

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In the Matter of the Petition)
of Level 3 Communications, LLC)
4 for Arbitration Pursuant to) Docket No. UT-023042
Section 252(b) of the) Volume IV
5 Telecommunications Act of 1996,) Pages 122 - 176
with Qwest Corporation Regarding)
6 Rates, Terms, and Conditions)
for Interconnection)
7 -----

8 An oral argument in the above matter
9 was held on January 15, 2003, from 3:08 p.m. to 4:41
10 p.m. at 1300 South Evergreen Park Drive Southwest,
11 Olympia, Washington, before Chairwoman MARILYN
12 SHOWALTER, Commissioners PATRICK J. OSHIE and RICHARD
13 HEMSTAD.

14 The parties were present as follows:

15 LEVEL 3 COMMUNICATIONS, LLC, by GREG L.
16 ROGERS, Attorney at Law, 1025 Eldorado Boulevard,
Broomfield, Colorado 80021; telephone (720) 888-2512.

17 QWEST CORPORATION, by MARY ROSE HUGHES,
18 Attorney at Law, Perkins Coie, 607 14th Street
Northwest, Washington, D.C. 20005-2011; telephone (202)
434-1606.

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25 Kathryn T. Wilson, CCR
Court Reporter

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1 P R O C E E D I N G S

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3 CHAIRWOMAN SHOWALTER: Good afternoon. This
4 is an oral argument in Docket No. UT-023042, which is a
5 matter regarding a petition for arbitration of
6 interconnection arrangement between Level 3
7 Communications, LLC, and Qwest Corporation. Let's
8 begin with introduction of counsel.

9 MR. ROGERS: Greg Rogers is appearing on
10 behalf of Level 3 Communications.

11 MS. HUGHES: Mary Rose Hughes, Perkins Coie,
12 outside counsel for Qwest on behalf of Qwest
13 Corporation.

14 CHAIRWOMAN SHOWALTER: As we discussed, each
15 side will have 45 minutes, and I understand that
16 Level 3 would like to reserve 15 minutes for rebuttal.
17 We will be sensitive in case the commissioners have a
18 lot of questions that take one side's time, I will try
19 to even things out a little, so go ahead, Mr. Rogers.

20 MR. ROGERS: Good afternoon, Madam Chairwoman
21 and Commissioners. Level 3 appreciates the opportunity
22 to be here this afternoon and to have the opportunity
23 to address the Commission about its arbitration and the
24 request for administrative review of the arbitrator's
25 recommended decision in this case. I would like to

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1 begin with a short introduction of the issue and our
2 description of what the issue is.

3 First what I would like to point out is that
4 we've agreed to an interconnection agreement that
5 allows the parties to exchange traffic that includes
6 Internet service provider traffic, ISP-bound traffic.
7 The network architecture that we've agreed to allows
8 Level 3 to establish one point of interconnection per
9 LATA, which would mean that Qwest is required to bring
10 its traffic that it originates, its end-users
11 originate, to the point of interconnection, at which
12 point Level 3 takes it and will terminate it.

13 At this time, because the only service that
14 Level 3 offers via its interconnection with Qwest is
15 dial-up Internet access service, all the traffic in
16 question is originated by Qwest end-users. Initially,
17 when we began exchanging traffic, that traffic flows
18 over a common network to the point of interconnection.
19 Qwest delivers its originated traffic to Level 3 at the
20 point of interconnection at no charge.

21 It is only when Qwest end-users generate or
22 originate a DS-1 worth of traffic that Level 3 is
23 required to order direct trunk transport. Direct trunk
24 transport is required, the parties agree, because it is
25 to the mutual benefit of both parties to establish

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1 direct trunk transport to avoid call blocking. A DS-1
2 worth of traffic is a threshold that has been
3 established so as to avoid call-blocking that may occur
4 over the common network if there is that much traffic
5 flowing to Level 3.

6 DTT, direct trunk transport, is required to
7 be ordered by Qwest in every interconnection agreement
8 that I've seen that I'm aware of. That's something
9 that they advocate for vigorously, and as I've said,
10 they do so because it affects their end-users'
11 experience. They want to avoid call-blocking from
12 occurring. But by requiring the direct trunk transport
13 be deployed and then requiring that Level 3 pay for it,
14 Qwest effectively forces Level 3 to establish a point
15 of interconnection at every end-office. It's at each
16 end-office where a DS-1's worth of traffic is
17 originated that is the measurement or dictates where
18 the DTT is deployed. So by requiring Level 3 to pay
19 for the facilities out to each end-office, it
20 eviscerates the value of having been able to establish
21 one POI in every LATA.

22 It also, by seeking payment for these trunks
23 -- excuse me. It is a discriminatory treatment because
24 they've not required any other CLEC to do this if voice
25 traffic were involved. If it were voice traffic that

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1 had raised to the level of the threshold of a DS-1
2 worth of traffic and DTT were required to be deployed,
3 Qwest would not at that point then begin billing the
4 CLEC for those facilities.

5 CHAIRWOMAN SHOWALTER: I'm going to jump in
6 with an interruption. It's your position that we made
7 a mistake in our generic cost proceeding, and that is
8 Docket 003013, and my question is if we did make a
9 mistake or didn't make a mistake?

10 Supposing we were wrong and your position is
11 correct, and we say in this order we were wrong in
12 003013. Level 3 is correct. What's the implications
13 of that? That is, we've issued a final order in that
14 generic cost case. What would it mean if we say in
15 this case we were wrong?

16 MR. ROGERS: I don't know I can say with
17 certainty what the exact effects would be, but I don't
18 believe that a decision in Level 3's favor in this
19 arbitration necessarily means that the final order has
20 to be affected or overturned. This arbitration is
21 binding on the parties to the arbitration. Other CLECs
22 would be allowed to opt into Level 3's final agreement,
23 which would contain language that Level 3 has proposed
24 that does not include Internet-bound traffic in the
25 calculation of relative use, but Level 3 is not saying

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1 that the Commission must go and overturn it's final
2 order in the cost case, in 003013.

3 CHAIRWOMAN SHOWALTER: Then I'll ask it the
4 other way. What if we were right or we had authority
5 to rule the way we did, and we maintain that position
6 in the generic cost case. Do you see a way that your
7 position here can prevail at the same time that we
8 reaffirm in the order, say, that the generic cost
9 decision is correct?

10 MR. ROGERS: I don't know how the Commission
11 could take that position, and I think maybe a way of
12 describing how Level 3 might prevail in this
13 arbitration but the Commission would not change its
14 previous final order, what Level 3 has done
15 specifically here is to request a review of the
16 arbitrator's recommended decision. The arbitrator's
17 recommended decision is essentially that the Commission
18 has determined this issue previously, and the
19 arbitrator did not feel that she could overturn, in
20 effect, the Commission's prior decision.

21 The Commission's decision is based, as I
22 understand it, on an understanding that the FCC has
23 already spoken unequivocally to this issue. On the
24 same day that we filed our petition for administrative
25 review in this case, the FCC issued their Qwest 271

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1 order. In the Qwest 271 order, the FCC said it had not
2 addressed this particular issue squarely, so the
3 Commission's prior decision that if it had, in fact,
4 spoken to this issue and the FCC's decision was binding
5 on the Commission, is, I think, at this point in time,
6 wrong. That is not the case because the FCC has now
7 said it's not spoken to this particular issue, and it
8 did not do so in the ISP remand order.

9 CHAIRWOMAN SHOWALTER: I guess there are two
10 aspects of potentially being wrong in our earlier case.
11 One is that what you just said, which is we said we
12 have to do this because the FCC has ruled and so we
13 will abide by that until such time that there are more
14 cases, and you are saying the FCC just clarified they
15 didn't, but then what about the merits of it?

