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-023043** RESPONSE OF QWEST CORPORATION

QWEST CORPORATION'S RESPONSE TO LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION

1. Qwest Corporation ("Qwest") has an office at 1801 California Street, Denver, Colorado, 80202.

2. Pursuant to Washington Administrative Code 480-09-420(3), the following rules and statutes may be brought into issue by this Response: the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the "Act") and 47 C.F.R. §§ 51.709(b), 51.703(b).

3. Pursuant to section 252(b)(3) of the Act and the Interpretive and Policy Statement issued by the Commission in Docket No. UT-960269,[1] Qwest submits this Response to the Petition for Arbitration ("Petition") of Level 3 Communications, LLC ("Level 3").

I. Introduction and Summary

4. As Level 3 accurately describes in its Petition, this arbitration currently involves only one disputed issue that relates to compensation for the interconnection facilities Level 3 purchases from Qwest.[2] In their negotiations, the parties were unable to resolve whether Internet traffic should be

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[1] *Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (Washington UTC June 1996).

[2] After Level 3 filed its petition, the Qwest and Level 3 negotiators identified another potential area of dispute relating to cost recovery for performing "trouble isolations" on network facilities. The parties are discussing

included in the "relative use" calculations that the parties agree should be used to determine each party's proportionate financial responsibility for local interconnection trunks. Because Level 3 specializes in serving Internet service providers ("ISPs") and originates almost no traffic on its network, it would pay virtually nothing for the local interconnection trunks it obtains from Qwest if Internet traffic were included in determining relative use. Not surprisingly, the law governing this issue, including a recent ruling by this Commission, does not permit this unjust compensation scheme.

5. In its Thirty-Second Supplemental Order in Docket UT-003013, issued less than three months ago, this Commission addressed precisely the same issue that Level 3 presents in its arbitration petition. The Commission squarely rejected the position that Level 3 advocates in its Petition, ruling that Internet traffic must be *excluded* from calculations of relative use.[3] This ruling, which is consistent with rulings from the Colorado and Oregon commissions resolving the same issue between Qwest and Level 3, is dispositive.

6. Level 3's proposed contract language relating to this issue directly conflicts with the Commission's ruling by including Internet traffic in relative use calculations. Qwest's language, by contrast, properly implements the Commission's ruling by excluding this traffic. Thus, consistent with the Thirty-Second Supplemental Order, the Commission should adopt Qwest's language.[4]

II. Procedural Background

7. The Act establishes a preference for resolving interconnection disputes between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs")

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this issue and are hopeful that they can resolve it without involving the Commission. If the issue is not resolved within the next week, Qwest and Level 3 will inform the Commission and will explain the issue and their conflicting positions.

[3] *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, at ¶ 113 (June 21, 2002) ("Thirty-Second Supplemental Order").

[4] The parties' competing language for these sections is accurately set forth in bold type in the proposed interconnection agreement Level 3 filed with its Petition for Arbitration.

through negotiation but permits parties to petition state commissions to resolve "any open issues."[5] In this case, the statutory scheme has worked well. The parties have agreed upon virtually all of the terms and conditions under which Qwest and Level 3 will interconnect in Washington. Those terms and conditions are included in the proposed interconnection agreement that Level 3 filed with its Petition.

8. Section 252(a)(1) of the Act establishes that an ILEC and a requesting carrier may negotiate an interconnection agreement upon the ILEC's receipt of "a request for interconnection, services, or network elements pursuant to section 251." Pursuant to section 252(b)(1), either the ILEC or the requesting carrier may petition a state commission to arbitrate any open issues "from the 135th to the 160th day (inclusive) after the date on which an [ILEC] receives a request for negotiation."

9. Qwest agrees with Level 3's statement that negotiations for an interconnection agreement in Washington began on February 27, 2002. Accordingly, Level 3 timely filed its Petition, and the nine-month period for this Commission to decide the disputed issue, as set forth in section 252(b)(4)(C), expires on November 27, 2002. Level 3 also correctly describes the success of the parties' negotiations in its Petition. The parties have engaged in extensive, good faith negotiations. As discussed, the only issue currently in dispute relates to whether Qwest should be required to pay all or most of the costs of the interconnection facilities that Level 3 obtains from Qwest to serve Level 3's ISP customers. That issue turns on whether Internet traffic is included in the parties' relative use calculations.

III. Discussion

A. The Commission Should Exclude Internet Traffic From The Relative Use Calculations That Determine The Parties' Proportionate Financial Responsibility For Interconnection Facilities.

