WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT BETWEEN **LEVEL 3 COMMUNICATIONS, LLC.,** AND **QWEST CORPORATION** PURSUANT TO 47 U.S.C. § 252	**DOCKET NO. UT-023042** **LEVEL 3 COMMUNICATIONS, LLC OPPOSITION TO QWEST CORPORATION'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DETERMINATION**

Level 3 Communications, LLC ("Level 3") through its undersigned counsel, hereby opposes the Motion to Dismiss, or in the alternative, Motion for Summary Determination filed by Qwest Corporation ("Qwest"). Both of Qwest motions should be denied, and this case should proceed to discovery and Commission arbitration of a single disputed issue: whether the "relative use" provisions applicable to dedicated transport interconnection facilities should govern traffic originated by customers of Qwest, including traffic bound to Internet service providers ("ISPs") served by Level 3.

ARGUMENT

I. QWEST FAILS TO PROVIDE ANY SUPPORT FOR ITS MOTION TO DISMISS THE LEVEL 3 PETITION

Qwest's Motion to Dismiss should be denied because Qwest provides no support for it. Qwest contends that "dismissal is appropriate if the complaint alleges no facts that would justify the relief requested."[1] Yet nowhere in the Motion to Dismiss does Qwest explain how the Level 3 Petition "alleges no facts that would justify the relief requested." Qwest fails to demonstrate that Level 3 has not stated a claim for which relief would be justified.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

Qwest does not attempt to support its Motion to Dismiss because it cannot. Level 3 filed a Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").[2] The Act provides for Level 3's right to petition this Commission for relief regarding interconnection with the Qwest network. Once Level 3 has commenced negotiations for an interconnection agreement with Qwest, starting with the 135th day of negotiation, "the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." [3] Whether ISP-bound traffic is included in "relative use" calculations for two-way trunking facilities is an open issue between Level 3 and Qwest that Level 3 would like the Commission to arbitrate. Level 3 has stated facts that justify the relief requested and the Qwest motion to dismiss must be denied.

II. QWEST'S MOTION FOR SUMMARY DETERMINATION IS PREMATURE

Qwest has also filed a motion for summary determination. Rule 480-09-426(2) of the Washington Administrative Code provides that the Commission may grant summary disposition if "there is no genuine issue of material fact and the moving party is entitled to summary disposition in its favor." Qwest's motion should be denied because there are genuine issues of material fact between Level 3 and Qwest.

Level 3 contends that Qwest has always treated ISP-bound traffic as local traffic for regulatory purposes. In fact, in large part because of the way Qwest treats ISP-bound traffic, the Commission previously ruled that ISP-bound traffic would continue to be treated as local traffic, notwithstanding FCC pronouncements that ISP-bound traffic is within the FCC's interstate

---

[1] Qwest Motion at 4.
[2] 47 U.S.C. § 151 *et seq.*
[3] 47 U.S.C. §252(b)(1).

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

jurisdiction.[4] Level 3 has prepared discovery to secure evidence that would show that, for all practical purposes other than compensation of and taking responsibility for the exchange of traffic with its competitors, Qwest treats ISP-bound traffic as local traffic.

These facts are important because this Commission has previously stated that only "local" traffic is to be considered in a relative use calculation for two-way trunks. Level 3 contends that ISP-bound traffic should be considered within the relative use calculation, as evidenced by Qwest's treatment of traffic to ISPs in all other respects, which is to be developed through discovery. Because there are genuine issues of material fact, the Qwest Motion for Summary Determination must be denied.