16 As I understand your argument is that aside
17 from our interpretation of what the FCC did, current
18 FCC rules, and maybe at the time also, distinguish
19 between interconnection agreements on the one hand and
20 terminating charges on the other, so we got it wrong on
21 the substance, not just a reliance on an FCC rule.

22 MR. ROGERS: I think that is a fair
23 characterization of what Level 3 has said in its
24 petition for administrative review in this case. We
25 believe that perhaps the Commission did not have the

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1 opportunity to consider all relevant arguments, all
2 relevant law in the cost case because there were so
3 many issues at hand, and it did not allow the
4 opportunity to know each and every issue in-depth as
5 we've done in this arbitration, so we do believe that
6 there are considerations that the Commission ought to
7 take into account that would ultimately result in an
8 order in Level 3's favor.

9 CHAIRWOMAN SHOWALTER: So you say we should
10 come out with an order that says the FCC had not
11 decided the question and they just clarified that
12 point, and furthermore, the law and the rules require
13 us to go the other way.

14 MR. ROGERS: That is what Level 3 submits,
15 correct.

16 COMMISSIONER HEMSTAD: Before we lose the
17 point or move onto something else, I want to be quite
18 clear. It's your view that the generic cost pricing
19 order is not able to be distinguished on the facts.

20 MR. ROGERS: No. I do believe that not only
21 because the Qwest 271 order has changed what the
22 fundamental decision was is that the Commission was
23 bound by the FCC, by the remand order. I think the
24 decision substantively can be distinguished by a closer
25 look at the rules that are being relied upon by Qwest,

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1 by a closer look at the ISP remand order and the
2 language that's contained in it, by a look at other
3 state commission decisions, by considering what is
4 currently going on in the Washington/Century
5 Tel/Level 3 arbitration where the Washington Commission
6 appears to acknowledge that there ought not be a
7 carve-out of ISP-bound traffic for interconnection
8 obligation and arrangements, which is what Qwest is
9 proposing to do here, that ISP traffic ought to be
10 carved out and have separate obligations, originating
11 obligations other than what it is obligated to do with
12 voice traffic.

13 COMMISSIONER HEMSTAD: Isn't that a result of
14 what you just said, that the arguable distinctions
15 swallows the rule, the rule of the generic proceeding
16 goes away?

17 MR. ROGERS: I think that's the right result.
18 As I started off by saying, I cannot say that that is
19 what will happen or necessarily must happen, because I
20 think the focus ought to be brought back to that the
21 arbitration contains this one issue, and it would be
22 binding on both parties to the arbitration. The fact
23 that it only has one issue allows everybody to look a
24 little bit more in-depth at the issue and come to,
25 perhaps, a different conclusion than was reached

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1 previously.

2 CHAIRWOMAN SHOWALTER: Where I'm getting
3 confused in this discussion is cast all of the process
4 aside, whether the FCC did or didn't rule and what
5 arguments we did or didn't have in front of us, just on
6 substance alone, can this case in front of us be
7 distinguished on the facts from the relevant, in your
8 opinion, facts in the generic cost proceeding? It
9 sound to me as if your answer is no.

10 MR. ROGERS: I think it can be distinguished
11 on the law, and I guess what Level 3 is saying is that
12 the Commission ought to go back to what it said in the
13 32nd Supplemental Order, that it would revisit this
14 issue to the extent there are developments in the law.
15 There have been developments in the law that should
16 cause it to go back and look at this issue more
17 closely, more in-depth, and upon doing so, Level 3's
18 position should prevail.

19 CHAIRWOMAN SHOWALTER: But is the necessary
20 implication of that Level 3's position should prevail
21 in this case is the necessary implication that today's
22 law applied to our generic cost proceeding requires a
23 reversal of the order that we came out with?

24 MR. ROGERS: Let me just be as
25 straightforward as possible is that we think that a

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1 reversal is appropriate; that it is not appropriate to
2 simply rely on precedent if that precedent is flawed,
3 so you would only be perpetuating a mistake and would
4 not be acknowledging the developments in the law that
5 require a change from that precedent.

6 CHAIRWOMAN SHOWALTER: But, for example, if
7 we rule in your favor in this case, is it necessary or
8 not necessary that we say to the world, And by the way,
9 don't rely on that generic cost proceeding case. We
10 got it wrong, or is there something else we would say,
11 and I don't know what it might be?

12 MR. ROGERS: I guess what I think it could
13 potentially be is that the Commission simply finds in
14 Level 3's favor in this arbitration and does not do
15 anything with respect to its cost docket. Others that
16 come along may opt into Level 3's language, but I think
17 the thing that ought to be done, whether that is what's
18 required or not I don't know, but what ought to be done
19 is that the Commission should, if it finds in Level 3's
20 favor, go back and revisit that particular part of its
21 order in the cost docket.

22 If I may, I was sort of describing the issue
23 and the architecture. The issue has been described as
24 one of relative use, but Level 3's position is that it
25 more accurately ought to be described as use and that

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1 use is synonymous with origination without exception.
2 That the party that originates the traffic is
3 responsible for its cost to bring traffic to a point of
4 interconnection has been established and that there is
5 nothing in the law that allows an extraction or a
6 carve-out of a particular type of traffic that flows
7 over those local interconnection facilities.

8 I made mention of the Washington/Century Tel
9 case. As you know, that was an issue of jurisdiction,
10 at least initially. That is not the case here. Qwest
11 acknowledges that ISP-bound traffic is properly dealt
12 with in an interconnection agreement that covers both
13 local traffic and ISP-bound traffic. Qwest also
14 acknowledges that these are local calls, locally dialed
15 that travel over the same type of local interconnection
16 facilities in the same fashion as local voice calls
17 would.

18 The problem in this case is that Qwest wants
19 to apply different regulatory regime to locally-dialed
20 ISP-bound calls that will travel over those very same
21 local interconnection facilities. Qwest's regulatory
22 regime for ISP-bound calls would allow it to create a
23 new source of revenue for itself that it does not have
24 if the calls are voice in nature.

25 Again, as I would like to point out, Qwest's

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1 agreement to establish one point of interconnection
2 would be eviscerated, in essence, if Qwest's language
3 is adopted and Level 3 is required to pay for the
4 direct trunk transport cost to every end-office, that
5 means that the POI no longer represents the financial
6 demarcation point for the parties, and that financial
7 demarcation point becomes every end-office.

8 CHAIRWOMAN SHOWALTER: Can you answer this
9 question? The agreement that you have relates to
10 two-way interconnection, but the traffic is only going
11 one way. So why do you have two-way trunks, and why
12 should our rule be the same for a theoretical two-way
13 trunk in which it's only going one direction?

14 MR. ROGERS: At this point in time, the
15 traffic is only one direction. We envision that at one
16 point in time, we would have traffic that flows in the
17 opposite direction. We have a new company and we are
18 trying to develop and deploy new services. We have not
19 done that yet, but I don't know that there has been any
20 indication or any evidence that has been submitted that
21 indicates that if one-way trunking were only deployed
22 that this would be a different issue in any way; that
23 if you had one-way direct trunk transport, would that
24 in any way affect the position of Qwest. I don't
25 believe that would be the case. It certainly would not

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1 affect Level 3's position.

2 CHAIRWOMAN SHOWALTER: By "position," do you
3 mean your legal position?

4 MR. ROGERS: Yes.

5 CHAIRWOMAN SHOWALTER: So you would say if it
6 were a one-way trunk, Qwest customers originate the
7 call, and therefore, they pay, or is there a relative
8 use issue when you have a one-way trunk?

9 MR. ROGERS: In essence, I guess not relative
10 use. As I say, to get down to it, the issue in Level
11 3's mind is use, and there are interconnection rules
12 that require that the CLEC be allowed to establish one
13 point of interconnection per LATA and that the
14 originating party is responsible to bring its traffic
15 to that point of interconnection. The terminating
16 party is responsible on its side of the point of
17 interconnection to terminate the traffic, and that is
18 what FCC Rule 51.703(b) requires. Qwest language is in
19 direct violation of that ban on originating charges.

