BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

CORRECTED DIRECT TESTIMONY OF

LARRY B. BROTHERSON

ON BEHALF OF QWEST CORPORATION

October 16, 2002
[Originally Submitted on October 9, 2002]

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I. IDENTIFICATION OF WITNESS

Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS ADDRESS.

A. My name is Larry B. Brotherson. I am employed by Qwest Corporation ("Qwest") as a director in the Wholesale Markets organization. My business address is 1801 California Street, Room 2350, Denver, Colorado, 80202.

Q. BRIEFLY OUTLINE YOUR EMPLOYMENT BACKGROUND.

A. Since joining Northwestern Bell Telephone Company in 1979, I have held several positions within Northwestern Bell, U S WEST Communications, and Qwest. Most of my responsibilities and assignments have been within the Law Department. Over the past 20 years, I have been a state regulatory attorney in Iowa, a general litigation attorney, and a commercial attorney supporting several organizations within Qwest. My responsibilities have included advising the company on legal issues, drafting contracts, and addressing legal issues that arise in connection with specific products. With the passage of the Telecommunications Act of 1996 (the "Act"), I took on responsibility for providing legal advice and support for Qwest's Interconnection Group. In that role, I was directly involved in working with competitive local exchange carriers ("CLECs"). I negotiated interconnection agreements with CLECs that implemented various sections of the Act, including the Act's reciprocal compensation provisions. In 1999, I assumed my current duties as director of wholesale advocacy.

My current responsibilities include coordinating the witnesses for all interconnection arbitrations and for hearings involving disputes over interconnection issues. Additionally, I work with various groups within the Wholesale Markets Organization of Qwest to develop

testimony addressing issues associated with interconnection services.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. I received a Bachelor of Arts degree from Creighton University in 1970 and a Juris Doctor degree from Creighton in 1973.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION?

A. Yes. I have presented testimony in the Qwest arbitration with Sprint, Docket UT-003006; the Tel West complaint proceeding, Docket UT-013097; and the workshops relating to Qwest's application pursuant to section 271 of the Act for entry into the long distance market.

II. SUMMARY

Q. PLEASE SUMMARIZE AND DESCRIBE THE PURPOSE OF YOUR TESTIMONY.

A. My testimony explains Qwest's position concerning the single issue presented in this arbitration: whether Internet traffic should be excluded from the parties' calculations of the "relative use" of interconnection trunks. As I explain below, Qwest and Level 3 agree that their respective financial responsibility for interconnection trunks will be determined by their relative use of the trunks. Consistent with the FCC's rule relating to relative use, 47 C.F.R. §51.709(b), Qwest and Level 3 must determine relative use based on the amount of telecommunications traffic that each party originates over a trunk. As defined by the FCC in Rule 51.701(b)(1), "telecommunications traffic" is "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 . . . ." (emphasis added). As this definition shows, the telecommunications traffic that is to be included in relative use calculations expressly *excludes* "interstate or intrastate exchange access." In the *ISP Remand Order* issued last year, the FCC ruled that Internet traffic is interstate access.[1] As such, it must be excluded from Qwest's and Level 3's calculations of relative use.

Significantly, this Commission has addressed this precise issue twice within the past few months and has ruled each time that Internet traffic must be excluded from relative use. In its *Thirty-Second Supplemental Order* in Docket UT-003013, issued June 21, 2002, 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.[2]

Less than three weeks ago, the Commission affirmed this ruling in its *Thirty-Eighth Supplemental Order* in the same docket:

> We agree with Qwest that 47 C.F.R. 51.709 does not contemplate inclusion of ISP-bound traffic flows when calculating each party's proportionate share of cost of interconnection

[1] 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, 2001 FCC LEXIS 2340 at ¶¶ 52, 57 (rel. Apr. 27, 2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[2] Thirty-Second Supplemental Order; Part B Order; *Line Splitting; Line Sharing Over Fiber Loops; OSS; Loop Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring Rates for UNEs, Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 113 (June 21, 2002) ("*Thirty-Second Supplemental Order*") (footnote omitted) (emphasis in original).