III. EVEN IF THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, QWEST IS NOT ENTITLED TO SUMMARY DISPOSITION IN ITS FAVOR

A. QWEST'S PROPOSED LANGUAGE MAKES NO SENSE WITH RESPECT TO INTERCONNECTION WITH LEVEL 3

Qwest is not entitled to summary disposition in its favor, and this proceeding should proceed to arbitration by the Commission because Qwest's position in this proceeding makes no sense as it would apply to Level 3. Level 3 establishes a point of interconnection ("POI") with Qwest in each LATA. Because the volume of traffic from Qwest to Level 3 may frequently justify dedicated transport facilities in lieu of using its common transport network, Qwest has deployed trunks from certain Qwest end offices directly to the Level 3 POI. These "direct trunk transport" facilities ("DTTs") are the transport facilities in question in this proceeding. Because they are dedicated to traffic between Qwest and Level 3, they have been configured so that traffic to the Level 3 network, as well as traffic from the Level 3 network, if any, travel over these facilities. Even though they are configured to be two-way, these facilities sit entirely on

[4] *Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc. and GTE*

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

the Qwest network, on Qwest's side of the POI. Level 3 deploys its own facilities on its side of the POI to route traffic from the Qwest tandem switch office to Level 3's switching facilities.

Level 3, however, presently serves no customers that originate traffic over the interconnection facilities established with Qwest. Level 3 has established local interconnection to provide direct inward dialing capability to its ISP customers in Washington. Therefore, all of the traffic that travels over the facilities between Level 3 and Qwest is originated by Qwest customers and is terminated to Level 3's ISP customers. If one were to exclude ISP-bound traffic from the calculation of relative use for these facilities, there would be no traffic on which to base a relative use calculation. Such a result obviously makes no sense. Therefore, some other approach must be used, and the Commission should proceed to arbitration.

B. QWEST MISREADS THE FCC RULES AND THE ISP ORDER ON REMAND

1. RULE 51.709(B) MUST BE CONSIDERED IN ITS PROPER CONTEXT

Qwest's mistake is applying a rule for reciprocal compensation when reciprocal compensation is not at issue. Qwest makes the mistake of taking Rule 51.709(b) out of context in order to seek payment from Level 3 for Qwest's own facilities. When Rule 51.709(b) is considered in its proper context, however, Level 3 has no financial obligation for the transport facilities on the Qwest side of the POI that carry only traffic originated by Qwest customers.

Rule 51.709(b) is one of the FCC regulations implementing the reciprocal compensation provisions of Section 251(b)(5) of the Act. Section 251(b)(5) imposes on all local exchange carriers the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic."[5] One may consider "transport" and "termination" to be separate functional elements, but compensation for "transport and termination" under

Northwest Incorporated, Arbitrator's Report and Decision, Docket No. UT-980370 (Wa. UTC 1999) ("*Electric Lightwave*").

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

section 251(b)(5) is paid only to the terminating carrier. Thus, the question of who should bear financial responsibility for traffic that originates on the Qwest network is separate and distinct from any question related to terminating intercarrier compensation for any section 251(b)(5) traffic. It is well established that the originating carrier is paid nothing by the terminating carrier to bring traffic to the POI, meaning all financial obligations for the transport facilities for originating traffic on the originating carrier's side of the POI lie with the originating carrier.[6]

The FCC has interpreted the "transport and termination" language of Section 251(b)(5) as applying only to services and facilities on the terminating carrier's side of the POI. For the purposes of Section 251(b)(5), "transport" is defined in the FCC's rules as "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC." [7] "Termination" is defined in the FCC's rules as "the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[8] Both definitions refer to functions provided by a "terminating carrier" "from the interconnection point" "to the called party's

---

[5] 47 U.S.C. § 251(b)(5).

[6] *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*, Memorandum Opinion and Order, WCB Dkt. No. 00-218 et al., DA 02-1731 (rel. July 17, 2002) ("*FCC Virginia Arbitration Order*") at ¶ 67. It is undisputed that this traffic originating from Qwest end users will go over the local interconnection facilities. *See* Section 7.3.1.1.3 of the Level 3/Qwest Draft Agreement. Qwest and its customers benefit from the deployment of these dedicated facilities – otherwise, these calls could clog up Qwest's common transport network, resulting in Qwest's own customers' calls not being completed. Notwithstanding the clear benefit to Qwest and its customers in having the DTTs established and having the Internet-related minutes of traffic go over them, Qwest is seeking to pretend as if those minutes of traffic generated by calls its customers place do not exist for purposes of determining who is responsible for the facilities carrying those calls. The Commission should not sanction such fiction, nor should it allow Qwest to reap the benefits of these facilities without also bearing a proportionate share of the responsibility for its originating traffic on those facilities.