20 CHAIRWOMAN SHOWALTER: So that is the rule
21 that you say is the operative rule that requires Qwest
22 to pay in this case because all of the traffic
23 originates with Qwest customers.

24 MR. ROGERS: That is the rule we say is the
25 operative rule, but we also point to the multitude of

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1 interconnection FCC orders, starting with the local
2 competition order and TSR wireless. TSR wireless was a
3 case that dealt with one-directional traffic, and it
4 also involved U S WEST, but the holding was that the
5 one-directional nature did not in any way allow U S
6 WEST to disregard its obligation to bring its
7 originated traffic to the point of interconnection.

8 TSR wireless also recognized that page-in
9 traffic, which was also an issue in that case, can be
10 often times interstate in nature, so you had a very
11 similar fact scenario in TSR wireless to what is at
12 issue in the Qwest/Level 3 arbitration.

13 Qwest wants to argue that what Level 3 is
14 proposing to do is that Level 3 wants to lease direct
15 trunk transport for free and that Level 3 can't expect
16 to be able to lease these facilities for free that are
17 being ordered by Level 3 and deployed for its benefit.
18 Level 3 submits that that is a misnomer and incorrect
19 characterization of the interconnection arrangement
20 that's been established. The only way that Qwest can
21 argue that Level 3 is leasing these facilities is
22 because Qwest bills Level 3 for these facilities.

23 As I set out by saying, the contract requires
24 at a DS-1 threshold that Level 3 order direct trunk
25 transport for the mutual benefit of both parties so

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1 that call blocking does not occur. Qwest then takes
2 that order and generates a bill to Level 3 because it's
3 placed an order for facilities. By generating a bill,
4 Qwest then says that Level 3 is leasing these
5 facilities and how could we expect to lease facilities
6 for free.

7 That does not recognize, it totally ignores
8 the interconnection obligations that are at issue.
9 Qwest, even though Level 3 is the one that initiates
10 the deployment process of the direct trunk transport,
11 that does in no way get rid of the obligation for them
12 to bring their originated traffic to the point of
13 interconnection that's been established.

14 CHAIRWOMAN SHOWALTER: I have another
15 question before your time is up, and you may have
16 answered this, but in Qwest's answer to your petition
17 for administrative review, Page 4 -- do you have that
18 document?

19 MR. ROGERS: Yes, I do.

20 CHAIRWOMAN SHOWALTER: It's in the middle of
21 the second paragraph. It begins with the word
22 "indeed." Qwest says, "Indeed, if Level 3 were correct
23 that Rule 51.703(b) applies to Internet traffic, then
24 the payment of reciprocal compensation would be
25 required for Internet traffic pursuant to Subsection A

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1 of the same rule. Now, do you agree with that
2 sentence?

3 MR. ROGERS: I don't agree with it
4 wholeheartedly. First of all, Level 3 is not seeking
5 reciprocal compensation in this arbitration. It has
6 agreed, and what has been put into the agreement is
7 that the parties will comply with the FCC's interim
8 rate regime that was established in the ISP remand
9 order. Level 3 believes that the ISP remand order is
10 consistent with 703(a), that reciprocal compensation in
11 a general sense for ISP-bound traffic is taken care of
12 by the rate structure in the ISP remand order.

13 Then further, I think it's important, and I
14 haven't mentioned WorldCom yet, but the WorldCom
15 decision and the D.C. circuit's language in the
16 WorldCom decision does away with much of what the FCC
17 attempted to do in the ISP remand order, and it is the
18 WorldCom decision that allows Qwest's position in this
19 case, which relies on the definition of
20 telecommunications traffic, which is critical to both
21 703(a) and 703(b).

22 Level 3's position is that after WorldCom,
23 the definition of telecommunications traffic does not
24 in any way exclude dial-up Internet-bound traffic
25 because it's no longer information access, and there

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1 has been no demonstration that it is Internet exchange
2 access. Qwest argues that the FCC ISP remand order
3 established that it is interstate access, but it
4 ignores the term "exchange" that is used in the
5 definition of telecommunications traffic.

6 It cannot be allowed to ignore the term
7 "exchange" because "exchange access" is a statutorily
8 defined term that ISP-bound traffic does not fit
9 within. Essentially, it is toll service or access to
10 toll service is what it is, and that is not what is at
11 issue when you are talking about Internet-bound
12 service. So the exclusion was focused on the fact that
13 the FCC had characterized ISP-bound traffic as
14 information access. WorldCom says the FCC was wrong to
15 do so and disallowed that attempt. So after WorldCom,
16 there is no exclusion from telecommunications traffic.

17 Going back to the Bell Atlantic decision by
18 the D.C. circuit, the D.C. circuit has said that this
19 looks like telecommunications traffic. There has been
20 no finding it is anything else, so there is no
21 exception from that definition, which leads you to
22 Level 3's point that 703(b) controls this issue.

23 CHAIRWOMAN SHOWALTER: I think your time is
24 up unless there is another question. We can be a
25 little flexible on this.

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1 COMMISSIONER HEMSTAD: Maybe you can answer
2 this briefly. I'm trying to get a handle on the
3 magnitude of this issue. How significant is it to
4 Level 3? What are we talking about in terms of dollars
5 here?

6 MR. ROGERS: That's a hard question to answer
7 because it's a moving target, and every time new direct
8 trunk transport is deployed, the dollar figure, the
9 significance increases. At the outset of the
10 arbitrations, we did an estimate of what the dollar
11 figure would be on a per-month basis in Washington, and
12 our estimate, I believe, was that it would be, at that
13 point in time, I want to say \$25,000 a month to Level 3
14 would be the difference between winning and losing,
15 essentially, in this arbitration.

16 CHAIRWOMAN SHOWALTER: Thank you.
17 Ms. Hughes, while we are on that one page I referred
18 to, Page 4 of your brief, a couple of sentences later,
19 you say, "The FCC has affirmed and reaffirmed on at
20 least nine occasions that reciprocal compensation is
21 not due on ISP-bound traffic," and my question is, did
22 any of those cases involve originating calls, the
23 origination of calls in an interconnection agreement,
24 or an interconnection obligation?

25 MS. HUGHES: If I understand your question

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1 correctly, Chairwoman Showalter, the exact precise
2 issue presented here has not been clearly addressed by
3 the FCC.

4 COMMISSIONER HEMSTAD: Pursuing that, how do
5 you interpret them in view of that answer, the 271
6 order and Counsel's interpretation of this issue?

7 MS. HUGHES: Yes. I would like to address
8 that in some length. I can answer the question right
9 now or I can just give you a little bit of background
10 in the way I believe this issue is now presented to you
11 today. Perhaps if I could give you some background,
12 especially in light of the earlier questions about the
13 effect that this commission's ruling and the generic
14 cost docket have on this particular arbitration issue.

15 This commission has previously addressed this
16 precise issue twice in its cost docket. It most
17 recently revisited the issue three months ago in its
18 38th Supplemental Order. This commission has also
19 previously addressed the issue of whether
20 Internet-bound traffic falls within the purview of
21 Section 251(b)(5) obligations in the dockets addressing
22 Qwest 271 application and in the context of approving
23 Qwest's SGAT.

24 Consistent with its rulings in the cost
25 docket, the Commission has approved Qwest's SGAT

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1 language which specifically excludes ISP-bound traffic
2 from the traffic used to calculate relative use of
3 local interconnection facilities for purposes of
4 determining financial responsibility for those
5 facilities.

6 Qwest respectfully submits that the
7 Commission reached the right decision each time it has
8 considered this issue. That is, the Commission's
9 decisions reflect the correct interpretation and
10 application of the act, FCC orders, and relevant FCC
11 rules. The Internet traffic at issue here is
12 interstate traffic. It's not local traffic. The
13 Internet traffic does not fall within the 251(b)(5)
14 obligations of Qwest. The traffic used to determine
15 each parties' relative use of these local
16 interconnection trunks should be local traffic.
17 Internet traffic should be excluded. That's what this
18 commission has previously determined.