facilities. Therefore, we reject AT&T/XO's arguments and reaffirm our decision in the Part B Order on this issue.[3]

Despite these clear pronouncements from the FCC and this Commission, Level 3 takes the position that Internet traffic should be included in the parties' relative use calculations. In addition to having no legal support, Level 3's position conflicts with the policy concerns relating to the treatment of Internet traffic that the FCC identified in the *ISP Remand Order*. In that order, the FCC found 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.[4] 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.[5] The policy objectives that led the FCC to this result also support excluding Internet traffic from relative use calculations. Indeed, if Internet traffic is included in relative use, Level 3 will obtain interconnection trunks from Qwest without paying anything (or very little) for them. That would lead to precisely the type of uneconomic subsidy and improper incentive that the FCC sought to avoid in the *ISP Remand Order*.

By excluding Internet traffic from the relative use calculations in Sections 7.3.1.1.3 and 7.3.2.2 of the interconnection agreement, Qwest's language properly implements this Commission's prior rulings and the FCC's pronouncements on this issue. Indeed, the

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[3] Thirty-Eighth Supplemental Order; Final Order on Reconsideration, Part B; *Line Splitting; Line Sharing Over Fiber Loops; OSS; Loop Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring Rates for UNEs, Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 64 (Sept. 23, 2002) ("*Thirty-Eighth Supplemental Order*").

[4] *ISP Remand Order* ¶¶ 67-76.

[5] *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.

Commission already has approved virtually identical language for Qwest's Statement of Generally Available Terms and Conditions ("SGAT"). Accordingly, the Commission should adopt Qwest's proposed language.

III. TESTIMONY

Q. PLEASE DESCRIBE THE PARTIES' DISPUTE.

A. As I have summarized above, Level 3 and Qwest agree that the division of financial responsibility for interconnection transport facilities will 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 facilities. The sole disagreement concerns whether Internet traffic should be included in the traffic counted to determine relative use of the facilities.

Q. WHAT ARE THE PARTIES' COMPETING LANGUAGE PROPOSALS THAT ARE THE SUBJECT OF THIS ARBITRATION?

A. Qwest's and Level 3's respective proposals for sections 7.3.1.1.3 and 7.3.1.1.3.1 of the interconnection agreement are set forth below. I have highlighted those portions of both parties' proposals that are in dispute. Qwest's proposed sections are as follows:

> 7.3.1.1.3 If the Parties elect to establish LIS two-way trunks, for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the LIS two-way facilities shall be shared among the Parties by reducing the LIS two-way EF rate element charges as follows:
>
> > 7.3.1.1.3.1 The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the Entrance Facility (EF), as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes

of use data ***for non-Internet Related traffic*** to substantiate a change in that factor. If either Party demonstrates ***with non-Internet Related data*** that actual minutes of use during the first quarter justify a relative use factor other than fifty percent (50%), the Parties will ***retroactively true up first quarter charges.*** Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. By agreeing to this interim solution, Qwest does not waive its position that Internet Related Traffic or traffic delivered to Enhanced Service Providers is interstate in nature.

Level 3's proposed language is as follows:

7.3.1.1.3 If the Parties elect to establish LIS two-way trunks, for reciprocal exchange of Exchange Service (EAS/local) ***(including traffic originated by Enhanced Service Providers), ISP bound traffic, Exchange Access (IntraLATA toll carried solely by Local Exchange Carriers) and Jointly Provided Switched Access (InterLATA and IntraLATA toll involving a third-party IXC)***, the cost of the LIS two-way facilities shall be shared among the Parties by reducing the LIS two-way EF rate element charges as follows:

7.3.1.1.3.1 ***Where the Parties have been exchanging traffic prior to the Effective Date of this Agreement in [STATE], the Parties shall utilize the existing relative use factor already employed to determine sharing of costs in that [STATE]. Where the Parties have not been exchanging traffic previously in [STATE] prior to the Effective Date of this Agreement***, the provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the Entrance Facility (EF), as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data to substantiate a change in that factor. ***(For example, if Level 3 originates 600 minutes of traffic and Qwest originates 400 minutes of traffic over the two-way EF, the new relative use factor for Level 3 would be 60% and the new relative use factor for Qwest would be 40%. Level 3 would then bear 60% of the cost of the two-way EF, and Qwest would bear 40% of the cost.)*** If either Party demonstrates that actual minutes of use during the first quarter justify a relative use factor other than fifty percent (50%), the Parties will ***apply the new factor going forward.*** Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. By agreeing to this interim solution, Qwest does not waive its position that Internet Related Traffic or traffic delivered to Enhanced Service Providers is interstate in nature.