[7] 47 C.F.R. §51.701(c) (emphasis added).

[8] 47 C.F.R. §51.701(d).

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

premises." There is nothing in these definitions that refers to functions provided by originating carriers for facilities or services up to the interconnection point.

2. *THE USE OF DEDICATED TRANSPORT DOES NOT CHANGE THE ANALYSIS*

The fact that Qwest and Level 3 use dedicated transport facilities does not change the conclusion that Rule 51.709(b) or reciprocal compensation obligations do not apply to traffic originated by Qwest. Rule 51.709(b) was intended to capture financial responsibility for the transport and termination of traffic when dedicated facilities are used. Because dedicated facilities are used both to originate traffic (which is not compensable under section 251(b)(5)) and terminate traffic (which is compensable under section 251(b)(5)), the FCC devised a system to take that distinction into account. The FCC ruled that the reciprocal compensation obligations for dedicated transport facilities would be owed only for that portion of traffic that is headed toward the terminating carrier.

In other words, the two-way trunks on Qwest's side of the POI assist in two transport obligations performed by Qwest: transport for the origination of traffic, for which Qwest is solely responsible for the costs; and transport for the termination of traffic on Qwest's side of the POI, for which Level 3 would pay Qwest in the form of reciprocal compensation. The "relative use" factor simply reflects the relative distribution of those financial obligations by apportioning the facilities based upon the relative percentage of originating and terminating traffic.

The FCC's discussion of the topic of reciprocal compensation for dedicated transport facilities in the *Local Competition Order* explains the intent of Rule 51.709(b):

> For example, if the providing carrier [i.e., Qwest] provides one-way trunks that the interconnecting carrier [i.e., Level 3] uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. *The interconnecting carrier [i.e., Level 3], however,*

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

> *should not be required to pay the providing carrier [i.e., Qwest] for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.*[9]

The FCC stated that a different approach would be applicable to the sharing of costs for two-way dedicated trunks:

> These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.[10]

Rule 51.709(b) reflects this description of two-way trunks. When traffic flows in only one direction—as would be the case here—there is no need to consider each carrier's relative use of the transport facility. Level 3 uses no trunk capacity on the Qwest DTTs to send terminating traffic to Qwest; therefore, Level 3 owes Qwest no compensation for these trunks.

2. THE FCC ISP ORDER ON REMAND DOES NOT RESOLVE THIS DISPUTE

Further, the FCC's ruling in the *ISP Order on Remand*[11] with respect to intercarrier compensation for the termination of traffic does not resolve this dispute, where the sole question is whether Qwest must be responsible for transporting traffic over its own network.

Qwest maintains that ISP-bound traffic is excluded from Rule 51.709(b) because it is "interstate access" and therefore excluded by Rule 51.701 as revised by *the ISP Order on Remand*. As explained above, Rule 51.709(b) is a reciprocal compensation provision that is not applicable to compensation for facilities used to originate traffic. Even if 51.709(b) were used to

---

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1062 (subsequent history omitted) (emphasis added).

[10] *Id.*

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

prove the negative—that ISP-bound traffic originated by Qwest customers must be excluded from "relative use" calculations for dedicated facilities and therefore relieve Qwest of its obligation to pay for such facilities—this approach is unavailing. Under Rule 51.701(b), the only traffic excluded from "telecommunications traffic" is "interstate or intrastate exchange access, information access, or exchange services for such access." The restriction applies to interstate "exchange access," not just "interstate access." Qwest nowhere demonstrates that this traffic is "exchange access" or "exchange services for such access," and the FCC declined to draw such a conclusion in the *ISP Order on Remand*.[12] Indeed, it would be improper to treat ISP-bound traffic as exchange access given that the FCC's ESP exemption excludes ISP-bound traffic from payment of access charges. Therefore, even if the rule applied, there is no basis to exclude ISP-bound traffic originated by Qwest customers from the relative use calculation under § 51.709(b) of the FCC's rules.