19 Now, in this arbitration proceeding,
20 Arbitrator Schaer looked at this relative use issue all
21 over again. It was the sole issue in this arbitration,
22 and I guess on that note, I'm pleased to report that
23 all other terms and conditions that will govern Qwest
24 and Level 3's business relationship in the State of
25 Washington were mutually agreed upon, so Qwest and

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1 Level 3 have not brought to this commission any issue
2 other than the issue of treatment of Internet-bound
3 traffic and the parties' calculations of relative use.

4 Contrary to Level 3's claim in its petition
5 for administrative review, and as Arbitrator Schaer's
6 report and decision reflects, Arbitrator Schaer did not
7 decide this issue summarily. A hearing was convened.
8 Evidence was received. Cross-examination was
9 conducted, and extensive pleadings were submitted.
10 Level 3 was provided a full opportunity to develop its
11 facts, to develop its law, and to present its
12 arguments.

13 Arbitrator Schaer on this record concluded
14 that Level 3 brought nothing new to the Commission and
15 that on the uncontested facts and on the application of
16 the law to those facts, the same result should apply
17 here that this commission has previously reached in its
18 other considerations of this issue, and that is that
19 ISP-bound traffic must be excluded from the traffic
20 that determines the parties' relative use.

21 CHAIRWOMAN SHOWALTER: But the arbitrator's
22 report expressly relied on our previous ruling in the
23 generic cost case, so one way to look at it is that's
24 our precedent and that was right. Another way to look
25 at it is that's our precedent but it was wrong, or

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1 that's our precedent, but some things have happened
2 since that time and some clarifications have happened
3 since that time which our generic order recognized
4 might cause us to review this issue.

5 So even though I'm sure it's extremely
6 annoying to have to go back over the same ground, that
7 is what's been presented in the arguments here, so
8 getting back to the substantive issue, not the
9 precedent-setting aspect of it, if you could turn to
10 Level 3's brief on Page 7.

11 MS. HUGHES: Are you referring to the
12 petition?

13 CHAIRWOMAN SHOWALTER: Let me see what
14 document this is. Posthearing brief.

15 MS. HUGHES: I found it.

16 CHAIRWOMAN SHOWALTER: This is where two
17 scenarios are laid out. One is a Qwest customer calls
18 her law firm, and the other is the Qwest customer calls
19 up the Internet on the computer and surfs the Internet.
20 So on the first scenario, the Qwest customer calls up
21 the law firm that uses Level 3, presumably. Do you
22 agree in that scenario that the call originates by a
23 Qwest customer, and therefore, that would be Qwest's
24 share, that call would count as Qwest's share?

25 MS. HUGHES: Yes. If this is a local voice

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1 call originated by Qwest that terminates within the
2 local calling area, that would be a local call.

3 CHAIRWOMAN SHOWALTER: But now we have the
4 second scenario in which there is a seven-digit call to
5 an Internet service that is originated by a Qwest
6 customer, and so it's Level 3's position that there is
7 no difference between those two scenarios. They are
8 both calls originated by a Qwest customer.

9 Is it at that point -- I know you would say,
10 my guess is, No, that's an interstate call because it's
11 an ISP, and therefore -- and here's the point I want to
12 inquire about. I gather you would say, Therefore, it
13 must be excluded, but from what and why? Why isn't
14 this under the interconnection rules that focus on
15 origination and no more?

16 MS. HUGHES: This call, the call that is
17 described in Level 3's second example, is an ISP-bound
18 call that we believe absolutely the FCC has determined
19 to be interstate in nature. We believe that that is
20 already decided. That is not an open issue. That is
21 an interstate call, and Level 3, again, has already
22 agreed that payment for these local interconnection
23 trunks should be based on a relative use calculation.
24 The only issue in dispute is whether Internet traffic
25 should be included in the parties' calculation of

0146

1 relative use.

2 And if I could, perhaps, move to the question
3 that Commissioner Hemstad asked earlier. This
4 commission has decided the issue twice in its cost
5 docket. This commission has approved Qwest's SGAT
6 language, which it specifically excludes ISP-bound
7 traffic in the parties' relative use calculations. The
8 FCC has specifically been asked to look at this issue
9 in the context of Qwest's 271 application, and in its
10 nine-state application, Level 3 submitted comments that
11 are in all respects identical to the arguments it has
12 made to Arbitrator Schaer and the arguments it is
13 making here today.

14 Level 3 told the FCC that it could not
15 approve Qwest's nine-state application, including the
16 Washington State application, but as well, the
17 applications of eight other states, each of whose
18 SGAT's included language identical to the relative use
19 language that this commission has approved in Qwest's
20 Washington SGAT.

21 Level 3 argued that the TSR wireless
22 decision, that its interpretation of 703(b), absolutely
23 required Qwest's position on this issue to be changed,
24 that it was a violation of the FCC's interconnection
25 rules and a violation of the act for this ISP-bound

0147

1 traffic to be excluded from relative use calculations,
2 and what I believe is relevant for this commission to
3 understand is exactly what was before the FCC as it
4 considered this very issue and as it considered
5 Level 3's detailed comments and the identical comments
6 that Level 3 is making to the Commission today.

7 The FCC, knowing that not only this
8 commission and eight others had approved this language
9 in Qwest's SGAT, but also that in interconnection
10 arbitration between Level 3 and Qwest on this very
11 issue commissions had ordered this identical language
12 into the interconnection agreement between Qwest and
13 Level 3, specifically declined to embrace Level 3's
14 arguments.

15 The FCC specifically declined to agree with
16 Level 3 that Qwest was violating its interconnection
17 obligations with its language in its SGAT and taking
18 this position in interconnection negotiations with
19 Level 3. Level 3 gave the FCC the exact language
20 that's at issue here and said it violates the act, it
21 violates the Commission obligation, and the FCC
22 specifically let stand these SGAT's in all nine states,
23 and it specifically let stand other commission rulings
24 on this issue.

25 The FCC also embraced the process that has

0148

1 been employed here. It said, We understand, of course,
2 what's in the SGAT. We understand that state
3 commissions are dealing with this issue in arbitration.
4 We understand some commissions have ruled in favor of
5 Qwest. We understand several have disagreed with
6 Qwest. We are comfortable with the process, and we are
7 confident that the appropriate judicial review will
8 insure that the results of these commissions reached
9 are in compliance with the act.

10 The only federal court that has reviewed this
11 issue so far is the Federal District Court for the
12 District of Oregon, and that court has affirmed the
13 decision of the Oregon Commission, which is that
14 ISP-bound traffic should be excluded from the parties'
15 relative use calculations and that excluding such
16 traffic is consistent with Qwest's meeting its
17 interconnection obligations.

18 CHAIRWOMAN SHOWALTER: But the Oregon court,
19 as I read it, said there is no rule or law that governs
20 this question; therefore, Level 3 hasn't carried its
21 burden to show that it's an inappropriate -- the court
22 didn't say the Oregon Commission's decision is the only
23 permissible outcome.

24 MS. HUGHES: I agree with that, but I think
25 the point here is that this commission properly

0149

1 addressed the issue in its cost docket, and in answer,
2 perhaps, to the earlier questions, I would point out
3 that in its generic cost proceeding, the Commission
4 said that the pricing decisions it was reaching in that
5 docket would apply to all interconnection agreements,
6 so Qwest respectfully submits that what Level 3 is
7 asking the Commission to do here is not reconcilable
8 with this commission's prior ruling in the cost docket.
9 The Commission having said those rulings would apply to
10 all interconnection agreements, that Level 3 is
11 collaterally attacking the rulings in the cost docket,
12 and is, in fact, asking the Commission to reverse those
13 rulings.