Q. IS LEVEL 3'S PROPOSED LANGUAGE APPROPRIATE FOR THE TYPE OF INTERCONNECTION ARRANGEMENT CONTEMPLATED UNDER THE TERMS AND CONDITIONS OF THE PENDING AGREEMENT?

A. No. The language that Level 3 proposes specifically calls for the inclusion of Internet traffic, intraLATA toll and interLATA toll in determining how the costs of the local interconnection service ("LIS") trunks will be apportioned. This position is contrary to the decisions of this Commission, the mandates of the Act and the FCC's rules implementing the Act.

Q. HOW HAS THIS COMMISSION ADDRESSED THE ISSUE OF RELATIVE USE AND INTERNET TRAFFIC?

A. As I have quoted above in the Summary section of my testimony, the Commission has ruled twice in Docket No. UT-003013 that because Internet traffic is interstate, not local, it must be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities.[6] The Commission issued these rulings after thoroughly considering detailed testimony and briefing on the issue.[7] In its arbitration petition in this case and in its testimony and briefs filed in other states, Level 3 has presented the same arguments that this Commission has already considered and rejected. Level 3 has not provided any basis for the Commission to reverse itself on this issue.

In addition to these rulings in Docket No. UT-003013, the Commission has addressed whether Internet-bound traffic falls within the scope of parties' reciprocal compensation

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[6] *Thirty-Second Supplemental Order* at ¶ 113; *Thirty-Eighth Supplemental Order* at ¶ 64.

[7] *See, e.g.*, Response Testimony of Rex Knowles on Behalf of XO Washington, Inc. at 8-15.

obligations for transport and termination of telecommunications traffic in Docket Nos. UT-003022 and UT-003040. In those dockets, the Commission's *Twenty-Fifth Supplemental Order* recognized that the FCC determined that Internet-bound traffic is not "telecommunications" and that such traffic does not fall within the purview of Section 251(b)(5).[8] Furthermore, the Commission expressly recognized that under FCC rules, state commissions do not have authority to determine intercarrier compensation for Internet-bound traffic.[9] In accordance with this ruling, Qwest's SGAT in Washington excludes Internet-bound traffic from the relative use calculations for entrance facilities and direct trunk transport used for interconnection and the exchange of telecommunications traffic between Qwest and CLECs. The language Qwest proposes for the parties' interconnection agreement is identical in all material respects to the language in Qwest's Washington SGAT.[10] In its *Thirty-Ninth Supplemental Order* in Docket Nos. UT-003022 and UT-003040, the Commission approved Qwest's SGAT and found that it complies with Qwest's obligations under Sections 252 and 271 of the Act.[11] In these dockets, the Commission

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[8] 25th Supplemental Order; Order Granting In Part And Denying In Part Petitions For Reconsideration Of Workshop One Final Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Feb. 8, 2002).

[9] *Id.*

[10] Qwest's SGAT and its proposed language for the Level 3 interconnection agreement use slightly different terms to refer to traffic bound for the Internet. Sections 7.3.1.1.3, 7.3.1.1.3.1 and 7.3.2.2.1 of Exhibit 1 (Qwest's SGAT) provide that the relative use calculation applies to "non-ISP-bound traffic" and "non-ISP-bound data." Qwest's proposed SGAT language for Sections 7.3.1.1.3.1 and 7.3.2.2.1 of its agreement with Level 3 provides that the relative use calculation applies to "non-Internet Related traffic" and "non-Internet Related data."

