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**

REBUTTAL TESTIMONY OF

LARRY B. BROTHERSON

ON BEHALF OF QWEST CORPORATION

October 16, 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. DID YOU FILE DIRECT TESTIMONY IN THIS CASE?

A. Yes. I am the same Larry Brotherson that filed Direct Testimony in this case on September 25, 2002.

II. PURPOSE AND SUMMARY OF REBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my Rebuttal Testimony is to respond to the Direct Testimony filed in this proceeding by William P. Hunt on behalf of Level 3 Communications, LLC ("Level 3").

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. As set forth in my Direct Testimony, Qwest seeks to strike a balance between meeting the interconnection needs of Level 3, while at the same time ensuring that the services that Qwest provides for local traffic comply with the governing law and do not improperly treat interstate traffic as local traffic. The parties have proposed alternative language dealing with relative use in the apportionment of local interconnection facilities and how interstate

traffic, specifically interstate Internet traffic[1] figures into these calculations. Federal Communications Commission ("FCC") rules relating to reciprocal compensation for these local interconnection trunks establish unambiguously that interstate traffic must be excluded from calculations of relative use. In the *ISP Remand Order*,[2] the FCC ruled that Internet traffic is interstate, not local traffic.[3] Accordingly, Internet traffic is outside the scope of the FCC's reciprocal compensation rules which govern local traffic and must be excluded from the carriers' relative use calculation.

Mr. Hunt's testimony is striking in the lack of attention it gives to governing law. He does concede that the parties have agreed to share the costs of interconnection facilities based on their relative use of the facilities.[4] The agreed-upon provisions of the interconnection agreement unambiguously establish that principle. However, while acknowledging that agreement, Mr. Hunt ignores and fails even to mention the FCC rule relating to relative use, 47 C.F.R. §51.709(b). Likewise, he says nothing about the FCC's far-reaching rulings and policy statements in the *ISP Remand Order* relating to Internet traffic that at least two

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[1] Throughout my testimony I refer interchangeably to Internet traffic as "ISP traffic," "ISP-bound traffic," "Internet-bound traffic," and "Internet-related traffic" without any intention to draw any distinction between any of these terms commonly used for Internet traffic.

[2] Order on Remand and Report and Order, *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 (rel. Apr. 27, 2001), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*"). The United States Court of Appeals for the District of Columbia recent remand of the ISP Remand Order does not affect the FCC's determination that traffic bound for Internet service providers ("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 F.3d at 434.

[3] *See ISP Remand Order* ¶¶ 52, 57, 65.

[4] *See* Direct Testimony of William P. Hunt ("Hunt Direct") at 4-5.

other commissions – Colorado and Oregon – have found support excluding Internet traffic from relative use. In addition, Mr. Hunt is wrong in describing the Qwest/Level 3 agreement to use relative use to allocate financial responsibility as a "variation" from the "general rule" concerning financial responsibility for the costs of interconnection facilities. The FCC rule that Mr. Hunt apparently is relying on, Rule 51.703(b), applies specifically only to "telecommunications traffic," which does not include interstate, Internet traffic. Thus, excluding Internet traffic from relative use is not a "variation" from Rule 51.703(b) but, instead, is entirely consistent with that rule and with Rule 51.709(b).

Because the governing law relating to relative use and Internet traffic is fatal to Level 3's position, Mr. Hunt attempts to piece together an argument using FCC rules and orders that have nothing to do with the arrangement (two-way interconnection facilities for which the parties have *agreed* to share responsibility based on relative use), the specific issue presented (whether ISP-bound traffic should be included in relative use calculations), or Internet traffic. For instance, Mr. Hunt cites as support for Level 3's position an FCC order, *TSR Wireless*,[5] issued almost a year before the *ISP Remand Order* that did not involve Internet traffic and in which the FCC never even mentioned relative use. As I explain in detail below, the FCC's order in *TSR Wireless* has no bearing on the question presented by Level 3's Petition for Arbitration.

Moreover, Mr. Hunt completely ignores the policy considerations underlying both the FCC's decision and rules requiring the exclusion of this traffic from relative use in order to

[5] *See* Memorandum Opinion and Order, *TSR Wireless, LLC v. US WEST Communications, Inc.*, 15 FCC Rcd. at 11166 (2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) ("*TSR Wireless*").

avoid uneconomic subsidies and to eliminate the improper incentive of competitive local exchange carriers ("CLECs") to specialize in serving Internet service providers ("ISPs") to the exclusion of other customers.[6] Instead, Mr. Hunt argues that excluding interstate Internet traffic from relative use will require Level 3 to unfairly bear too large a percentage of the costs of local interconnection trunks. Mr. Hunt fails to reveal, however, that because Level 3's customers are primarily ISPs, Level 3 originates virtually no traffic; thus, including relative use in Internet traffic likely would result in *Qwest* paying *all* the costs of these trunks. In other words, under Level 3's proposed approach, Qwest would be forced to subsidize Level 3, and Level 3 would, in turn, have an even stronger incentive to continue specializing in serving ISPs. This is the precise result that the FCC sought to avoid in the *ISP Remand Order*. Moreover, it would lead to a plainly inequitable scheme under which Level 3 would "buy" from Qwest the trunks it needs to serve its ISP customers without paying for these essential facilities.