14 CHAIRWOMAN SHOWALTER: I would like to ask
15 you more or less a procedural question that I asked
16 Mr. Rogers. Supposing we think that we made a mistake
17 in the generic cost case and that's not good precedent
18 to follow, and supposing we rule for Level 3 in this
19 case. If we come out with such an order, what do you
20 make of the generic cost ruling? Can the two be
21 reconciled, or would we be essentially required to say
22 that was an error?

23 MS. HUGHES: I don't believe, Chairwoman
24 Showalter, that the two can be reconciled. I think
25 that if the Commission believes that this issue should

0150

1 be reconsidered, and as Qwest respectfully submits, the
2 FCC has, looking at all of Level 3's arguments, less
3 than three weeks ago declined to agree with any of them
4 and has allowed the situation to remain as it is
5 knowing what is in Qwest SGAT's, not just in Washington
6 but in all other states issued, knowing what Level 3's
7 arguments were, the FCC just three weeks ago had
8 disagreed with Level 3 and declined to say that Qwest
9 is violating its interconnection obligations, but --

10 CHAIRWOMAN SHOWALTER: Could I stop you
11 there? I'm not sure what it means that in a 271
12 application whether it means the FCC definitively
13 addressed the question. The question before the FCC at
14 the time was, Does Qwest deserve to get into the
15 long-distance business. Something akin to the one
16 doesn't deserve a perfect trial, only a fair one, or
17 whatever that line is.

18 I don't perceive the FCC as going over every
19 single thing and making sure everything was perfect
20 before Qwest could get into the long-distance business,
21 so it doesn't seem to me that that issue was squarely
22 before them. It was raised to them, but they chose,
23 basically, not to take it up.

24 MS. HUGHES: Qwest agrees with those
25 observations to the extent that the FCC said that it

0151

1 had not, quote/unquote, clearly addressed this issue,
2 and to the extent the FCC said that it was comfortable
3 leaving the issue as it was, which is review by state
4 commissions in the context of carrier-to-carrier
5 disputes in arbitration proceedings and judicial
6 review, but as I said, it's important to understand
7 what arguments were in front of the FCC, and the
8 arguments that were in front of the FCC was that Qwest
9 was not in compliance with its interconnection
10 obligations, that Qwest's SGAT violated interconnection
11 obligations, and so I think in fairness, the issue was
12 certainly before the FCC.

13 Level 3 certainly brought all of its
14 arguments to bear on the issue. It certainly told the
15 FCC that its prior orders were dispositive here and
16 required a remedy before Qwest's 271 application could
17 be approved, so in fairness to the hard work of this
18 commission and other commissions whose results were
19 before the FCC in this nine-state application, the FCC
20 declined to agree with Level 3 and allowed to stand the
21 results that were before it, which were reflected in
22 these nine SGAT's, but if the question is --

23 CHAIRWOMAN SHOWALTER: I want to move on to
24 another question. Let's flip this into your camp.
25 Supposing we rule in your favor. Then who will pay for

0152

1 trunks that are used to transport ISP-bound traffic?
2 Is it your position then it is the terminating carrier
3 who pays? Does that become the operative rule?

4 MS. HUGHES: The language that the parties
5 have agreed upon, the relative use language that's not
6 in dispute here is that the parties will pay for the
7 cost of these facilities in proportion to their
8 relative use as determined by originating traffic. If
9 Qwest uses these trunks to originate local voice
10 traffic, it will pay Level 3 for that proportion of
11 costs that are associated with Qwest's use of these
12 trunks to originate local traffic, and of course --

13 CHAIRWOMAN SHOWALTER: But I'm talking about
14 ISP traffic now. Suppose we have the situation we
15 have, which there is no local traffic. There is only
16 ISP traffic.

17 MS. HUGHES: If there is no local traffic
18 originated by Qwest over these trunks, Qwest will not
19 pay Level 3 for Qwest's use of these trunks to
20 originate local voice traffic because there will be no
21 local voice traffic originated.

22 In other words, the way this would work and
23 the way it works where it's been ordered by commissions
24 in the past is that Level 3 orders the trunks from
25 Qwest and Qwest bills Level 3 for the cost of the

0153

1 trunk. Qwest credits back to Level 3 any costs
2 associated with Qwest's use of the trunk to originate
3 local traffic.

4 CHAIRWOMAN SHOWALTER: So if there is a
5 situation where there are zero minutes of traffic
6 originated by Qwest and zero minutes of traffic
7 originated by Level 3, then you say Level 3 pays
8 everything because there is nothing to subtract.

9 MS. HUGHES: Correct.

10 CHAIRWOMAN SHOWALTER: What about the issue
11 of relative use? Doesn't this become zero divided by
12 zero? Is that a meaningful number?

13 MS. HUGHES: No. The way this works is that
14 we back out ISP traffic. When that traffic is backed
15 out from the traffic that's at issue, we will credit
16 back to the CLEC. Here, it's undisputed that Level 3
17 will originate no traffic, that all of the traffic will
18 be one-way ISP-bound traffic to Level 3, so in this
19 scenario, I think it's quite clear and that's why
20 Level 3 is here, that the cost of the ISP-bound traffic
21 that's flowing over these trunks will be borne by
22 Level 3. Again, if that changes and Qwest originates
23 voice traffic, Qwest will credit to Qwest the
24 proportionate amount.

25 CHAIRWOMAN SHOWALTER: I have a follow-up to

0154

1 this line. If you have the interconnection agreement
2 itself --

3 MS. HUGHES: I do.

4 CHAIRWOMAN SHOWALTER: -- 7.3.2.2.1 --

5 MS. HUGHES: Could I also amend my response
6 to that last question as well, because it also depends
7 on who orders the trunks. If Level 3 orders the
8 trunks, this is the way the payment would be. If Qwest
9 orders the trunks, that same regime would apply to
10 Qwest.

11 CHAIRWOMAN SHOWALTER: At Page 51 of the
12 interconnection agreement, it appears that there is a
13 starting point of 50 percent, a relative use factor,
14 and then that changes based on actual minutes, but if
15 there are never any actual minutes, does the relative
16 use factor stay at 50 percent?

17 In other words, what I'm confused about is
18 one way to look at this that you would characterize it
19 is that Level 3 pays everything minus originating
20 traffic, if there is any. So if there isn't any,
21 Level 3 pays everything, but then what does this 50
22 percent starting point mean?

23 MS. HUGHES: 50 percent reflects just an
24 initial agreement that the traffic initially, until we
25 have actual traffic studies and actual data, would be

0155

1 flowing 50 percent both ways, and then the idea here is
2 that when the parties have actual data, it would be
3 trued up to reflect the actual relative use by the
4 parties of these trunks.

5 In other words, it's assumed initially that
6 the relative use will be 50/50, in which scenario Qwest
7 would be crediting back to the CLEC 50 percent of the
8 cost of the trunk, but that that situation would be
9 trued up down the road as the parties have actual
10 experience with the local traffic originating over the
11 trunks.

12 CHAIRWOMAN SHOWALTER: Assume that we adopt
13 your position or order your position, and now Level 3
14 begins offering voice service. If a single Qwest
15 customer makes a single voice call to a Level 3
16 customer, what does that do to the payment arrangement?

17 MS. HUGHES: Local voice call originated by
18 Qwest? That's Qwest's use of the trunk for local
19 calling.

20 CHAIRWOMAN SHOWALTER: What is your relative
21 use?

22 MS. HUGHES: I think it would depend on how
23 all this plays out.

24 CHAIRWOMAN SHOWALTER: Why wouldn't it be 100
25 percent? In other words, exclude the ISP, but let's

0156

1 look at relative use. You used 100 percent for local.

2 MS. HUGHES: No. We used one percent.

3 CHAIRWOMAN SHOWALTER: Why is that?

4 MS. HUGHES: We will credit back to Level 3 a
5 credit that reflects our proportional use of the trunk
6 for local traffic.

