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** **QWEST CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DETERMINATION**

I. INTRODUCTION

Qwest Corporation submits this reply in support of its Motion to Dismiss or, in the alternative, for Summary Disposition ("Qwest's Motion") and in response to the Opposition of Level 3 Communications, LLC to Qwest's Motion to Dismiss or, in the alternative, for Summary Disposition ("Level 3's Opposition").

The straightforward issue in this case is whether the Commission should exclude Internet traffic from the calculations of each party's "relative use" of interconnection facilities in the interconnection agreement between Level 3 and Qwest. As Qwest demonstrated in its Motion, this issue must be resolved by applying the FCC's binding rulings in the *ISP Remand Order*[1] relating to the treatment of Internet traffic under the Act and the FCC's binding rule relating to relative use and compensation for interconnection facilities.[2]

These FCC pronouncements leave no question about that the lawfulness of Qwest's proposed contract language. In the *ISP Remand Order*, the FCC conclusively determined that Internet traffic is

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[1] *See* 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, ¶¶ 52, 57, 65 (rel. Apr. 27, 2001), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*").

[2] *See* 47 C.F.R. § 51.709(b).

interstate access traffic. As such, this traffic is expressly excluded from the "telecommunications traffic" that parties must use under FCC Rule 51.709(b) to determine their relative use of interconnection facilities. Again, the FCC order and rules that require this conclusion are binding under the Hobbs Act, and the Commission cannot deviate from these rulings. Indeed, the Commission has already recognized this fact and determined in Docket No. UT-003013 that Internet-bound traffic should be excluded from the relative use inquiry.

Level 3's Opposition rests entirely on law and Commission rulings that have changed as a result of the FCC's *ISP Remand Order*. Indeed, Level 3 asks the Commission to ignore all of its most recent decisions, including its decision on reconsideration in Docket No. UT-003013 issued barely one month ago, and revert to decisions rendered long before the FCC conclusively determined that Internet-bound traffic is interstate and excluded from the transport and termination obligations of Section 251(b)(5). The FCC rules are controlling, as this Commission recognizes, and Level 3 simply cannot change that fact.

Level 3's Opposition is striking in the lack of (or conflicting) attention it gives this governing law. Because federal law and prior Commission decisions are fatal to its claim, Level 3 attempts to piece together an argument using FCC rules and orders that have nothing to do with relative use or Internet traffic. Thus, it bases much of its argument on an FCC order 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.[3] Similarly, it argues for the relevance of another ruling of the FCC Wireline Competition Bureau that does not touch upon whether ISP-bound traffic should be considered in the calculations under Rule 51.709(b).[4]

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[3] *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*").

[4] *See* 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, (rel. July 17, 2002) ("*Verizon Arbitration Order*").

The legal landscape is not nearly has complicated as Level 3 attempts to make it. The FCC and this Commission have conclusively determined that Internet-bound traffic is not properly included in the relative use calculation for allocating costs of transporting telecommunications traffic, and 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.[5] 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 Qwest's proceedings for a positive Section 271 recommendation.[6] This Commission's position on treatment of Internet-bound traffic in the relative use calculation, therefore, stands in good company. The Commission should grant Qwest's Motion and adopt its proposed contract language as a matter of law.

II. DISCUSSION

A. The Commission Has Recently and Conclusively Determined That Internet Traffic Is Not Included In A Relative Use Calculation.

As set forth in Qwest's Motion, summary disposition of this single issue in dispute between the parties is appropriate because the Commission recently addressed the identical issue Level 3 raises and rejected Level 3's arguments. Specifically, in June 2002 in Docket No. UT-003013, the Commission's Phase B cost docket proceeding, the Commission ruled unequivocally that because Internet traffic is interstate, it should be excluded from ILEC/CLEC allocations of financial responsibility for interconnection facilities.[7] This determination is dispositive to the issue now in dispute.

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

[6] 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.

[7] 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*").

Level 3, however, argues that the Commission should reconsider this recent decision. CLECs participating in the cost docket made the same request, and less than one month ago, the Commission rejected it, holding:

> 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 AT&T/XO's arguments and reaffirm our decision in the Part B Order on this issue.[8]

Thus, the Commission *has* readdressed this issue and has reached the identical conclusion.

Level 3 cannot escape that the Commission has expressly rejected the arguments it advances. Although Level 3 claims the Commission "specifically and expressly anticipated revisiting its decision as further judicial and federal regulatory review occurs,'[9] Level 3 cites no alteration in the law in the mere four weeks since the Commission affirmed its determination that ISP-bound traffic should be excluded from relative use calculations. Given this prior cost docket determination, the Commission should grant Qwest's Motion and adopt Qwest's proposed contract language as a matter of law.