In addition, this Commission has approved language for Qwest's Washington Statement of Generally Available Terms ("SGAT") that is virtually identical to what Qwest proposes for its agreement with Level 3.[7] Indeed, every SGAT that Qwest has negotiated and litigated in the course of its Section 271 proceedings excludes Internet-bound traffic from the relative use calculations for direct trunk transport and entrance facilities. To date, eleven of the fourteen states in Qwest's region have supported Qwest's SGAT in connection with

[6] *ISP Remand Order* ¶¶ 67-76.

[7] *See* Exhibit 1 to Qwest's Motion to Dismiss, which provides the relevant provisions of the Washington SGAT.

Qwest's proceedings for a positive Section 271 recommendation.[8]

Finally, Mr. Hunt ignores other available interconnection options Level 3 has under the agreed-to provisions of the interconnection agreement. The direct trunk transport ("DTT") and entrance facilities ("EF") options at issue here are only *two* of a number of methods available for Level 3 to select to transport interstate traffic destined for its ISP customers. In addition to these options, under the parties' agreement, for example, Level 3 may: (1) lease or purchase facilities from another provider; (2) order one-way facilities; collocate at the Qwest end office; or (3) build its own facilities to an agreed-to Mid-Span Meet Point. Level 3 should not, however, be allowed to avoid the consequences of its own choice to use the DTT or EF options by foisting upon Qwest the costs of these facilities.

In short, there is no dispute as to *whether* the Qwest and Level 3 will share the costs associated with the facilities provided for DTT and EF, including costs on Qwest's side of the POI. The parties have agreed to do so based on their relative local use of the facilities. The only dispute involves *how much* Level 3 will pay for those facilities. That determination turns on the sole question presented here – whether Internet traffic should be included in relative use. Under binding FCC rules and orders, and consistent with the policies and rationale in those orders, such interstate traffic should not be included in relative calculations. Accordingly, the Commission should adopt Qwest's proposed language for sections 7.3.1.1.3., 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 of the proposed

[8] Those states are Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming. Section 271 proceedings remain open in Arizona, Minnesota, and South Dakota.

Qwest/Level 3 interconnection agreement.[9]

III. REBUTTAL TESTIMONY

Q. AT PAGES 4 AND 5 OF HIS DIRECT TESTIMONY, MR. HUNT DESCRIBES THE CONCEPT OF "RELATIVE USE" AND THE PARTIES' DISPUTE HERE. DO YOU AGREE WITH HIS EXPLANATION?

A. I agree that the parties are in agreement that each party's financial responsibility for two-way facilities such as DTT and EF may change and will be determined by the parties' "relative use" of these local interconnection facilities.[10]

Q. DO YOU AGREE WITH MR. HUNT'S ASSERTIONS THAT QWEST PROPOSES TO "PRETEND" THAT INTERNET RELATED MINUTES OF USE DO NOT EXIST OR THAT CHARGING LEVEL 3 FOR THESE FACILITIES WOULD RESULT IN A "DOUBLE RECOVERY OF [QWEST'S] COSTS?"[11]

A. No.

Q. DOES QWEST PROPOSE TO "PRETEND" THAT INTERNET RELATED MINUTES OF USE DO NOT EXIST?

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[9] As Qwest noted in its response to Level 3's Petition for Arbitration, the interconnection agreement attached to the Petition accurately reflects the parties' competing language for each of these provisions. For the sake of brevity, I will not repeat those sections, and the parties' competing proposals as to each of these provisions. I do, however, incorporate them here by this reference.

[10] *See* Hunt Direct at 4-7, 25-26.

[11] *See* Hunt Direct at 6.

A. No.

Q. PLEASE EXPLAIN.

A. Qwest measures very carefully all of the minutes of use ("MOUs") on the DTT and EF facilities in question, including Internet related MOUs. Internet related MOUs do exist and must be accounted for in accordance with the governing law. However, because governing law holds that Internet traffic is interstate traffic, Internet related MOUs are not local minutes, and they, therefore, must be excluded from the MOUs used to determine the parties' relative use of local facilities, such as DTT and EF.

Q. WOULD THE ADOPTION OF QWEST'S PROPOSED LANGUAGE FOR SECTIONS 7.3.1.1.3, 7.3.2.2 AND 7.3.3.1 RESULT IN QWEST'S "DOUBLE RECOVERY" OF ITS COSTS?

A. No.

Q. PLEASE EXPLAIN.

A. To begin with, I note that Mr. Hunt fails to explain the basis of his assertion that Qwest will double recover its costs if the Commission adopts Qwest's proposed language. More importantly, from a cost recovery perspective, Mr. Hunt is simply wrong.

It is not clear that Mr. Hunt has an accurate understanding of how the process of paying for these facilities that Level 3 orders from Qwest operates under the parties' relative use approach. Under the agreed-to provisions of the Qwest/Level 3 interconnection agreement,

Level 3 has several options to establish interconnection between the parties.[12] Among those options are the two methods at issue here – establishment of entrance facilities ("EF") and direct trunk transport ("DTT").[13] Relative use calculations apply to these options; they do not apply to, for example, the Mid-Span Meet Point of Interconnection option, under which "[e]ach party will be responsible for its portion of the build to the Mid-Span Meet POI."[14] Thus, to the extent that Level 3 seeks to avoid any financial responsibility for facilities on Qwest's side of the POI, it is free, under the agreement, to select the Mid-Span Meet POI option under which both parties are obligated to construct facilities to the agreed-to POI and neither party is responsible for any charges associated with the facilities on the other party's side of the POI.