Further, the FCC also eliminated the local/non-local distinction for reciprocal compensation obligations. In the *ISP Order on Remand* itself, the FCC eliminated all references to "local telecommunications traffic" in Rules 51.701 et seq. The local/non-local distinction, which the FCC prior to the *ISP Order on Remand* had interpreted to be a non-interstate/interstate distinction, was repudiated. Thus, the FCC rewrote Rule 51.701 so that the definition of "telecommunications traffic" no longer turned on whether traffic was "local," but only on whether the traffic was subject to 251(g).

There is another reason to reject the Qwest approach. The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rejected the FCC's legal analysis regarding

---

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, (2001), *remanded WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied,* at ¶ 44 ("*ISP Order on Remand*").

[12] *ISP Order on Remand* at ¶ 42, n.76.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

reciprocal compensation for ISP-bound traffic.[13] The D.C. Circuit rejected the FCC's conclusion that ISP-bound traffic was "information access" under section 251(g) and therefore excluded from section 251(b)(5). By doing so, the Court overturned the basis on which Qwest relies for excluding ISP-bound traffic from 51.709(b).

Further, the *ISP Order on Remand* addresses only compensation for the termination of traffic, not compensation for the origination of traffic or other interconnection responsibilities. The FCC made this point absolutely explicit. Footnote 149 categorically refutes the argument that the *ISP Order on Remand* applies to originating traffic on the originating carrier's side of the POI: "This interim regime affects only the intercarrier *compensation* (*i.e*., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, *such as obligations to transport traffic to points of interconnection*." (First emphasis in original, second emphasis added). If the FCC had intended to change carriers' originating responsibility with respect to ISP-bound traffic as part of the *ISP Order on Remand* as Qwest suggests, this footnote in the FCC's order would make no sense whatsoever. Indeed, if the FCC had intended to excuse carriers from their obligation to bring originating ISP-bound traffic to a POI, there would have been no reason for it to include this cautionary statement about the scope of its ruling. Qwest cannot apply the *ISP Order on Remand* to the issue of compensation obligations for transport provided by Qwest up to the point of interconnection without squarely contradicting this directive from the FCC.

In fact, all transport obligations for traffic on Qwest's side of the POI originated by Qwest customers lie solely with Qwest. This issue was decided in the *TSR Wireless* case, [14] in

---

[13] *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied.*

[14] *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al*., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001) (*"TSR Wireless"*).

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

which Qwest sought to impose almost the same transport requirements on other competitive carriers. Qwest argued to the FCC that it should not be required to bear the cost of taking calls placed by its customers to the POI with a paging company. The FCC disagreed, stating that its rules and orders "require a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier..."[15] The FCC continued:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network.[16]

Qwest maintains that the *TSR Wireless* case is irrelevant to the issue presented here.[17] Qwest's argument, however, is a confusing mish-mash that in fact proves Level 3's point—the proper inquiry is not one under Rule 51.709(b), but under a carrier's general interconnection obligations. Qwest characterizes *TSR Wireless* as a dispute "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 carrier's networks."[18] Substitute "paging" with "ISP" and the sentence summarizes Level 3's dispute with Qwest precisely.[19] Qwest then asserts that because the FCC interpreted a reciprocal compensation provision other than the reciprocal compensation provision regarding dedicated transport facilities that Qwest favors, *TSR Wireless* has no relevance to this proceeding.[20]

---

[15] *Id*. at ¶ 34.

[16] *Id*. (emphasis added).

[17] Qwest Motion at 13.