[11] 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the*

again considered and rejected CLEC testimony and arguments that specifically advocated the inclusion of Internet traffic in the relative use calculations used to determine financial responsibility for interconnection trunks.[12]

Finally, also in Docket Nos. UT-003022 and UT-003040, the Commission addressed an analogous issue of whether Internet-bound traffic should be considered "local" traffic for purposes of the current FCC local use restriction on the use of Enhanced Extended Loops ("EELs"). In the Commission's *Twenty-Fourth Supplemental Order*,[13] the Commission addressed whether Qwest could apply local usage restrictions on the use of EELs under FCC orders governing the use of EELs.[14] The Commission also addressed whether Internet-bound traffic would be considered "local" traffic for purposes of the FCC's interim restrictions on EEL usage. On the first question of whether a restriction could even apply, the Commission originally held that Qwest could not impose any restrictions on the use of EELs unless the FCC issued final rules permitting such restrictions.[15] The Commission noted, however, that if such restrictions were permitted, Internet-bound traffic would not be

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Telecommunications Act of 1996, Docket Nos. UT-003022/UT-003040 ¶ 391 (WUTC July 3, 2002) ("*39th Supplemental Order*") ("The Commission approves Qwest's SGAT and all Exhibits, as filed on June 25, 2002, and allows the SGAT to become effective on July 10, 2002").

[12] *See, e.g.*, Workshop 2 Response Testimony of Kaylene Anderson on Behalf of XO Washington, Inc. at 3-10.

[13] 24th Supplemental Order; Commission Order Addressing Workshop Three Issues: Checklist Items Nos. 2, 5, and 6, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Dec. 20, 2001) ("*24th Supplemental Order*").

[14] *E.g.*, Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587 (June 2, 2000) ("*Supplemental Order Clarification*").

[15] *24th Supplemental Order* ¶ 24.

considered "local" telecommunications traffic and, instead, would be "interstate" traffic.[16] The Commission further recognized that it was preempted from deviating from the FCC's determination on this treatment of Internet-bound traffic.[17] Subsequently, in its *Thirty-First Supplemental Order*, in light of FCC precedent, the Commission reconsidered and reversed its previous determination that Qwest could not impose local use restrictions on EEL usage.[18] As a result, the Commission has found that local use restrictions can be applied to EELs and, most important for this matter, that Internet-bound traffic is not "local" traffic.

Q. HOW HAS THE FCC ADDRESSED THIS ISSUE?

A. Qwest's proposal to exclude Internet traffic is *required* by applicable FCC rules and orders. The analysis starts with FCC rule 51.709(b). The rule provides:

> The rate of a carrier [*i.e.*, Qwest] 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 [*i.e.*, Level 3] to send traffic that will terminate on the providing carrier's network.[19]

The "traffic" referred to in this rule is "telecommunications traffic," defined by the FCC as

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[16] *Id.* ¶ 27 ("The Commission believes, as Qwest proposes, that states have been preempted by the FCC's *ISP Remand Order* on this question, and that ISP-bound traffic must be treated as interstate for the purpose of determining local use of the facilities in question").

[17] *Id.*

[18] 31st Supplemental Order; Order Granting Qwest's Petition for Reconsideration of the 24th Supplemental Order and Granting and Denying Petitions for Reconsideration of the 28th Supplemental Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040 ¶ 16 (WUTC Apr. 12, 2002) ("*31st Supplemental Order*").

[19] 47 C.F.R. § 51.709(b).

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."[20] Under this definition, any traffic that is "interstate or intrastate access or information access" is outside the scope of Rule 51.709(b) and must be excluded from calculations of relative use.

Q. YOU MENTIONED THAT FCC RULES AND ORDERS ADDRESS THE ISSUE OF RELATIVE USE. WHAT ORDER OF THE FCC IS RELEVANT HERE?

A. The *ISP Remand Order* issued by the FCC in April of 2001.

Q. WHY IS THE *ISP REMAND ORDER* RELEVANT TO THE DISPUTE HERE?

A. In the *ISP Remand Order*, the FCC ruled unequivocally that Internet-bound traffic is properly characterized as "interstate access" traffic: "[m]ost Internet-bound traffic traveling between a LEC's (*i.e.* Qwest's) subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[21] As interstate traffic, Internet traffic is excluded from the "telecommunications traffic" that, pursuant to 47 C.F.R. § 51.709(b), must be used to determine relative use.