There are, however, sound reasons for Level 3 to choose the EF/DTT options instead of the Mid-Span Meet POI. By so choosing, Level 3 is able to avoid the initial, and often substantial, investment associated with building its own facilities to the agreed-to POI. Under the EF/DTT approach, Level 3 pays a nominal non-recurring charge to "turn on" Qwest facilities and then pays a monthly recurring charge that is subject to a credit based on Qwest's relative use of the facilities.[15] To be clear, pursuant to Qwest's proposals for

[12] *See* Qwest/Level 3 Agreement § 7.1.2.

[13] *See* Qwest/Level 3 Agreement §§ 7.3.1.1 (EF), 7.3.2 (DTT).

[14] *See* Qwest/Level 3 Agreement § 7.1.2.3.

[15] The credit based on relative use applies only to the recurring charges associated with DTT and EF. As noted in Level 3's Petition for Arbitration, the parties do not agree as to whether the relative use factor should apply to *non*-recurring charges for local interconnection service ("LIS") trunks as set forth in § 7.3.3.1. There is no reason to apply the relative use factor to LIS trunks because Qwest provisions these facilities, and incurs the costs associated with provisioning, as a result of Level 3's request for the facilities. Accordingly, Qwest's proposed § 7.3.3.1 should be adopted.

sections 7.3.1.1.3.1 and 7.3.2.2.1, Qwest provides the DTT and EF facilities to Level 3 in exchange for Level 3's payment of charges that, based on *Qwest's* proportionate share of originating traffic on (*i.e.*, relative use of) the facilities, may be subject to a credit.[16]

Because Qwest gives Level 3 a credit for all local traffic that originates on Qwest's side of the network under Qwest's approach, Qwest would not double recover the costs associated with the EF or DTT facilities used by the parties for this traffic. Nor would Qwest, under its proposed language, "double recover" for these facilities when Internet related traffic is excluded from the relative use calculations. To the extent that Qwest recovers the costs of these facilities, they are recovered through wholesale rates for interconnection trunks.

Finally, aside from these cost recovery issues, as I noted in my Direct Testimony, Internet traffic simply does not qualify as traffic eligible for inclusion in relative use calculations under the FCC's rules and the *ISP Remand Order*.[17] Under Qwest's proposed approach, each party will pay bear a portion of the costs of the EF or DTT based upon the party's relative use of these local interconnection facilities for the transmission of local traffic.

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[16] Contrary to the implication of Mr. Hunt's discussion on this point, *see, e.g.*, Hunt Direct at 14, Qwest does *not* provide the facilities to Level 3 for free, subject to a possible payment from Level 3 based on *Level 3's* relative use of the facilities. The credit process works as follows: Qwest determines the total MOUs over the facility, excludes Internet related MOUs and jointly provided switched access and transit traffic, thus, leaving only local MOUs, which are then examined to determine the percentage of local traffic originating on Qwest's network, for which Qwest provides Level 3 a corresponding credit on its bill for the facility at issue. Under this approach, Qwest pays Level 3 for Qwest's relative share the facility based on its relative use of the facility to originate local traffic, or telecommunications traffic, as defined by the FCC in the relevant rules. *See* 47 C.F.R. §§ 51.701(b), 709(b).

[17] *See* Brotherson Direct at 10-14.

Q. DOES QWEST'S PROPOSAL CALL FOR THE EXCLUSION OF EXCHANGE ACCESS AND JOINTLY PROVIDED SWITCHED ACCESS FROM RELATIVE USE CALCULATIONS?

A. Yes. Because exchange access traffic and jointly provided switched access traffic do not fall within the FCC's definition of "telecommunications traffic" set forth in Rule 51.701(b),[18] this traffic should also be excluded from relative use calculations under the parties' interconnection agreement.

Q. AT PAGE 10 OF HIS TESTIMONY, MR. HUNT ARGUES THAT REGARDLESS OF THE TYPES OF TRAFFIC THAT THE COMMISSION ORDERS INCLUDED IN RELATIVE USE FACTORS, THERE SHOULD BE NO "TRUE UP" PROCESS. DO YOU AGREE?

A. No. Apart from the fact that Level 3 did not raise this true up issue in its negotiations or in its Petition for Arbitration, the provision of an initial 50% relative use factor with a true up to actual MOUs is more than fair given the parties' historical traffic patterns. As I mentioned in my Direct Testimony, because Level 3 is primarily in the business of serving ISPs 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, the 50% initial relative use factor likely significantly overstates the amount of relative use Qwest will make of the facilities and the true up to actual minutes reallocates costs based on the parties' actual use, thus making both parties whole.

[18] 47 C.F.R. § 51.701(b) (excluding from the definition of "telecommunications traffic" traffic that is "interstate or intrastate *exchange access*") (emphasis added). Unless otherwise noted, all citations in my testimony to FCC rules are to 47 C.F.R., Part 51 (Interconnection), Subpart H (Reciprocal Compensation for Transport and Termination of Telecommunications Traffic).

Q. AT PAGES 8 AND 13 OF HIS DIRECT TESTIMONY, MR. HUNT ASSERTS THAT THE FACILITIES AT ISSUE ARE FOR THE "MUTUAL BENEFIT" OF THE PARTIES AND THAT THE PARTIES HAVE "MATCHING CAPACITY." DO YOU AGREE?

