made that choice, Level 3 should not be permitted to challenge the Commission's rulings from that docket in this arbitration.

On the merits, Level 3's Petition is flawed and the Commission need not reconsider yet again its well-founded decision to exclude Internet traffic from relative use calculations. First, Level 3's claim that the Commission "did not consider binding FCC *interconnection* rules, such as FCC Rule 51.703(b), which require Qwest to deliver its originating telecommunications traffic to the POI at no charge to Level 3"[12] is wrong. As Qwest explained in its briefing, the Commission has considered the FCC's rules and reached the correct result,[13] and Level 3's argument that FCC Rule 51.703(b) applies to Internet traffic[14] is wrong. Indeed, if Level 3 were correct that Rule 51.703(b) applies to Internet traffic, then the payment of reciprocal compensation would be *required* for Internet traffic pursuant to subsection (a) of the same rule (51.703).[15] But this novel (and unfounded) approach directly contradicts repeated FCC rulings, dating from before the issuance of the *ISP Remand Order* to the present, including the *Verizon Arbitration Order*[16] on which Level 3 relies. The FCC has affirmed and reaffirmed, on at least *nine* occasions, that reciprocal compensation is not due on ISP-bound traffic

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[12] *Id.* (emphasis in original).

[13] *See, e.g.*, Qwest Corporation's Motion To Dismiss Or, In The Alternative, For Summary Determination at 5-8; Qwest Corporation's Reply In Support Of Its Motion To Dismiss Or, In The Alternative, For Summary Determination at 3-6.

[14] *See* Level 3 Petition at 2.

[15] Rule 51.703(a) provides: "Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." 47 C.F.R. § 51.703(a).

[16] Memorandum Opinion and Order, *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, et al,* CC Dkt. Nos. 00-218, 00-249, & 00-251, DA 02-1731, (Wireline Competition Bureau, rel. July 17, 2002) ("*Verizon Arbitration Order*").

under section 251(b)(5) of the Act.[17] This unbroken string of FCC pronouncements on the issue continues in the recent decision of the Wireline Competition Bureau, cited by Level 3, in the *Verizon Arbitration Order*.[18] In short, contrary to Level 3's new claim, the FCC has consistently ruled that because Internet traffic is interstate traffic, it is *not* subject to the reciprocal compensation provisions of the Act and the FCC rules.[19] For this same reason, Level 3's claim that Qwest's reliance on FCC Rule

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[17] *See, e.g.,* Memorandum Opinion and Order, *Application by Verizon New Jersey, Inc., et al. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, CC Dkt. No. 02-67, FCC No. 02-189 17 FCC Rcd 12,275 ¶ 160 (rel. June 24, 2002) (noting that because the FCC has previously determined that ISP-bound traffic is not subject to § 251(b)(5), "whether a BOC pays reciprocal compensation for Internet-bound traffic 'is not relevant to compliance with checklist item 13'") (footnotes omitted); Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Dkt. No. 02-35, FCC 02-147, ¶ 272 (rel. May 15, 2002) (rejecting assertions regarding reciprocal compensation for ISP-bound traffic and noting that "under a prior [FCC] order, ISP-bound traffic is not subject to the reciprocal compensation provisions of §§ 251(b)(5) and 252(d)(2)") (footnotes omitted); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Dkt. No. 01-138, FCC No. 01-269, 16 FCC 17,419 ¶ 119 (rel. Sept. 19, 2001) (stating that because "ISP-bound traffic is not subject to the reciprocal compensation provisions of §§ 251(b)(5) and 252(d)(2) . . . we continue to find that whether a carrier pays such compensation is 'irrelevant to checklist item 13'") (footnotes omitted); Memorandum Opinion and Order, *Application of Verizon New York, Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Dkt. No. 01-100, FCC No. 01-208, 16 FCC Rcd 14,147 ¶ 67 (rel. July 20, 2001) (same) (footnotes omitted); Memorandum Opinion and Order, *Application of Verizon New England, Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Dkt. No. 01-9, FCC 01-130, ¶ 215 (rel. April 16, 2001) (same); Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Dkt. No. 00-207, FCC 01-29, ¶ 251 (rel. Jan. 22, 2001) (same); Memorandum Opinion and Order, *Application by SBC Communications, Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Dkt. No. 00-65, FCC 00-238, ¶ 378 (rel. June 30, 2000) (noting that the FCC had determined that ISP-bound traffic was not subject to the reciprocal compensation requirements of § 251(b)(5) of the Act); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Dkt. No. 99-295, FCC 99-404, ¶ 377 (rel. Dec. 22, 1999) (concluding that because ISP-bound traffic is not subject to § 251(b)(5) of the Act, carrier's payment or non-payment of such compensation on Internet traffic is "irrelevant to checklist item 13") (footnotes omitted).

[18] *Verizon Arbitration Order* ¶¶ 245, 256 (noting that the FCC had long ago concluded "that ISP-bound traffic is not subject to [reciprocal compensation under] section 251(b)(5)").