[18] *Id.*

[19] The fact that Level 3 is not a paging carrier makes no difference. The *TSR Wireless* decision explains the interconnection obligations between carriers generally.

[20] *Id.* at 14.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

What Qwest ignores is that the FCC based its decision in *TSR Wireless* on the fact that *no* reciprocal compensation requirements applied to facilities on the originating carrier's side of the POI.[21] The originating carrier is obligated to deliver traffic to the terminating carrier, and also to pay reciprocal compensation to the *terminating* carrier to complete a call originated by one of its customers. The paging carriers won in *TSR Wireless* because reciprocal compensation requirements are not applicable to originating traffic.

In addition, the principles stated in the *TSR Wireless* decision were repeated in the context of an FCC arbitration of disputes between an ILEC and facilities-based CLECs. In the recent *FCC Virginia Arbitration Order*, the FCC was asked to consider a proposal by Verizon that CLECs should be required to compensate Verizon for transport from numerous end offices on Verizon's side of the POI. The FCC rejected the Verizon proposal because it was not consistent with the FCC's interconnection rules. The FCC stated, in pertinent part, as follows:

> Specifically these rules establish that: (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent's network at only one place in a LATA; [and] (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination.[22]

These are the rules applicable to this dispute, and Qwest is obligated to bear the cost of delivering traffic its customers originate to the POI with Level 3.

4. *QWEST ADDS LANGUAGE TO THE FCC RULE THAT IS NOT THERE*

Even if Rule 51.709(b) were applicable to this dispute, Qwest commits a fundamental error in its analysis of the regulation. In order for Qwest to reach the conclusion that Level 3 is

[21] The FCC regulation that was being interpreted—Section 51.703—explains that reciprocal compensation provisions do not apply to facilities used to originate traffic.

[22] *FCC Virginia Arbitration Order* at ¶ 67.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

solely responsible for the cost of two-way trunks between Qwest and Level 3, Qwest must rewrite the rule to add words that are not there. When read as actually written—rather than as Qwest would prefer it to be written—the FCC rule does not support Qwest's argument.

Rule 51.709(b) reads as follows:

> 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.

Even though the term "telecommunications traffic " does not appear at all in 51.709(b), Qwest maintains that the word "traffic" actually means "telecommunications traffic."[23] Qwest does not bother to explain how it makes that leap, because it cannot. Under common principles of statutory construction, when a legislature—or in this case, an agency promulgating regulations—includes particular language in one section of a statute but omits it in another section of the same legislation, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion.[24] Thus, the fact that the FCC refers to "telecommunications traffic" in several portions of Subpart H of Part 51, but refers only to "traffic" in 51.709(b) requires the conclusion that the FCC intended to distinguish "traffic" in 51.709(b) from "telecommunications traffic." Qwest's suggestion to the contrary is meritless.

From that point, Qwest's argument with respect to the FCC ISP Order on Remand falls apart. Whatever restrictions the FCC may have placed on "telecommunications traffic" would not apply under 51.709(b) when that section does not even refer to "telecommunications traffic."

[23] Qwest Motion at 9.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

5. *QWEST'S POLICY ARGUMENTS ARE MERITLESS*

Qwest's plea that Level 3 should be required to pay for interconnection trunks on Qwest's side of the POI on policy grounds should also be rejected.[25] Qwest begins with the assertion that reciprocal compensation payments for the transport and termination of ISP-bound traffic creates improper incentives for CLECs.[26] Qwest then warps this misguided policy statement into a conclusion that not only should Qwest not have to pay Level 3 to terminate ISP-bound traffic, but Level 3 should be required to pay Qwest to *originate* ISP-bound traffic by paying for Qwest's facilities to the POI. The Commission must reject this unreasonable position. Through the *ISP Order on Remand*, the FCC has already addressed the intercarrier problems it perceived arising from the exchange of ISP-bound traffic. It found that the way to address those problems was to limit the amount of compensation payable by the originating carrier to the carrier serving the ISP. The FCC did *not* find that the originating carrier was entitled to any further relief, such as being excused from all originating obligations – and in fact, to the contrary, the FCC warned in footnote 149 that its decision should *not* be read to give originating carriers such further relief.