A. While I agree that both parties benefit from interconnection, I have some concerns with the allegation that Level 3 deploys "matching capacity." Mr. Hunt chooses his words very carefully here, and without proper context, the statement is misleading. Importantly, Mr. Hunt does not contend that Qwest and Level 3 have matching *facilities*; clearly they do not. His statement about capacity appears to be aimed at persuading the Commission that the parties make matching contributions to the interconnection facilities arrangement at issue, which is simply not true. The facilities on each side of the POI are not matching – they are disproportionately Qwest's facilities. An example may better illustrate my point. If two companies (A and B) agreed to connect their own portions of a 6-lane highway that together will span 1000 miles, with Company A building 900 miles of the highway and Company B building 100 miles, each company's segment of the highway would have the same "capacity" (i.e., 6-lanes of traffic), but Company A's overall contribution to the completed highway would be nine times that of Company B. Similarly, while it is true that if Qwest transmits over its local interconnection trunks 10 DS3's worth of capacity to the POI, Level 3 will have to have the "capacity" to receive that same amount of traffic. That "capacity" comparison, though, bears no relationship to the parties' respective contributions to the facilities used to exchange traffic between the parties. It also bears no relevance to the single issue in dispute here – whether Internet-bound traffic is to be included in the relative use calculation that the parties agree should govern their financial obligation for the facilities at issue.

Q. DOES MR. HUNT AGREE THAT THE WASHINGTON COMMISSION HAS ALREADY ADDRESSED THE RELATIVE USE DISPUTE LEVEL 3 RAISES IN ITS PETITION?

A. Yes. At page 10 of his Direct Testimony, Mr. Hunt acknowledges that the Commission addressed this issue in June 2002 in Docket No. UT-003013, the Commission's Phase B cost docket proceeding.

Q. DOES MR. HUNT AGREE WITH THE COMMISSION'S RESOLUTION OF THE ISSUE THERE?

A. No. According to page 10 of his Direct Testimony, Mr. Hunt "disagree[s] with the determination and the reasoning" of the Commission's decision on this issue.

Q. DO YOU AGREE WITH MR. HUNT'S ANALYSIS AND CONCLUSIONS ON THIS ISSUE?

A. No. The Commission ruled unequivocally that because Internet traffic is interstate, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities.[19] This determination is dispositive of the issue now in dispute. Mr. Hunt's suggestion that the Commission should reconsider this recent decision was rejected less than one month ago when the Commission held:

> 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 facilities. Therefore, we reject

[19] 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*").

AT&T/XO's arguments and reaffirm our decision in the Part B Order on this issue.[20]

In short, despite Mr. Hunt's attempts to complicate and confuse the issue presented, Level 3 cannot escape the fact that the Commission has expressly rejected the very arguments Level 3 advances here.

Q. IS MR. HUNT CORRECT IN URGING THE COMMISSION TO "RE-EXAMINE" ITS CONCLUSIONS ON THE RELATIVE USE ISSUE?

A. No. In both Docket No. UT-003013 (the cost docket) and in Docket Nos. UT-003022 and UT-003040 (the Section 271 and SGAT dockets), the Commission followed the FCC's lead in excluding Internet traffic from obligations under the Act associated with telecommunications traffic, as that term is defined by the FCC. In Docket Nos. UT-003022 and UT-003040, 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).[21] Furthermore, the Commission acknowledged that under FCC rules, state commissions do not have authority to determine intercarrier compensation for Internet-bound traffic.[22] Mr. Hunt claims that

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

[21] 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) ("*Twenty-Fifth Supplemental Order*").

[22] *Id.*

the Commission made this determination before the United States Court of Appeals for the District of Columbia Circuit remanded, but did not vacate, the *ISP Remand Order* and suggests that perhaps the court's remand would affect the Commission's determination on treatment of traffic bound for ISPs.[23] Plainly, it did not. In its *Thirty-Ninth Supplemental Order* in those dockets, issued several months after the D.C. Circuit's decision, the Commission approved Qwest's SGAT, which excludes ISP-bound traffic from relative use calculations, and found that the SGAT as written complies with Qwest's obligations under sections 252 and 271 of the Act.[24] As set forth in Qwest's Motion to Dismiss, this SGAT language is virtually identical to the language Qwest proposes for the parties' interconnection agreement. Likewise, both of the relevant Commission decisions in Docket No. UT-003013 post-date the D.C. Circuit's decision.

Further, as I noted above,, every SGAT that Qwest has negotiated and litigated in the course of its Section 271 proceedings excludes Internet-bound traffic from the relative use calculations for direct trunk transport and entrance facilities. To date, eleven of the fourteen states in Qwest's region have supported Qwest's SGAT in connection with Qwest's

[23] *See* Hunt Direct at 11..

[24] 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 Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040 ¶ 391 (WUTC July 3, 2002) ("*Thirty-Ninth 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").

proceedings for a positive Section 271 recommendation.[25]

Q. PLEASE ADDRESS MR. HUNT'S ARGUMENTS REGARDING RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION SET FORTH AT PAGES 11-13 AND 14-21.

A. In these portions of his Direct Testimony, Mr. Hunt engages in a lengthy discussion of his view of reciprocal compensation for transport and termination of traffic, focusing on his interpretation of the obligations of "originating" and "terminating" carriers. Mr. Hunt, however, over-generalizes the FCC's rules and rulings and ignores that the FCC's rules at issue all relate to the transport and termination of "*telecommunications traffic*." Contrary to Mr. Hunt's suggestion, Qwest does not dispute that it is responsible for transport costs for the "telecommunications traffic" that Qwest customers originate. Rather, the issue presented here is whether Internet-bound traffic is "telecommunications traffic" for purposes of the FCC's reciprocal compensation rules.