Q. DOES LEVEL 3 AGREE THAT THE FCC'S RECIPROCAL COMPENSATION RULES AND THE *ISP REMAND ORDER* CONTROL THE PARTIES' DISPUTE ABOUT RELATIVE USE OF FACILITIES?

A. Based on its advocacy in other jurisdictions, it appears that Level 3 does not believe that

[20] 47 C.F.R. § 51.701(b)(1) (emphasis added).

[21] *ISP Remand Order* ¶ 58.

these rules and order govern the parties' dispute.

Q. DO YOU AGREE?

A. No. As explained above, the FCC rules and the *ISP Remand Order* directly control the issue here. Moreover, on a policy level, the same concerns that led the FCC to phase out reciprocal compensation for Internet traffic require the exclusion of Internet traffic from the relative use calculation set forth in the parties' interconnection agreement.

Q. WHAT POLICY CONCERNS DID THE FCC EXPRESS?

A. In addition to being required under the FCC's rules, the exclusion of Internet traffic from the relative use calculation is required by the policy rationale that led the FCC to phase out payment of intercarrier reciprocal compensation in the *ISP Remand Order*.[22] In that order, the FCC found that the payment of reciprocal compensation for Internet traffic under the Act causes uneconomic subsidies and improperly creates incentive for CLECs to specialize in serving ISPs to the exclusion of other customers.[23] These improper effects, the FCC concluded, arise from the fact that reciprocal compensation permits carriers to recover their costs "not only from their end-user customers, but also from *other carriers*."[24] The FCC explained:

> Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little

[22] *Id*. ¶¶ 77-82.

[23] *Id*. ¶¶ 67-76.

[24] *Id*. ¶ 68 (emphasis in original) (footnote omitted).

> relationship to its actual costs, thereby gaining an advantage over its competitors. *Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.*[25]

The FCC found further that the market distortions caused by reciprocal compensation payments "are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act."[26] By targeting ISP customers that have large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap "a reciprocal compensation windfall."[27]

Q. HOW ARE THESE CONCERNS RELEVANT HERE?

A. Level 3 is precisely the type of carrier the FCC singled out in its *ISP Remand Order* as causing market distortions and engaging in regulatory arbitrage. Because 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 – it originates almost no traffic on its network. Instead, virtually all of the traffic exchanged between the parties originates on Qwest's network by customers of ISPs served by Level 3. Thus, given the parties' historic traffic patterns, under Level 3's proposed language Qwest would be assigned close to 100% of the use of an interconnection facility and would bear virtually all of the costs of the interconnection facilities that Level 3 obtains from Qwest to serve its ISP customers (and presumably its intraLATA and interLATA toll customers as well). Under its proposed

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

[26] *Id.* ¶ 69.

[27] *Id.* ¶ 70.

language, Level 3 would therefore be able to improperly shift the costs of interconnection trunks entirely onto Qwest and Qwest's customers even though Qwest would be delivering *no local traffic to Level 3*. The distorted incentive for Level 3 to continue to focus its business on ISPs created by this arrangement is precisely the effect the FCC determined to eliminate in the *ISP Remand Order*.

Q. HOW DOES QWEST'S PROPOSED LANGUAGE REMEDY THIS DISTORTION?

A. By excluding Internet traffic from the relative use calculations in sections 7.3.1.1.3 and 7.3.2.2 of the interconnection agreement, Qwest's proposed language is consistent with the FCC's rules and the *ISP Remand Order* and properly limits the traffic included in the parties' relative use calculations to local telecommunications traffic.

Q. IS QWEST'S PROPOSED LANGUAGE INTENDED TO RECOVER COSTS STRICTLY ASSOCIATED WITH THE EXCHANGE OF LOCAL TELECOMMUNICATIONS TRAFFIC?