7 CHAIRWOMAN SHOWALTER: Right. One of your
8 customers made one local call. That's all the local
9 calls there were.

10 MS. HUGHES: Right. We will credit back one
11 percent.

12 CHAIRWOMAN SHOWALTER: Why is it one percent?

13 COMMISSIONER HEMSTAD: If there were 100
14 units and there was one call, then it would be one
15 percent.

16 CHAIRWOMAN SHOWALTER: But what's the 100
17 units; what is that?

18 MS. HUGHES: It would be the other traffic
19 that is not attributable to Qwest.

20 CHAIRWOMAN SHOWALTER: The interstate, the
21 ISP traffic?

22 MS. HUGHES: Correct.

23 CHAIRWOMAN SHOWALTER: So you are saying the
24 ISP traffic does count in the denominator?

25 MS. HUGHES: The ISP traffic is not ignored.

0157

1 It's backed out is the best way to explain it, and the
2 credit is based on Qwest's use of the trunk to
3 originate local traffic.

4 CHAIRWOMAN SHOWALTER: There is one voice
5 call, so we are trying to derive a ratio, right, to
6 determine -- you are saying Level 3 pays 100 percent
7 minus what? One over what?

8 MS. HUGHES: Maybe the best way to explain it
9 is this way: If the trunk costs a thousand dollars,
10 and if 800 minutes flowing over that trunk are
11 ISP-bound minutes, we back that out. We back Level 3's
12 ISP-bound minutes out. What's left is 200 minutes. So
13 that's the local traffic at issue, 200 minutes.

14 If Qwest's originating local traffic accounts
15 for 20 percent of that, Qwest will credit back to
16 Level 3 an amount that represents 20 percent of 200.

17 CHAIRWOMAN SHOWALTER: So the denominator is
18 all minutes and the numerator is only your share of the
19 local minutes.

20 MS. HUGHES: Correct. We will always credit
21 back for our use of the local interconnection
22 facilities to originate local calls.

23 CHAIRWOMAN SHOWALTER: I understand your
24 interpretation. If you knew right where to focus me to
25 back it up in the interconnection agreement, it would

0158

1 be great. If you can't, that's all right. I'll search
2 for the right spot.

3 MS. HUGHES: You mean in terms of where this
4 is reflected?

5 CHAIRWOMAN SHOWALTER: Yes.

6 MS. HUGHES: This is the language that the
7 Chairwoman has directed me to on Page 51.

8 CHAIRWOMAN SHOWALTER: I'll read it.

9 COMMISSIONER HEMSTAD: I have a question,
10 just backing up a bit. I'm guessing there is interplay
11 between the decisions between the FCC and our
12 decisions. Assume for this point that our two
13 decisions in the generic proceeding have not been made;
14 in other words, the question in that regard were open.
15 In view of what the FCC said in the 271 proceeding,
16 would that then now be an open question for us, or
17 would it be still foreclosed?

18 MS. HUGHES: I'm sorry, Commissioner Hemstad,
19 may I have the question again?

20 COMMISSIONER HEMSTAD: Assume for purposes of
21 the discussion we have not made the decision that you
22 say is binding in the generic cost proceeding. Then is
23 the narrow issue in front of us today an open question?

24 MS. HUGHES: No, I don't believe it is. I
25 think that the result that this commission reached when

0159

1 it considered this precise issue twice in the cost
2 docket --

3 COMMISSIONER HEMSTAD: That's not what I'm
4 asking. I'm giving you the hypothetical that we had
5 not so decided in the proceeding.

6 MS. HUGHES: If you had not so decided, Qwest
7 would be here today telling you that the appropriate
8 analysis, the appropriate application of the act, the
9 prior FCC orders and the FCC's rules is to exclude
10 ISP-bound traffic from the calculation of relative use.

11 COMMISSIONER HEMSTAD: I may have
12 misunderstood, but as I interpret what you said here
13 about the 271 order, the Commission was saying it was a
14 decision left to the state commissions to review and
15 consider.

16 MS. HUGHES: That is absolutely correct, but
17 again, what the FCC had before it were decisions that
18 commissions, including this commission, had already
19 made, and it had before it an attack on those
20 decisions.

21 CHAIRWOMAN SHOWALTER: I would like you to
22 focus on costs for terminating ISP-bound traffic versus
23 costs for transporting ISP-bound traffic. Am I correct
24 that the parties agree that the FCC has required bill
25 and keep for terminating ISP-bound traffic?

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1 MS. HUGHES: Yes. I don't believe there is
2 any dispute on that issue, from Qwest's perspective.

3 CHAIRWOMAN SHOWALTER: That's terminating.
4 What about transporting ISP-bound traffic? Is there
5 originating and terminating and transporting, or is
6 there only originating and terminating?

7 MR. ROGERS: Is this an open floor?

8 CHAIRWOMAN SHOWALTER: We are just at the end
9 of Ms. Hughs' time, so let's say this is for both of
10 you.

11 MR. ROGERS: Level 3 believes there are
12 originating obligations and there are terminating
13 obligations, and that is what is set out in the FCC's
14 orders on interconnection obligation. They have
15 established a terminating intercarrier compensation
16 regime for ISP-bound traffic, and that is the only
17 thing they asserted in the FCC-ISP remand order. They
18 asserted jurisdiction for that sole purpose. I think
19 that answers the question as far as what Level 3's view
20 of the world is.

21 CHAIRWOMAN SHOWALTER: What is your view of
22 the world?

23 MS. HUGHES: Qwest respectfully disagrees.
24 Qwest believes that it is quite clear that
25 Internet-bound traffic is excluded from Section

0161

1 251(b)(5) obligations.

2 CHAIRWOMAN SHOWALTER: So is it your position
3 that the FCC has preempted the states from deciding
4 this issue but has not decided the issue itself or has
5 decided the issue itself?

6 MS. HUGHES: No. We believe that what the
7 FCC said in a nine-state Qwest application is that it
8 has not clearly decided the issue; therefore,
9 commissions may interpret the orders and the regulation
10 as they are currently doing, and we believe the FCC
11 said that it was comfortable leaving the matter where
12 it stood and allowing for a judicial review of what
13 state commissions are doing in this area, and again,
14 looking at what the FCC had before it, we believe that
15 this commission can take comfort in its prior decisions
16 interpreting the act.

17 COMMISSIONER HEMSTAD: With regard to our
18 generic proceeding decision, that was dealing with
19 cost. This is dealing with compensation. Is there a
20 difference?

21 MS. HUGHES: Qwest doesn't believe that there
22 is. We are talking about the cost, if you will, of the
23 interconnection facilities that will be used to
24 transport this traffic.

25 MR. ROGERS: One of the questions that I

0162

1 anticipated receiving potentially was why Level 3 did
2 not participate in the cost docket, and the answer is
3 that we did not expect the relative use issue to be in
4 a cost docket, that cost rate setting is what we would
5 expect to be in a cost docket. This is the application
6 of interconnection rules as opposed to rate setting.

7 CHAIRWOMAN SHOWALTER: I realize I did not
8 give Ms. Hughes enough time because I only gave her
9 half an hour, which she probably recognized, so before
10 you begin your 15 minutes, Ms. Hughes, continue if you
11 need to.

12 MS. HUGHES: I think I would just say in
13 conclusion, Chairwoman Showalter and Commissioners,
14 that the federal regulatory landscape has not changed
15 since this commission reached the decision in the
16 generic cost docket that it reached, nor has the
17 judicial landscape changed except in support of the
18 position that this commission took and ordered into the
19 Qwest SGAT, and for that reason, we believe that
20 Arbitrator Schaer's decision should be approved and
21 adopted by this commission.

22 CHAIRWOMAN SHOWALTER: Could we shift a
23 little bit off what we decided and what the FCC decided
24 and just go to policy or equities? It's your position
25 that if Level 3 prevails, it won't have to pay anything

0163

1 for these trunks or its business, but isn't it also the
2 case that if your position prevails, you won't have to
3 pay anything, and why is that more equitable?