Straightforward application of FCC Rule 51.709(b) and the FCC's rulings in the *ISP Remand Order* establish that Internet traffic must be excluded from Qwest's and Level 3's calculations of relative use of interconnection facilities. First, Rule 51.709(b) establishes that the parties' proportionate financial responsibility for interconnection trunks must be determined by the amount of "traffic" each party sends to the other party from its network. This rule is set forth in "Subpart H" of the FCC's rules relating to "Reciprocal

[25] Those states are Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming. Section 271 proceedings remain open in Arizona, Minnesota, and South Dakota.

Compensation for Transport and Termination of *Telecommunications Traffic*."[26]

Second, Rule 51.709(a) provides that "a state commission shall establish rates for the transport and termination of *telecommunications traffic* that are structured consistently with the manner that carriers incur those costs . . . ." (Emphasis added). Read in context with Rule 51.709(a), it is plain that the "traffic" referred to in Rule 51.709(b) is "telecommunications traffic" that, as defined in Rule 51.701(b)(1) of Subpart H, 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, information access, or exchange services for such access.*"[27]

Third, in the *ISP Remand Order*, the FCC ruled that Internet traffic is interstate access traffic that is not subject to reciprocal compensation under section 251(b)(5).[28] As interstate traffic, therefore, Internet traffic is specifically excluded from the traffic addressed in all of the FCC rules within Subpart H, including Rule 51.709(b). Accordingly, this traffic must be excluded from calculations of relative use.

At pages 15-16, Mr. Hunt claims that the reference to "traffic" in Rule 51.709(b) is somehow not "telecommunications traffic." Tellingly, however, Mr. Hunt does not address any of the numerous references to telecommunications traffic in the FCC rules, nor does he suggest what other type of "traffic" the FCC could possibly mean. Mr. Hunt's argument

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[26] *See* 47 C.F.R. § 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers") (emphasis added).

[27] 47 C.F.R. § 51.701(b)(1) (emphasis added).

[28] *ISP Remand Order* ¶¶ 52, 55.

that the FCC attempted to "carve out" this one particular rule for "special treatment" is both unsupported and counterintuitive. Had the FCC intended to create an exception for Internet-bound traffic in this single subpart of a rule in a subpart of its rules devoted to compensation for transport and termination of "telecommunications traffic," it certainly would have said so.[29]

Moreover, to the extent that Level 3 argues that application of this straightforward rule is "unfair" because, it alleges, Level 3 would be required to pay for facilities on "Qwest's side of the POI," or point of interconnection, if it were to order direct trunk transport, this argument both misstates the issue before the Commission and ignores the fundamentally different rules that apply when Level 3 leases facilities from Qwest instead of building its own facilities to the point of interconnection. As I noted above, the latter situation – where Level 3 builds its own facilities to the point of interconnection – is referred to as "Mid-Span Meet Point" interconnection arrangement. As described in an agreed-to provision of the Qwest/Level 3 proposed interconnection agreement, under this arrangement, "[e]ach party will be responsible for its portion of the build to the Mid-Span Meet POI."[30] As this language establishes, if Level 3 chooses a mid-span arrangement and builds its own facilities, it will not be responsible for costs on Qwest's side of the point of interconnection. However, if Level 3 elects to avoid the cost of building its own facilities and instead leases facilities from Qwest, it must pay for the leased facilities, subject to a credit based on

[29] Mr. Hunt's claim that "traffic" in Rule 51.709(b) does not mean "telecommunications traffic" is also undermined by the FCC's revisions to its rules in accordance with the *ISP Remand Order*. *See, e.g.*, 66 Fed. Reg. 26800, 26806 (May 15, 2001) (noting that all references to "local telecommunications traffic" in several rules, including Rule 51.709, should be modified to "telecommunications traffic").

[30] Qwest/Level 3 Agreement § 7.1.2.3.

Qwest's relative use of the facilities.[31] In that situation, unlike with the mid-span meet arrangement, the point of interconnection demarcation between the parties' networks is irrelevant.

Finally, though Mr. Hunt tries to couch the parties' dispute as one involving whether Level 3 should be obligated to pay for facilities on Qwest's side of the POI, the real issue that Level 3 is presenting to the Commission is whether Level 3 should have to pay anything at all for the interconnection trunks it chooses (from a variety of options) to lease from Qwest. As Mr. Hunt readily admits, Level 3 does not originate *any* traffic on its network;[32] it seeks interconnection with Qwest solely to reach its ISP customers.[33] Accordingly, if Internet traffic were included in relative use calculations, Level 3 would pay *nothing* for the interconnection facilities it leases from Qwest – even though Level 3 leases those facilities solely to achieve its self-interested objective of giving its ISP customers access to the public switched telephone network and to the Internet traffic on the network. Although it causes Qwest to incur these costs for facilities, Level 3 would nevertheless have the Commission shift the costs *entirely* onto Qwest by including Internet traffic in relative use. This would require Qwest and its customers to subsidize Level 3,

[31] *See* Qwest/Level 3 Agreement §§ 7.3.1.1.3.1, 7.3.2.2.1. To be clear, pursuant to §§ 7.3.1.1.3 and 7.3.2.2, Qwest provides the DTT and EF facilities to Level 3 in exchange for Level 3's payment of charges that, based on *Qwest's* proportionate share of originating telecommunications traffic on (*i.e.*, relative use of) the facilities, may be subject to a credit. Contrary to Level 3's explanation, Qwest does *not* provide the facilities to Level 3 for free, subject to a possible payment from Level 3 based on *Level 3's* relative use of the facilities.