A. Yes. Qwest's proposal properly limits the traffic at issue to local telecommunications traffic exchanged between Qwest and Level 3. Under Qwest's proposal, each party will bear a portion the cost of the entrance facilities and direct trunk transport facilities based strictly upon the party's relative use of the facilities for the transmission of local traffic. In this way, the party that causes the cost pays for the portion of the facilities it uses to conduct its business as a local service provider.

Q. HOW HAVE THE FCC AND STATE REGULATORS HISTORICALLY TREATED THE TRANSPORT OF INTERSTATE TRAFFIC?

A. Interstate providers, as well as intrastate toll providers, have paid for the transport of their interstate and intrastate toll calls. As the causer of the cost of transporting these calls, they have recovered their costs from their customers in the price they charge for the interstate or intrastate service. In the local service world, by contrast, the cost of completing a local call is recovered from the end user through local rates. Applying the "local model" for Internet traffic, interstate toll, and intrastate toll is totally inappropriate.

Q. DOES LEVEL 3 AGREE THAT QWEST'S PROPOSED LANGUAGE PROPERLY ALIGNS THE COST OF LOCAL INTERCONNECTION FACILITIES WITH USE OF THE FACILITIES?

A. No. Level 3 suggests here, as it has in other proceedings, that Qwest is attempting to force Level 3 to bear the entire cost of interconnection facilities on Qwest's side of the point of interconnection ("POI") or be required to construct the facilities itself.[28]

Q. WHAT IS QWEST'S RESPONSE?

A. 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 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 for local traffic as required by the FCC's rules. Under its proposal, Level 3 would have the unilateral right to require Qwest to deliver non-local, Internet-bound traffic to Level 3's POI from across all of Qwest's Washington network for free. The applicable FCC rules do not give Level 3 that

[28] *See* Level 3 Pet. at 5.

right.

Q. HAVE OTHER STATE COMMISSIONS WITHIN QWEST'S REGION CONSIDERED THIS ISSUE?

A. Yes. Commissions in the states of Colorado and Oregon have also addressed this very issue in arbitration proceedings between Qwest and Level 3.[29]

Q. HOW HAVE THESE COMMISSIONS RESOLVED THE RELATIVE USE ISSUE?

A. Both of these commissions have ruled that Internet traffic must be excluded from calculations of relative use. In arbitration proceedings initiated by Level 3 in Colorado and Oregon, the commissions in those states rejected Level 3's position and adopted Qwest's proposed language. In ruling for Qwest on this issue, the Colorado Commission found that the same reasons relied upon by the FCC in the *ISP Remand Order* for requiring bill and keep for Internet traffic -- avoiding subsidies, market distortions, and improper incentives -- also require excluding Internet traffic from relative use.[30] Similarly, in adopting Qwest's language, the arbitrator in the Qwest/Level 3 arbitration in Oregon 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

[29] The Arizona Corporation Commission addressed this issue in the Qwest/Level 3 arbitration in that state, however, that decision was issued prior to the FCC's April 27, 2001 decision in the *ISP Remand Order* and, therefore, is not of any precedential or persuasive value in this case. Opinion and Order, *In the Matter of Petition of Level 3 Communications LLC for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996*, Dkt. Nos. T-03654A-00-0882 and T-01051B-00-0882, Decision No. 63550, at 10 (Ariz. C.C. April 10, 2001).

[30] *See* Initial Commission Decision, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Dkt. No.00B-601T (Colo. P.U.C. March 30, 2001) at 36.

> 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.[31]

These rulings on precisely the same issue presented here confirm that the FCC's rules, the *ISP Remand Order*, and the relevant policy considerations require excluding Internet traffic from relative use determinations in the Qwest/Level 3 interconnection agreement in Washington.

IV. CONCLUSION

Q. HOW SHOULD THE COMMISSION RESOLVE THE DISPUTE PRESENTED IN THIS ARBITRATION PROCEEDING?

A. The Commission should apply the FCC rules and orders and adopt Qwest's proposed sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.

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[31] *See* Commission Decision Adopting Arbitrator's Decision, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 with Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Order No. 01-809, ARB 332 (Or. P.U.C. Sept. 13, 2001), Arbitrator's Decision at 9.