4 MS. HUGHES: Well, I think the problem here
5 is that all of the traffic -- I think there would be no
6 disagreement if Level 3 originated some traffic, but
7 the issue here is that Level 3 has chosen to pursue a
8 business plan that exclusively serves ISP's, and there
9 is nothing inequitable about a relative use commitment
10 that says the parties will pay for these facilities in
11 proportion to their relative use of them, and so we
12 think that the fundamental issue here, that is the
13 relative use principle, is very sound and very fair.

14 It's only when you have a situation where all
15 of the traffic is one-way ISP-bound traffic and you
16 look at how the application of that traffic to the
17 relative use principle would play out that you see some
18 potential inequities, that Qwest respectfully submits
19 that it is inappropriate for Qwest to have to bear the
20 cost of the facilities used to transport ISP-bound
21 traffic.

22 CHAIRWOMAN SHOWALTER: The simplicity of
23 going with originating traffic is that you have to
24 build into your costs, your plans, all of the calls, no
25 matter what, including the ISP that your customers

0164

1 originate, and if that requires more money, then you
2 need to raise your rates accordingly.

3 In essence, if you forget about interstate
4 aspects of it and just think there are lawyers and
5 Lands End and ISP and Qwest customers use all of those
6 things, why isn't it equitable to require Qwest to
7 anticipate all those uses and build in their plans
8 accordingly?

9 MS. HUGHES: Again, going back to the ISP
10 order on remand and the policy concerns that the FCC
11 expressed there and it believed it was addressing in
12 determining that reciprocal compensation was not due on
13 ISP-bound traffic, the FCC has attempted to more
14 perfectly connect the costs of a facility with the
15 causer of those costs.

16 The causer of these costs is Level 3 ISP
17 customers, and Level 3 is in a much better position
18 than Qwest to charge its ISP customers a cost that will
19 reflect the facilities that are necessary to bring
20 these calls to these ISP customers, and we think that
21 that's the policy concern that the FCC unambiguously
22 expressed and addressed in the ISP remand order, and
23 that is Qwest's answer about inequities and having
24 Qwest ratepayers in general assume the cost of the ISP
25 traffic that should more properly be caused by the cost

0165

1 causer, which is the ISP.

2 CHAIRWOMAN SHOWALTER: Mr. Rogers, why don't
3 you go ahead.

4 MR. ROGERS: The first point I would like to
5 address that was raised is at the outset, you seem to
6 recognize in pointing to our example our intent in our
7 brief is to demonstrate the discriminatory treatment
8 that results from Qwest's position that ISP-bound
9 traffic gets one type of treatment; voice traffic gets
10 another type of treatment.

11 The New York Commission in the Global NAPS
12 arbitration with Verizon found that there is no basis
13 in the law for that type of discriminatory treatment.
14 The FCC in the ISP order on remand, Paragraph 90, said
15 that in adopting its terminating intercarrier
16 compensation regime, both at 90 and Footnote 109, that
17 it in no way wanted to establish any sort of
18 discriminatory treatment, whether it be based on rates
19 or terms or conditions between voice or Internet
20 traffic.

21 The Minnesota Commission in our arbitration
22 there pointed specifically to this language in the ISP
23 remand order and said that it was unwilling to take any
24 action that would establish separate intercarrier
25 compensation rates, terms, and conditions for local

0166

1 voice and ISP-bound traffic. Footnote 149 of the ISP
2 remand order explicitly says that it did not intend to
3 overturn its interconnection rules that were firmly
4 established, but what Qwest is proposing to do is in
5 the direct contravention of footnote 149.

6 We also in that vein would like to address
7 the relative use in practice discussion that you went
8 through with Ms. Hughes that demonstrates one of
9 Level 3's points is that Qwest language simply doesn't
10 work. It simply doesn't make sense when you apply it.
11 If the current situation continues, you wind up with a
12 relative use factor of zero, and it's not clear what
13 that means.

14 CHAIRWOMAN SHOWALTER: I'm not sure we are
15 talking about the same thing, but I think we are, and
16 the question I posed about the actual operation of
17 Qwest's position and the example of 800 minutes of ISP
18 traffic and 200 minutes of Qwest originated voice
19 traffic, and that's everything, is your calculation the
20 same as Ms. Hughes?

21 MR. ROGERS: No. Our calculation is as you
22 framed the question, I guess, that if there is one
23 voice call, that would be the only use over those
24 facilities. Essentially, what Qwest is saying is that
25 you would exclude it but then turn around and count it,

0167

1 which doesn't to Level 3 make any sense. It's
2 essentially heads we win; tails you lose.

3 CHAIRWOMAN SHOWALTER: But sense aside, what
4 about the interconnection agreement itself? Can you
5 point to somewhere where your result is dictated versus
6 Ms. Hughes?

7 MR. ROGERS: Our proposed language does not
8 result in that situation.

9 CHAIRWOMAN SHOWALTER: I guess my question
10 is, if we adopt Qwest's position, and that's the
11 interconnection agreement, then I'm asking you how
12 would it operate in the case of Qwest either making one
13 voice call or the other scenario, which I think is the
14 same in substance, 200 minutes of Qwest originated
15 voice and 800 minutes of Qwest originated Level 3 ISP
16 use?

17 MR. ROGERS: I think the question and answer
18 exchange demonstrates what likely would happen is that
19 you would almost automatically have a billing dispute
20 because the parties cannot come to agreement as to the
21 effect of Qwest's language.

22 CHAIRWOMAN SHOWALTER: You've said it doesn't
23 make sense, but what about the language? If we adopt
24 Qwest's position, do you have a dispute as to the
25 operation of the language, or you just don't think that

0168

1 would make sense?

2 MR. ROGERS: I think the likely result is
3 that we would take the position that relative use is
4 zero; therefore, we've not been able to move off the 50
5 percent that was initially established. There is no
6 new relative use factor, and Level 3 is not using the
7 facilities, if you exclude all the Internet traffic.
8 Therefore, how can we be billed.

9 CHAIRWOMAN SHOWALTER: Why do you say
10 relative use is zero in this case? Isn't there a
11 numerator and a denominator?

12 MR. ROGERS: As I understand the language
13 they've proposed, you exclude it, and that's what get's
14 you to zero.

15 The other point that follows that I would
16 like to point out is a situation that is more in line
17 with a question about the equities involved, and if we
18 had an example where it was voice traffic, and
19 Level 3's service rather than being dial-up Internet
20 access was a call center service where we provided the
21 ticket office to the Super Sonics, and I know the
22 Sonics are not doing great this year so maybe there
23 wouldn't be too many calls, but if that were the case,
24 it would be all one-directional to Level 3 originated
25 by Qwest end-users, so you have a very similar

0169

1 situation, and the equities involved would be there is
2 100 percent traffic originated by Qwest. 100 percent
3 is terminated by Level 3. Qwest has said in that
4 situation they would bear all of their costs. There is
5 no basis in the law for a separate regulatory regime to
6 be applied if it were ISP-bound traffic.

7 And I think the question and answer exchange
8 also demonstrates what is involved if the Commission
9 were to adopt Qwest's language. It then has the
10 obligation, the job, the duty, to oversee that separate
11 regulatory regime, that now you have two different
12 regimes with two different sets of rules and two
13 different potential outcomes that it must oversee in
14 the case there is a billing dispute or whatever to
15 separate out this type of treatment and this type of
16 traffic and another kind of treatment for another kind
17 of traffic, and that, again, going back to the ISP
18 order on remand Paragraph 90, is not what the FCC
19 envisioned when they said that Internet traffic appears
20 to be interstate for the purpose of setting terminating
21 intercarrier compensation rates.