IV. THERE IS NO HOBBS ACT ISSUE RAISED BY THE LEVEL 3 PETITION

Qwest also asserts that Level 3 may not attack the FCC rules collaterally.[27] Level 3 is not attacking any FCC rules collaterally. Instead, Level 3 is *relying* on the FCC rules regarding interconnection and reciprocal compensation to demonstrate that Level 3 is not obligated to pay for Qwest facilities on Qwest's side of the POI with Level 3. Nothing in the Level 3 Petition

---

[24] *Russello v. United States*, 464 U.S. 16, 23 (1983).
[25] Qwest Motion at 9-10.
[26] *Id.*
[27] *Id.* at 10-11.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

constitutes a violation of the Hobbs Act prohibition on litigating FCC decisions outside the U.S. Court of Appeals.

Further, if Qwest contends that Level 3 is attacking the legal reasoning of the *ISP Order on Remand*, Qwest is wrong—the D.C. Circuit has already done that and has thrown the decision back to the agency. Level 3 is merely repeating what the D.C. Circuit has already said about the infirmities of the *ISP Order on Remand*. The legal reasoning in that order has been flatly rejected by the U.S. Court of Appeals. Whatever remains as good law from the *ISP Order on Remand* most certainly does not stand for the proposition that Internet traffic is to be considered interstate in nature for all regulatory purposes as Qwest argues.

V. THE COMMISSION'S DECISION IN DOCKET NO. UT-003013 SHOULD BE RECONSIDERED

Qwest relies heavily on the Commission's decision on a related issue in the Docket No. UT-003013, the Qwest Unbundled Network Element Pricing proceeding.[28] That reliance is misplaced because the Commission looked only to the federal reciprocal compensation rules in reaching its prior conclusion about originating responsibility, and the circumstances between Level 3 and Qwest may be distinguished from the facts underlying the Commission decision. In addition, the Commission specifically and expressly anticipated revisiting its decision as further judicial and federal regulatory review occurs.

First, the Commission asserted in the prior case that FCC Rule 51.709 requires the sharing of costs for interconnection facilities to be determined according to the relative *local* traffic flow over that facility.[29] As discussed above, however, the FCC's reciprocal compensation rules should not be applied outside the reciprocal compensation (*i.e.*, terminating

[28] *Id.* at 5-8, referring to *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirty-Second Supplemental Order, etc., (Wa. UTC June 21, 2002) at ¶ 113 ("*UNE Rates Decision*").

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

function) context. The FCC rule relates *only* to the amount of terminating compensation that a carrier owes a second carrier for using dedicated transport facilities to terminate traffic that the first carrier originates. As the FCC cautioned in footnote 149, it does not purport to delegate financial interconnection responsibilities based on the jurisdictional nature of the traffic.

More importantly, however, the Commission's decision is inconsistent with the way in which Level 3 and Qwest interconnect their networks. FCC regulations permit enhanced service providers, including ISPs, to obtain telecommunications services from local exchange tariffs, even though they may use those services to provide interstate information services.[30] Thus, for all regulatory purposes (other than intercarrier compensation), service to ISPs is a local exchange service. The trunks established between Level 3 and Qwest that are used to transport calls to ISPs are EAS/Local Exchange trunks. Level 3 and Qwest have agreed to route only EAS and local exchange traffic over those trunks, and they specifically agreed that ISP-bound traffic would be routed over those trunks.[31] Thus, the Commission's distinction between "local" and non-local traffic for determining relative use is not applicable between Qwest and Level 3. They have already agreed that all traffic over the EAS/Local Exchange trunks will be EAS/Local Exchange traffic.[32]

Further, the Commission decisions cited by Qwest squarely contradict Commission precedent regarding ISP-bound traffic. In the arbitration proceeding between Electric Lightwave, Inc. and GTE Northwest, Inc., the Commission required the parties to make ISP-

---

[29] *Id.*

[30] *See* Level 3 Petition at 7.