[32] *See* Hunt Direct at 15 (noting that traffic will flow "only in one direction" from Qwest to Level 3).

[33] *See* Level 3 Opposition to Qwest's Motion to Dismiss at 4 ("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").

resulting in precisely the type of improper subsidy and uneconomic pricing signals that the FCC expressly sought to eliminate through its rulings in the *ISP Remand Order*.

Section 252(d)(1) of the Act *requires* that rates for interconnection and network element charges be "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In *Iowa Utilities Board v. FCC*, the United States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests."[34] By including Internet traffic in the calculation of relative use, Level 3's proposal would deny Qwest any recovery of its costs in violation of this critical requirement of the Act.

Q. AT PAGES 21-25 OF HIS TESTIMONY, MR. HUNT CITES FCC RULE 703 AND TWO ORDERS RELATING TO CARRIERS' RESPONSIBILITIES ON THEIR RESPECTIVE SIDES OF THE POI. DO YOU AGREE WITH HIS ANALYSIS?

A. No. Mr. Hunt's arguments here mischaracterize the issue presented and completely ignore his own admissions regarding that issue. Moreover, the FCC order Mr. Hunt relies upon[35] not only predates the *ISP Remand Order*, it also addresses issues that are irrelevant here.

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[34] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (emphasis added).

[35] Mr. Hunt fails to provide a full citation to what he calls the "TSR Order." *See* Hunt Direct at 9, 10. Qwest assumes that the order at issue is the FCC's Memorandum Opinion and Order in *TSR Wireless, LLC v. US WEST Communications, Inc.*, 15 FCC Rcd. at 11166 (2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) ("*TSR Wireless*").

First, the issue in this arbitration is not, as Mr. Hunt appears to suggest, *whether* Qwest and Level 3 will share the costs associated with the facilities provided for DTT and EF, including costs on Qwest's side of the POI. The parties have agreed to do so based on their relative use of the facilities, and Mr. Hunt concedes as much.[36] The only dispute in this proceeding involves *how much* Level 3 will pay for those facilities. That determination turns on the sole question presented here – whether Internet traffic should be included in relative use. Under binding FCC rules and orders, and consistent with the policies and rationale in those orders, such interstate traffic should not be included in relative calculations. As noted above, to the extent that Level 3 seeks to avoid any financial responsibility for facilities on Qwest's side of the POI, it is free, under the agreement, to select the Mid-Span Meet POI option under which both parties are obligated to construct facilities to the agreed-to POI and neither party is responsible for any charges associated with the facilities on the other party's side of the POI.

Second, Mr. Hunt's attempt to recast the issue presented by citing to rules and orders that relate to whether, as a general matter, parties are responsible for costs associated with facilities on the other party's side of the POI is misleading. Mr. Hunt relies upon the FCC's order issued more than two years ago in the *TSR Wireless* case for the proposition that "Qwest cannot require Level 3 to pay Qwest for the interconnection trunks that transport Qwest-originated traffic to Level 3 for termination.[37] But the *TSR Wireless* case involved the unique issue of whether the FCC's reciprocal compensation rules apply to "one-way"

[36] *See* Hunt Direct at 4-5, 7-8, 25-26 (admitting that the parties have "agreed" to a regime with respect to EF and DTT under which the parties' relative use of these facilities may change the percentage of the total cost borne by each party for these facilities even though they are located on *Qwest's* side of the POI).

[37] Hunt Direct at 23.

paging carriers – carriers that are in the business of receiving paging calls over one-way interconnection trunks. It did *not* involve either the FCC's relative use rule or consideration of the effect of Internet traffic on carriers' reciprocal compensation obligations and, therefore, is completely irrelevant to this case. Like Level 3 here, the paging carriers in *TSR Wireless* based their claim on the express language of then-existing Rule 51.703(b), but unlike Level 3 here, the paging carriers limited their claim to *local* calls and did not claim that ILECs were prohibited from charging for the interconnection facilities used to carry interstate calls.[38] As the FCC described their claim, the carriers were seeking to establish that Rule 51.703(b) prohibits incumbent LECs "from charging CMRS providers, including paging providers, for *local* telecommunications traffic that originated on the LECs' networks."[39]

In ruling for the paging carriers, the FCC established only that Rule 51.703(b) prohibits ILECs from charging paging carriers for facilities used to carry local telecommunications

[38] *See, e.g., TSR Wireless* at ¶ 11 (Complainant Metrocall requesting ILECs to cease charging for "facilities used for *local* transport") (emphasis added). Indeed, it is telling that the paging carriers did not even dispute their responsibility to pay for facilities used to carry interstate calls. That acknowledgement on their part is more relevant to the issue in this case than the FCC's restriction on facility charges for local paging calls. Indeed, it is noteworthy that unlike Level 3, paging carriers have consistently acknowledged 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.*, Dkt. No. 99A-001T, Decision No. C99-419 (Colo. P.U.C. Apr. 23, 1999), at 15 ("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").

[39] *TSR Wireless* at ¶ 5 (emphasis added). Rule 51.703(b) provides: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b).

traffic originating on the ILECs' networks.[40] Nothing in the order precludes ILECs from assessing charges for facilities used to carry non-local paging traffic, and nothing in the order even remotely relates to the issue in this case – whether Internet traffic, which the FCC has conclusively determined to be interstate traffic,[41] should be excluded from relative use calculations. Contrary to Level 3's claim, it is that decision dealing with the very traffic at issue here, and not the *TSR Wireless* decision dealing with very different traffic, that establishes the "rules of the road" on the issue before the Oregon Commission and now this Court.