22 There was another point that I think you made
23 clearly that I wanted to point out. You, Chairwoman
24 Showalter, said that, essentially, if Level 3 went
25 away, if you took Level 3 out of the equation, because

0170

1 these are Qwest end-users that generate the traffic,
2 there would still be the traffic generated, and Qwest
3 would be in a position of being required to have the
4 network capacity in place to handle those calls.

5 Level 3 is not in a position of, is not
6 responsible, it's not Level 3's doing that this traffic
7 is being generated, and we've attached exhibits to our
8 testimony. Qwest promotes its local products as
9 allowing its end-users the capability to make Internet
10 calls, encourage them to buy a second line to generate
11 more Internet calling. If you took Level 3 out of it,
12 they still have the duty to handle those calls that
13 their end-users generate.

14 CHAIRWOMAN SHOWALTER: In other words, Qwest
15 customers are not in search of an Internet service
16 provider. You happen to be it, but they will search
17 for somebody else.

18 MR. ROGERS: Right. There were some
19 questions about the Qwest 271 order and what effect it
20 has on this decision, I guess, this case, and I think
21 one point I would like to make is that the
22 arbitrator-recommended decision is granting Qwest's
23 motion to dismiss, rather than based on what was
24 presented at the hearing. The motion to dismiss was
25 granted because there was precedent from the Commission

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1 that said the FCC has unequivocally addressed this
2 issue.

3 Now the FCC has said, We have not addressed
4 this issue squarely. Therefore, the motion to dismiss
5 ought not to be granted at this stage, and the
6 precedent of the Commission ought to be revisited based
7 on the declaration by the FCC. So almost regardless of
8 the outcome of this particular case, the Qwest 271
9 order almost in and of itself requires the Commission
10 to go back and address its precedent.

11 CHAIRWOMAN SHOWALTER: To require or permit.

12 MR. ROGERS: Permit is probably more
13 accurate, but what has been said in the Commission's
14 order is that the FCC -- we feel bound by the FCC's
15 declaration that Internet traffic is interstate in
16 nature. The FCC has now said we have not established
17 that it's interstate in nature for all regulatory
18 purposes, that this particular issue and this
19 particular application of ISP-bound traffic has not
20 been addressed, so there is no binding order that
21 requires the Commission to adopt Qwest's language,
22 which is what appears to have happened in the cost
23 docket.

24 So I would say one of the closing comments of
25 Qwest was the landscape has not changed. I would say

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1 otherwise; that the landscape has, in fact, changed,
2 and the outcome of this case must change because of it.
3 Finally, I think I would point out that the rules, in
4 particular that the parties are relying upon, ought to
5 be looked at very carefully. That really hasn't been
6 discussed in-depth. I pointed out that the definition
7 of telecommunications traffic and the fact that
8 WorldCom means that Internet traffic is no longer
9 information service means that 703(b) ought to control.

10 But the rule that Qwest is relying upon in
11 this case is being taken out of context to begin with,
12 that it is really a terminating compensation rule, and
13 we are talking about originating interconnection
14 obligations here in this arbitration, but it also
15 doesn't say what Qwest wants it to say. It doesn't say
16 telecommunications traffic.

17 Then they've inserted the term
18 "telecommunications traffic" to get to the definition
19 of telecommunications traffic, and as I've said
20 previously, once you get to the definition of
21 telecommunications traffic, Qwest then ignores a term
22 in that definition, which is the term "exchange," which
23 is critical because then you are being asked to ignore
24 a statutorily defined term.

25 So Level 3 submits that a careful

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1 consideration of the rules and the plain language of
2 those rules dictates that the Commission find in Level
3 3's favor.

4 CHAIRWOMAN SHOWALTER: Just before we end,
5 and I think we are at the end, I just want you to
6 clarify your answers to my questions about the
7 numerator and the denominator. The two of you don't
8 agree on what would actually happen under Qwest's
9 scenario, and is that because the term that we are
10 trying to interpret is simply the words "relative use,"
11 or is there a mathematical calculation somewhere in
12 this interconnection agreement that has a numerator and
13 a denominator and you are looking at it differently?

14 MR. ROGERS: I think just briefly, Level 3
15 would say that the billing system that was described by
16 Ms. Hughes does not appear in the same fashion as she's
17 described in the language that they propose, and that
18 creates problems when they then attempt to enforce that
19 particular billing system that is not in the language
20 that they've drafted.

21 CHAIRWOMAN SHOWALTER: Does the Commission
22 have anything more to go on than the term "relative
23 use," and we will have to fill it in. I see there is
24 an example in here, but is there anything in the
25 interconnection agreement that explicates what relative

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1 use is in some kind of mathematical formula?

2 MR. ROGERS: Level 3's proposed language
3 does.

4 CHAIRWOMAN SHOWALTER: What about Qwest?

5 MS. HUGHES: If I may address that issue, the
6 language that Qwest has proposed here to implement the
7 agreement that the parties' payments for these
8 facilities will be based on their relative use of them
9 has been out there for months and months and months.

10 Level 3 has not suggested to Qwest, it did
11 not suggest in its petition for arbitration of this
12 issue that it had a problem in any respect with Qwest's
13 actual language implementing its relative use position.
14 Rather, the parties have been talking about whether or
15 not Internet-bound traffic should be included or
16 excluded.

17 Qwest believes the language is clear. Qwest
18 witnesses have explained to Level 3 repeatedly how this
19 language would be implemented, so we do not believe
20 that there is an issue here regarding how relative use
21 would actually be calculated in practice.

22 COMMISSIONER HEMSTAD: You mean by that that
23 that is an issue already decided in the agreed-upon
24 terms of the interconnection agreement?

25 MS. HUGHES: I mean by that that this is not

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1 an issue that Level 3 has raised. It's not an issue
2 that Level 3 has raised with our specific language. I
3 think Qwest is confident that if the language can be
4 clarified or needs to be clarified, we can work with
5 Level 3 to do that, but the issue before this
6 Commission is whether or not Internet-bound traffic
7 should be included or excluded from this calculation.
8 It was not an issue presented to Arbitrator Schaer, for
9 example.

10 CHAIRWOMAN SHOWALTER: But your position is
11 that we all really know what you mean by "relative use"
12 and also what Level 3 means by "relative use," so let's
13 just talk about that as distinct from a possible
14 misunderstanding or maybe just a confusion on our parts
15 since we are reading this fresh, but it is your view
16 that what "relative use" means is that you remove ISP
17 traffic from the numerator. You do not remove it from
18 the denominator.

19 MS. HUGHES: That is correct.

20 MR. ROGERS: If I may, Level 3, I think it is
21 an issue that has been out there from the very
22 beginning, and if you look at Level 3's proposed
23 language, that issue is addressed squarely. There is
24 no description in Qwest's language and what "relative
25 use" is. It simply throws out that term and you are

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1 left to try to interpret it.

2 Level 3 proposes to adopt language that's
3 contained in the -- of how it ought to be applied, and
4 we think that that example is critical to demonstrate
5 how it actually gets applied in practice.

6 CHAIRWOMAN SHOWALTER: Were you trying to
7 finish a response, Ms. Hughes?

8 MS. HUGHES: I just have one final comment if
9 the Commission would permit me one. Qwest believes
10 that the Commission's analysis and interpretation of
11 the act, FCC's orders and rules, was correct both times
12 that this Commission rendered it in the cost docket,
13 and Arbitrator Schaer's recommended result here is
14 likewise an appropriate and proper interpretation of
15 the act and of the FCC's rules and orders.

16 However, if this Commission is inclined to
17 revisit the results it reached in the cost docket,
18 Qwest respectfully submits that the place to do that is
19 not here in this interconnection arbitration but it is
20 in the new generic docket that is pending.

21 CHAIRWOMAN SHOWALTER: Thank you, very much.

22 MR. ROGERS: Thank you.

23 MS. HUGHES: Thank you.

24 (Arbitration concluded at 4:41 p.m.)

25