[31] *Id.* at 6; *see also* Section 7.3.1.1.3.1 of Qwest/Level 3 Draft Agreement.

[32] Moreover, it is incorrect to presume that ISP-bound traffic is exclusively interstate traffic. Qwest cannot seriously assert that an ISP subscriber in Olympia that accesses information stored on servers in the Microsoft complex in Redmond engages in an interstate communication. While the FCC declared that "ISP traffic is properly classified as interstate" because "the interstate and intrastate components cannot be reliably separated," *ISP Order on Remand* at ¶ 52, this conclusion was made in connection with federal *preemption* of state authority over ISP-bound traffic under the principles stated in *Louisiana PSC v. FCC*, 476 U.S. 355 (1986).

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

bound traffic subject to the same reciprocal compensation obligations applicable to non-ISP local traffic:

> The parties should apply the same MOU-based reciprocal compensation mechanism to ISP-bound local-interstate traffic that is used for non-ISP local traffic exchanged between their networks over local interconnection facilities.[33]

This approach was based on sound policy as well as being the most practical result:

> Due to the prevailing flat-rate retail structure and the lack of substantive evidence of differing costs for the transport and termination of ISP local-interstate and non-ISP local traffic, it is inappropriate and inequitable to adopt separate reciprocal compensation mechanisms in this arbitration.[34]

At that time, the jurisdictional nature of an ISP-bound call was not relevant to whether ISP-bound traffic would be treated as local traffic in interconnection obligations. More specifically, all reciprocal compensation provisions—including Rule 51.709(b)—applied equally to the termination of ISP-bound traffic and non-ISP-bound local traffic. Nothing has changed in the interim to alter that result.[35] Rather than looking again to the FCC's rulings with respect to *terminating* compensation to determine what a carrier's *originating* responsibility must be, the Commission should look to how the parties themselves handle that traffic (over local trunks) and how that traffic is generated (by locally-dialed calls placed by the parties' local service subscribers) in considering the interconnection obligations each carrier bears.

---

[33] *Electric Lightwave* at 13.

[34] *Id.*

[35] Although the Commission subsequently said that "Traffic bound for ISPs is not subject to the reciprocal compensation provisions of section 251(b)(5)," *Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, 25th Supplemental Order (Wa. UTC Feb. 28, 2002) at ¶ 10, that statement was based on the *ISP Order on Remand* before it was rejected by the D.C. Circuit. Whether ISP-bound traffic is subject to section 251(b)(5) is now an unresolved issue. One can infer that the D.C. Circuit thinks that ISP-bound traffic does fall within section 251(b)(5) obligations. *See* *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) at 6 (calls to ISPs appear to fit the FCC's definition of termination under § 251(b)(5)), and *WorldCom*, 288 F.3d at 434 (declining to vacate FCC's interim compensation regime because the FCC might have authority to implement it under §§ 251(b)(5) and 252(d)(B)(i)).

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

VI. OTHER STATE COMMISSION DECISIONS SUPPORT THE LEVEL 3 POSITION

While Qwest refers to decisions from the Colorado and Oregon commissions that purportedly support Qwest's argument, Qwest ignores the decision of the Arizona Corporation Commission that ruled in favor of Level 3 on this issue. The Commission's resolution of this arbitrated issue is as follows:

> We concur with Level 3 that Qwest's arguments ignore the fact that the facilities Qwest installs on its side of the POI serve Qwest's own customers. Qwest does not provide these facilities to Level 3 without compensation, but rather receives compensation for these facilities from its own customers. The issue of relative use of facilities on Qwest's side of the POI is distinct from the issue of whether Internet traffic is local and subject to reciprocal compensation. Qwest's reliance on FCC rules and orders concerning reciprocal compensation for local traffic is misplaced. Because this is a distinct issue from reciprocal compensation, we do not believe that employing the same compromise for switching costs and reciprocal compensation is appropriate. We, therefore, find that ISP traffic should be included in the calculation of relative use of interconnection facilities on Qwest's side of the POI.[36]

The Arizona Commission correctly recognized that all traffic carried over the interconnection facilities on the Qwest side of the POI must be considered to calculate each carrier's relative use of the facility.