For the same reasons, Mr. Hunt's reliance on the FCC's *Verizon Arbitration Order*[42] is equally misplaced.[43] That case also did not involve Rule 51.709(b) or the issue of how to treat Internet traffic in determining carrier's financial responsibility for interconnection trunks. It is, therefore, completely irrelevant to the issue before the Court. The FCC's concern in *Verizon* was that virtual POIs could permit Verizon to shift the costs of "telecommunications traffic" – in contrast to interstate Internet calls – originating on its

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[40] *TSR Wireless* at ¶ 18. The FCC ruled that ILECs cannot charge paging carriers "for the delivery of LEC-originated, intraMTA traffic to the paging carriers' point of interconnection." *Id.* "IntraMTA traffic" is local paging traffic that originates and terminates within the same "Major Trading Area" or MTA. *Id.* at ¶ 11.

[41] *See ISP Remand Order* ¶¶ 52, 57-58.

[42] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al,* CC Dkt. Nos. 00-218, 00-249, & 00-251, DA 02-1731, (FCC Competition Bureau rel. July 17, 2002) ("*Verizon Arbitration Order*").

[43] *See* Hunt Direct at 24-25.

network to the interconnecting CLEC.[44] Here, nothing in the agreed-to portions of, or Qwest's proposals for, the parties' interconnection agreement permits Qwest to shift the cost of "telecommunications traffic" (as that term is defined in the FCC's reciprocal compensation rules) originating on its network to Level 3.

Q. MR. HUNT ARGUES THAT THE FCC'S *ISP REMAND ORDER* DOES NOT GOVERN THE ISSUE PRESENTED HERE. DO YOU AGREE?

A. No. At pages 17-18, Mr. Hunt claims that the FCC *ISP Remand Order* does not apply to the dispute at issue here. Mr. Hunt fundamentally misreads the *ISP Remand Order*. In its order, the FCC did not limit in any way its reaffirmed holding that Internet traffic is interstate traffic. Mr. Hunt's citation to footnote 149 of the *ISP Remand Order* for the proposition that the FCC intended to limit its findings and conclusions to intercarrier compensation rates cannot be squared with plain text of the order. That footnote provides:

> 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 to transport traffic to points of interconnection.[45]

The plain intent of this footnote is to establish that the interim per minute reciprocal compensation *rates* the FCC established in the order for terminating Internet traffic do not affect carriers' transport obligations. That limiting language has nothing to do with

[44] *See Verizon Arbitration Order* at 19 and ¶ 38. Specifically, the Competition Bureau observed in this paragraph that the CLECs' concern was that the virtual POI proposal would violate the FCC rules "which prevent Verizon from assessing charges for traffic subject to reciprocal compensation that originates on Verizon's network." The "traffic subject to reciprocal compensation" is "telecommunications traffic" which does not include Internet traffic.

[45] *ISP Remand Order* ¶ 78 n.149 (emphasis in original).

whether Internet traffic is interstate traffic (which it is) that should be excluded from relative use for the purpose of determining financial responsibility for trunks that interconnect the networks of different carriers under Rule 51.709(b).

Q. IN OTHER PROCEEDINGS, MR. HUNT HAS ARGUED THAT EVEN IF THE *ISP REMAND ORDER* APPLIES, IT DOES NOT AFFECT LEVEL 3'S PROPOSED APPROACH. DO YOU AGREE?

A. No. Again, this assertion is based on a fundamental misunderstanding of how the parties' agreed-to approach to relative use works in practice. Mr. Hunt asserts that the "FCC's [*ISP Remand Order*] actually results in Qwest being *prohibited* from charging Level 3 *anything* for the origination of ISP-bound traffic on the Qwest network in Washington."[46] As noted above, under the EF/DTT approach, *Level 3 pays* a nominal non-recurring charge to "turn on" Qwest facilities and then pays a monthly recurring charge that is *subject to a credit* based on Qwest's relative use of the facilities. In other words, Qwest provides the DTT and EF facilities to Level 3 in exchange for Level 3's payment of charges that, based on Qwest's proportionate share of originating traffic on (*i.e.,* relative use of) the facilities, may be subject to a credit; Qwest does *not* provide the facilities to Level 3 for free, subject to a possible payment from Level 3 based on *Level 3's* relative use of the facilities.

Q. MR. HUNT ARGUES THAT QWEST HAS AGREED TO IMPLEMENT A SINGLE POI PER LATA? DO YOU AGREE?

A. Qwest has agreed to establish a single POI per LATA only for the purposes of transporting

[46] Hunt Direct at 14 (emphasis in original).

"telecommunications traffic" as defined by the FCC, but not for transporting interstate traffic, Intra LATA toll, and interstate toll as Level 3 proposes. In agreeing to this interconnection arrangement Qwest did not agree it applies to toll, interstate or Internet traffic. While it is understandable why Level 3 has chosen not to build its own network or avail itself of the Mid-Span Meet Point interconnection option under which both parties are responsible for all costs on their respective sides of the POI, Level 3 should not be allowed, under the guise of local interconnection, to use Qwest's local network to haul interstate traffic and not without paying for it.

Q. AT PAGES 28-30 MR. HUNT CONTENDS THAT QWEST HAS TAKEN A POSITION IN A PROCEEDING BEFORE THE FCC THAT IS "DIFFERENT" FROM THE POSITION QWEST TAKES HERE. IS MR. HUNT CORRECT?