10. Level 3 and Qwest agree that the division of financial responsibility for interconnection transport facilities should be based upon each party's relative use of the facilities. The parties also agree that relative use will be determined by the amount of traffic that each party originates over those

[5] 47 U.S.C. § 252(b)(1).

facilities. Their only disagreement concerns whether Internet traffic should be included in the originating traffic that determines each party's relative use.

11. In considering this very issue in Docket UT –003013, the Commission ruled unequivocally that because Internet traffic is interstate, not local, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities:

> [C]ost sharing for interconnection facilities will be determined according to the relative *local* traffic flow over that facility. Whereas the FCC has concluded that ISP-bound traffic is interstate traffic, this traffic should be excluded from the consideration of interconnection facilities cost-sharing.[6]

Level 3's proposal to include Internet traffic in the parties' relative use calculations obviously conflicts with this ruling and should be rejected.

12. The concept of assigning financial responsibility for interconnection facilities based upon interconnecting carriers' relative use of those facilities is firmly embedded in the FCC's rules relating to reciprocal compensation for the transport and termination of "telecommunications traffic." In particular, 47 C.F.R. § 51.709(b) provides:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

13. The "traffic" referred to in this rule is "telecommunications traffic" which, as defined by the FCC, expressly excludes interstate traffic. The FCC defines "telecommunications traffic" as traffic "exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access*, information access, or exchange services for such access."[7] Under this definition, therefore, any traffic that is "interstate or intrastate access" is outside the scope of Rule 51.709(b) and must be excluded from the originating traffic that determines carriers' relative use of interconnection facilities.

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[6] Thirty-Second Supplemental Order at ¶ 113 (footnote omitted) (emphasis in original).

[7] 47 C.F.R. § 51.701(b)(1).

14. In its *ISP Remand Order*, the FCC ruled that Internet traffic is properly characterized as interstate access: "the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access."[8] As such, this traffic is excluded from the "telecommunications traffic" that must be used under 47 C.F.R. § 51.709(b) to determine relative use.

15. In addition to being compelled by the FCC's finding that Internet traffic is interstate, the Commission's ruling on this issue in the Thirty-Second Supplemental Order is supported by the policy reasons that led the FCC to phase out the payment of reciprocal compensation for this traffic. The FCC found in the *ISP Remand Order* that reciprocal compensation for Internet traffic causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.[9] Citing these and other policy considerations, the FCC adopted a compensation scheme under which reciprocal compensation for Internet traffic is phased out over three years.[10]

16. The policy objectives that led the FCC to this result also support excluding Internet traffic from relative use calculations. Level 3 is primarily in the business of serving ISPs -- it receives Internet traffic from Qwest's network and sends that traffic to its ISP customers. Because this is Level 3's primary business focus, it originates almost no traffic on its network. Including Internet traffic in the

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[8] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, at ¶¶ 52, 57, 65 (rel. Apr. 27, 2001)("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F3d 429 (D.C Cir. 2002). The recent remand of the *ISP Remand Order* by the United States Court of Appeals for the District of Columbia does not affect the FCC's determination that traffic bound for ISPs is interstate in nature. Rather, the court's remand turns on its determination that section 251(g) of the Act cannot provide the basis for the FCC's conclusion that reciprocal compensation is not owed for ISP-bound traffic. *See WorldCom, Inc.*, 288 F3d at 434.

[9] *ISP Remand Order* ¶¶ 67-76.

[10] *Id.* ¶¶ 77-82. The FCC endorses bill and keep as the likely permanent compensation scheme for Internet traffic, stating that there is a "strong possibility" that a pending rulemaking proceeding "may result in the adoption of a full bill and keep regime for ISP-bound traffic." *Id.* ¶ 83. As defined by the FCC, "'[b]ill and keep' refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network." *Id.* ¶ 2 n.6.

originating traffic that determines relative use of interconnection facilities, therefore, would dramatically skew the relative use percentages; Qwest would typically be assigned 100% of the use of an interconnection facility. Under this scheme, Qwest would be responsible for virtually all of the costs of the interconnection facilities that Level 3 obtains from Qwest to serve its ISP customers. This outcome would result in precisely the type of uneconomic subsidies and skewed incentives that the FCC attempted to eliminate in the *ISP Remand Order*.

17. By excluding Internet traffic from the relative use calculations in sections 7.3.1.1.3, 7.3.2.2 and 7.3.3.1 of the interconnection agreement, Qwest's language properly implements this Commission's prior ruling and the FCC's pronouncements on this issue. Under Qwest's proposal, if Level 3 originates 95% of the local traffic across a transport facility provided by Qwest, it must pay 95% of the transport rate. If, however, Qwest provides the transport facility and originates 95% of the local traffic carried over the facility, it must issue a credit for 95% of the transport rate.