[19] In its recent order granting Qwest's application to provide InterLATA services in Washington and eight other states, the FCC again stated that Internet traffic is not subject to the reciprocal compensation provisions of sections 251(b)(5) and 252(d)(2). *See* Memorandum Opinion and Order, *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Dkt. No. 02-314, FCC No. 02-332 (rel. Dec. 23, 2002) ("*Qwest 9-State 271 Order*") at ¶ 324. In doing so, the FCC also rejected Level 3's claim that Qwest's policy of excluding Internet traffic from relative use calculations gives rise to a violation of Checklist Item 1 of section 271. *Id.* While stating that it "has not clearly addressed the issue raised here – the treatment of Internet-

51.709(b) is "inapposite"[20] also misses the mark. Consistent with those rulings, this Commission and state commissions in Colorado and Oregon exclude Internet traffic from relative use calculations. The United States District Court for the District of Oregon recently upheld the Oregon Commission's ruling.[21]

Second, including Internet traffic in relative use would violate the very policy considerations that led the FCC to reject the payment of reciprocal compensation for Internet traffic in the *ISP Remand Order*.[22] As Qwest has explained, Level 3 does not dispute that including Internet traffic in the relative use calculations would result in Level 3 obtaining interconnection trunks from Qwest for free.[23] It would order from Qwest the trunks it must have to serve its Internet service provider ("ISP") customers, cause Qwest to incur the substantial costs of providing these trunks, and then shift all of those costs onto Qwest.[24] This inequitable result would violate section 252(d)(1) of the Act, which requires that incumbent local exchange carriers ("ILECs") like Qwest receive "just and reasonable" compensation for providing interconnection and unbundled network elements ("UNEs") to CLECs.

Level 3's claim that the Commission did not consider decisions supporting Level 3's position, including the *Verizon Arbitration Order* and decisions by the regulatory commissions in Arizona, New York and Minnesota and a recommendation by the New Mexico staff is similarly misguided. The decisions and staff recommendation relied upon by Level 3 do not constitute grounds for the Commission's reconsideration of its previous rulings on the relative use issue presented here. As Qwest made clear in its briefs relating to its motion to dismiss, the decision of the FCC Wireline Competition

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related traffic in the intercarrier allocation of shared facilties costs," (*Id*. at ¶ 325) the FCC expressly declined "to find Qwest out of compliance with checklist item one" for excluding Internet traffic from relative use calculations.

[20] *See* Level 3 Petition at 2.

[21] *See* Opinion and Order, *Level 3 Communications, LLC v. Public Util. Commission of Oregon*, No. CV 01-1818-PA, slip op. at 8 (D. Or. Nov. 25, 2002). A copy of this decision is attached as **Attachment A**.

[22] *ISP Remand Order* ¶¶ 66-70.

[23] *See* Qwest Post-Hearing Brief at 3-7.

[24] *See id.*

Bureau in the *Verizon Arbitration Order* does not touch upon whether ISP-bound traffic should be considered in the relative use calculations under FCC Rule 51.709(b).[25] Similarly, the New York decision does not address the relative use issue before the Commission. The Arizona decision Level 3 relies upon was rendered before the *ISP Remand Order* and therefore is not consistent with current, governing FCC law. The Minnesota decision is also unpersuasive because it misapplies Rule 51.703(b) and contravenes binding FCC rulings establishing that reciprocal compensation rules do not apply to Internet traffic. Finally, the "recommendation" of the New Mexico staff is just that – it is not a decision of the New Mexico Commission or even of an arbitrator considering the relative use issue. Moreover, Level 3 fails to mention, let alone distinguish, state commission decisions in Colorado and Oregon (and the United States District Court's decision affirming the Oregon Commission's order) which support the Washington Commission's resolution of the issue.

While Level 3 correctly notes that the Commission stated that it "may revisit [its] decision excluding ISP-bound traffic [from relative use calculations] as further judicial and federal regulatory review occurs,"[26] the "decisions" it cites do not satisfy that standard. Level 3 does not cite to any judicial or federal regulatory review of the relative use issue justifying the Commission's reconsideration of its prior rulings on this issue. The federal regulatory landscape has not changed since the Commission made its rulings in Docket No. UT-003013. And, Level 3 ignores the only *judicial* authority on this precise issue – the recent decision of the United States District Court for the District of Oregon affirming the Oregon Commission's decision to exclude Internet traffic from relative use calculations that in an arbitration between these same parties.[27]

In sum, despite repeated attempts to do so, Level 3 cannot escape the fact that the Commission has considered and rejected Level 3's arguments regarding the relative use issue presented in this

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[25] *See* Qwest Corporation's Reply In Support Of Its Motion To Dismiss Or, In The Alternative, For Summary Determination at 13-14.

[26] Level 3 Petition at 4.

[27] *See* Opinion and Order, *Level 3 Communications, LLC v. Public Util. Commission of Oregon*, No. CV 01-1818-PA, slip op. at 8 (D. Or. Nov. 25, 2002).

arbitration. The Commission need not reconsider its prior determinations on this issue, and should, therefore, adopt the Arbitrator's Report and Decision.

III. Conclusion

For the reasons stated herein, the Commission should deny Level 3's Petition, adopt the Arbitrator's Report and Decision and approve Qwest's proposed interconnection language relating to relative use.

DATED: January 8, 2003 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the attached **Qwest Corporation's Answer to Level 3 Communications, LLC's Petition for Administrative Review** were served on the following:

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