A. No.

Q. PLEASE EXPLAIN.

A. First of all, I note that Mr. Hunt is careful to describe Qwest's position, as set forth in the *Ex Parte* filing before the FCC attached as Exhibit WPH-4 to Mr. Hunt's testimony, as being "different" from that it proposes here.[47] He does not assert that Qwest's position before the FCC is inconsistent with the position it takes here.

More importantly, however, Qwest's position here is not different from that which it has advocated before the FCC. First, the rule Mr. Hunt cites at 29 of his testimony is plainly a

[47] *See* Hunt Direct at 28.

"default" rule that is subject to modification through negotiations by the parties.[48] On the very page Mr. Hunt cites, the default nature of the proposed rules is highlighted by the text stating that the proposed rules will apply "when interconnecting carriers have not been able to negotiate another agreement."[49] Indeed, page 9 of the same Exhibit clearly anticipates that the proposed default will be useful in aiding interconnecting carriers to arrive at the very point Qwest and Level 3 are today – negotiating the terms governing shared transport facilities. The *Ex Parte* provides that "[m]ost carriers will use the default to facilitate the negotiation of something that is mutually beneficial *including jointly sharing the cost of the transport*."[50]

Second, contrary to the scenario under which the relative use question presented here arises, the default rule Mr. Hunt cites assumes that the parties will use *one-way* facilities.[51] As I note above, the arrangement at issue here involves financial responsibility for two-way, co-carrier interconnection facilities. It does not involve one-way facilities, and for this reason, Mr. Hunt's discussion of the default rules contained in the *Ex Parte* filing is misleading.

Finally, although self-evident from the filing, it is important to note that even the default rules discussed in the *Ex Parte* filing are presented in the context of a uniform, complete

[48] *See* Hunt Direct, WPH-4 (Qwest *Ex Parte*) at 2.

[49] Hunt Direct, WPH-4 (Qwest *Ex Parte*) at 2.

[50] Hunt Direct, WPH-4 (Qwest *Ex Parte*) at 9.

[51] *See, e.g.*, Hunt Direct, WPH-4 (Qwest *Ex Parte*) at 9 (noting that parties are "expected" to negotiate the implementation of *two-way* facilities because they are "generally more efficient tha[n] one-way groups"); *see also* Hunt Direct, WPH-4 (Qwest *Ex Parte*) at Figs. 1 & 4 (noting "one-way" facilities and "Likely Negotiated Two-Way Agreement").

over-haul of intercarrier compensation. That over-haul has not occurred and likely will not occur in the near future.

Q. BUT DOESN'T MR. HUNT HAVE A POINT THAT UNDER A BILL AND KEEP ARRANGEMENT, BOTH CARRIERS WILL BE FINANCIALLY RESPONSIBLE FOR ALL COSTS INCURRED IN TRANSPORTING TRAFFIC TO THE OTHER CARRIER?

A. No. As Qwest's *Ex Parte* filing notes, even under a bill and keep arrangement for *termination* compensation, the parties are likely to agree to share financial responsibility for two-way *transport* facilities based on their relative use.

Q. BUT DOESN'T THE *ISP REMAND ORDER* MANDATE BILL AND KEEP FOR ALL INTERCARRIER COMPENSATION, INCLUDING PAYMENTS RELATING TO TRANSPORT FACILITES?

A. No. To the contrary, the *ISP Remand Order* affects the Commission's analysis here only to the extent that it conclusively reaffirms that Internet traffic is interstate traffic and articulates compelling policy rationales for eliminating the uneconomic subsidies and market distortions that accompany the payment of such compensation on ISP-bound traffic. As I explained in my Direct Testimony, those policy rationales apply with equal force to the question presented here and mandate the exclusion of Internet-related traffic from relative use calculations in the parties' interconnection agreement.

Q. PLEASE ADDRESS MR. HUNT'S "FINAL COMMENTS" REGARDING THE TRUE-UP MECHANISM AND IDENTIFICATION OF INTERNET RELATED TRAFFIC.

A. I have addressed the issue of true up above. On the issue of identification of ISP-bound

traffic, Mr. Hunt's claim that "no carrier has successfully implemented a process by which to accurately parse 'Internet Related' related [*sic*] traffic" from other traffic is both incorrect, and, ultimately irrelevant. Qwest has developed a proprietary process to identify ISP-bound traffic. That process has been fully examined by Level 3 in arbitrations on this same issue in other states. More importantly, however, Mr. Hunt's "comment" on this issue is irrelevant. As the Colorado Public Utilities Commission noted in rejecting this same argument made by Level 3 there:

> Any problems that may arise when executing this call identification process can either be addressed through the dispute resolution process included in the interconnection agreement or a request can be made for modifying the interconnection agreement. *Level 3 has the least cost access to this information about ISP-bound and non-ISP-bound traffic.* Now that it is aware of its compensation rights under the interconnection agreement, it should have ample incentive to make sure its traffic is with Qwest is properly differentiated.[52]

In other words, Level 3 knows the nature of the ISP traffic at issue. Nothing precludes it from taking issue with Qwest's proposed differentiation of this traffic and presenting its own data if it so chooses.

V. 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

[52] *See* Initial Commission Decision, *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 21 (emphasis added).

sections 7.3.1.1.3, 7.3.1.1.3.1, 7.3.2.2.1 and 7.3.3.1 for the proposed Qwest/Level 3 interconnection agreement.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.