18. Contrary to Level 3's suggestions, Qwest does not propose that Level 3 bear the entire financial burden of interconnection facilities on Qwest's side of the point of interconnection ("POI") or be required to construct those facilities. Rather, where Level 3 and Qwest use two-way facilities and do not establish a mid-span meet POI, the cost of facilities used to exchange traffic should be shared based upon each carrier's relative use of those facilities, as required by the FCC's rules. Under its proposal, Level 3 could require Qwest to carry non-local, Internet traffic from Level 3's POI across Qwest's Washington network for free. The applicable FCC rules do not give Level 3 that right.

B. Decisions of Other State Commissions

19. The other state commissions in Qwest's region that have addressed this issue, Colorado and Oregon, also did so in the context of an interconnection arbitration between Level 3 and Qwest. Both of these commissions rejected Level 3's position and adopted Qwest's language relating to relative use.

20. In ruling for Qwest, the Colorado Commission found that the reasons for requiring bill and keep for Internet traffic -- avoiding subsidies, market distortions, and improper incentives -- also

require excluding Internet traffic from relative use.[11] Similarly, in adopting Qwest's language, the arbitrator in the Qwest/Level 3 arbitration in Oregon, and the Oregon Commission in turn, cited the policy considerations underlying the *ISP Remand Order*:

> The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded when calculating relative use by the originating carrier.[12]

21. These rulings, involving precisely the same issue and the same parties as presented in this case, confirm that the FCC's rules, the *ISP Remand Order*, and the relevant policy considerations require excluding Internet traffic from relative use determinations. They also confirm the correctness of this Commission's ruling on the same issue.

C. TSR Wireless Does Not Apply to the Issue in Dispute Here.

22. In attempting to overcome the clear application of the FCC's relative use regulations and the weight of authority from this Commission and the Colorado and Oregon commissions, Level 3 argues that the "rules of the road" require Qwest to pay for the facilities that carry Internet traffic.[13]

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[11] *See In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establih and Interconnection Agreement with Qwest Corporation,* Dkt. NO. 00B-601T, Decision No. C01-312, at 36 (Colo. PUC March 30, 2001) (A copy of this decision is attached hereto).

[12] *See In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Commission Decision, ARB 332, Order No. 01-809, Arbitrator's Decision at 9 (Oregon PUC Sept. 13, 2001) ("Level 3 Oregon Decision") (A copy of this decision is attached hereto).

[13] *See* Level 3 Petition at 4-5.

However, the decision upon which Level 3 relies for this assertion, *TSR Wireless, L.L.C. v. U S WEST Communications, Inc.*,[14] is irrelevant to the issue presented here.

23. That case involved billing disputes among ILECs and several paging carriers arising from the ILECs' attempt to recover the costs of the trunks used to deliver one-way paging traffic from the ILECs' networks to the paging carriers' networks. The paging carriers sought an order prohibiting the ILECs from charging for these trunks.[15] Their claim required an interpretation of FCC Rule 51.703(b) and a determination of whether the reciprocal compensation obligations established by that rule apply to paging carriers.

24. In reaching the narrow conclusion that Rule 51.703(b) does apply to paging carriers and that the ILECs could not charge for some of the facilities at issue, the FCC did not address in any way Rule 51.709 and the concept of relative use. That issue was simply not germane to the paging carriers' complaint. Moreover, even if *TSR Wireless* had any relevance to this proceeding, it would be superseded by the *ISP Remand Order* which, as discussed, bears directly on relative use. Thus, when Level 3 cited *TSR Wireless* in the Oregon arbitration, the Oregon Commission did not deem it relevant.[16]

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[14] 15 FCC Rcd 11166 (2000).

[15] *Id.* at 11167.

[16] Level 3 Oregon Decision at 4. Far more relevant than *TSR Wireless* is the fact that paging carriers acknowledge that the FCC's reciprocal compensation rules do not exempt carriers from paying for interconnection facilities that carry non-local traffic. *See, e.g., Petition of AirTouch Paging, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc.*, Docket No. 99A-001T, Decision No. C99-419 at 15 (Colo. P.U.C. Apr. 23, 1999) ("Notably, AirTouch concedes that it is obligated to pay for the portion of USWC facilities used to deliver exempt traffic (i.e., non-local and transit) to it.").

IV. Conclusion

25. For all the reasons set forth above, the Commission should follow the governing law and adopt Qwest's proposed language relating to the relative use calculations that determine the parties financial responsibility for interconnection trunks.

DATED: August 30, 2002 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the foregoing **QWEST CORPORATION'S RESPONSE TO LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION** were served on the following:

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