VII. QWEST SEEKS TO CIRCUMVENT THE ESP EXEMPTION ON ACCESS CHARGES

Finally, Qwest's proposal that Level 3 pay for the facilities used to transport traffic that Qwest customers originate represents a back-door attempt to evade the FCC rules regarding access charges for traffic to ISPs. ESPs, including ISPs, are permitted to use local exchange

[36] *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*, Opinion and Order, Decision No. 63550 (Ariz. C.C. Apr. 10, 2001) at 10.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

services in order to provide their information services, which may include interstate information services. They are not required to pay access charges, even for interstate services.

To the extent ISP-bound traffic is considered access traffic, however, the additional costs that Qwest would force Level 3 to collect from its ISP customer represent a form of access charges that Qwest would not be permitted to collect if it served the ISP itself. The Commission should not sanction Qwest's attempt to skirt the FCC requirements regarding enhanced service providers.

VIII. CONCLUSION

For the foregoing reasons, the Qwest Motion to Dismiss and the Qwest Motion for Summary Determination must be dismissed. Qwest provides no support whatsoever for its Motion to Dismiss. Qwest is also not entitled to Summary Determination because there are genuine issues of material fact that are still in dispute. Even if there were no facts in dispute, Qwest would not be entitled to Summary Determination because Qwest relies on an FCC rule applicable to reciprocal compensation when reciprocal compensation is not at issue in this proceeding. Further, even if the reciprocal compensation rules were applicable, Qwest reads language into Rule 51.709(b) that is not there and ignores the decision of the U.S. Court of Appeals for the D.C. Circuit in *Worldcom v. FCC* that establishes that ISP-bound traffic is not excluded from the definition of "telecommunications traffic" under Rule 51.701(b). When the rule is read as written, Qwest's argument for relief falls apart.

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409

RESPECTFULLY SUBMITTED this 9th day of October, 2002.

GREGORY L. ROGERS
LEVEL 3 COMMUNICATIONS, LLC
1025 ELDORADO BOULEVARD
BROOMFIELD, CO 80021
(720)888-2512 (TEL)
(720)888-5134 (FAX)

PEÑA & ASSOCIATES, LLC

By:_____
ROGELIO E. PEÑA
PEÑA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, COLORADO 80302
(303)415-0409 (TEL)
(303)415-0433 (FAX)

ATTORNEYS FOR LEVEL 3 COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing LEVEL 3 COMMUNICATIONS, LLC, OPPOSITION TO QWEST CORPORATION'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DETERMINATION in WUTC Docket No. UT-023042, including diskette of same in Word and Adobe format, was sent via electronic, facsimile and ABC Legal Messenger on this 9th day of October, 2002, addressed to the following:

Carole J. Washburn
Executive Secretary
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

And that a true and correct copy of same has been served via electronic and/or facsimile and FedEx Priority Overnight on this 9th day of October, 2002, addressed to the following:

LISA A. ANDERL
1600 7TH AVENUE, ROOM 3206
SEATTLE, WA 98191

JOHN M. DEVANEY
MARTIN WILLARD
PERKINS COIE, LLP
607 FOURTEENTH ST., N.W., SUITE 800
WASHINGTON, D.C. 20005-2011

MARJORIE R. SCHAER
ARBITRATOR
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

DATED at Seattle, Washington this 9th day of October, 2002.

_____
GRETCHEN ELIZABETH EOFF
INDUSTRY SPECIALIST, ATER WYNNE LLP

PENA & ASSOCIATES, LLC
1919 14TH STREET, SUITE 330
BOULDER, CO 80302
(303) 415-0409