Although Level 3 claims that the issue in dispute does not involve "reciprocal compensation," it falls back on arbitration decisions relating to reciprocal compensation for Internet-bound traffic decided by this Commission two years before the FCC issued the *ISP Remand Order* in an attempt to support its claims.[10] Putting aside that Level 3 cannot have it both ways, since the FCC issued its *ISP Remand Order*, the Commission has revised its position in accordance with that order. Indeed, it has done so in both Docket No. UT-003013 (the cost docket) and in Docket Nos. UT-003022 and UT-003040 (the Section 271 and SGAT dockets), as discussed in Qwest's Motion. In Docket Nos. UT-003022 and UT-003040, the Commission's *Twenty-Fifth Supplemental Order* recognized that the FCC

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[8] 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).

[9] Level 3 Opposition at 14.

[10] Level 3 Opposition at 16 (citing *Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc. and GTE Northwest Incorporated*, Arbitrator's Report and Decision, Docket No. UT-980370 (WUTC 1999).

determined that Internet-bound traffic is not "telecommunications" and that such traffic does not fall within the purview of Section 251(b)(5).[11] Furthermore, the Commission acknowledged that under FCC rules, state commissions do not have authority to determine intercarrier compensation for Internet-bound traffic.[12] Level 3 claims that 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.[13] 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 complies with Qwest's obligations under Sections 252 and 271 of the Act.[14] As set forth in Qwest's Motion, this SGAT language is virtually identical to the language Qwest proposes for its agreement with Level 3. Likewise, both of the relevant Commission decisions in Docket No. UT-003013 post-date the D.C. Circuit's decision.

The Commission's recent decisions all support Qwest's proposed contract language. Accordingly, the Commission should grant Qwest's Motion and determine as a matter of law that Qwest's proposed language for Sections 7.3.1.1.3, 7.3.1.1.3.1, and 7.3.2.2.1 is consistent with Commission and FCC rulings.

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[11] 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).

[12] *Id.*

[13] Level 3 Opposition at 16 n. 35.

[14] 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) ("*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").

B. The Relative Use Calculation Relates to Reciprocal Compensation, Which Applies Only to Non-Internet Bound Telecommunications Traffic.

Level 3 engages in a lengthy discussion of its view of reciprocal compensation for transport and termination of traffic, focusing on its interpretation of the obligations of "originating" and "terminating" carriers.[15] Level 3's discussion, however, over-generalizes the FCC's rules. Throughout its discussion, Level 3 ignores that the FCC's rules at issue all relate to the transport and termination of "*telecommunications traffic*." Contrary to Level 3's discussion, Qwest does not dispute that it is responsible for transport costs for the "telecommunications traffic" that Qwest customers originate. Rather, the entire issue in dispute is whether Internet-bound traffic is "telecommunications traffic" for purposes of the FCC's reciprocal compensation rules. This is the issue Level 3 assiduously avoids.

As Qwest explained in its Motion, straightforward application of FCC Rule 51.709(b) and the 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. Contrary to Level 3's Opposition,[16] it is crystal clear that Rule 51.709(b) relates to the parties' obligations for transport of "telecommunications traffic," and Internet-bound traffic is *not* such traffic for purposes of Section 251(b)(5) of the Act:

> 1. 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 Compensation for Transport and Termination of *Telecommunications Traffic*."[17]
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> 2. 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

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[15] Level 3 Opposition at 4-8.

[16] Level 3 Opposition at 12-13.

[17] *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).

> "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.*" (Emphasis added).[18]
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> 3. 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).[19] 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.

Level 3 vainly argues that the reference to "traffic" in Rule 51.709(b) is somehow not "telecommunications traffic." Tellingly, Level 3 does not address any of these numerous references in the FCC rules, nor does it suggest what other type of "traffic" the FCC could possibly mean. Level 3's argument that the FCC attempted to "carve out" this one particular rule for "special treatment" is nonsensical. Had the FCC intended to create an exception for Internet-bound traffic in this single subsection of a rule in a subpart devoted to compensation for transport and termination of "telecommunications traffic," it certainly would have said so.

The fact is that the *ISP Remand Order*[20] and other FCC rulings[21] set forth the governing law, and they directly refute Level 3's claim that Internet traffic is subject to the reciprocal compensation

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[18] Level 3'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").

[19] *ISP Remand Order* ¶¶ 52, 55.

[20] In support of its claim that the *ISP Remand Order* did not address relative use and compensation for interconnection trunks, Level 3 cites a two-sentence footnote (footnote 149) in the 72-page *ISP Remand Order*. That footnote, which is quoted in its entirety as follows, addresses neither of these subjects:

> 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.

obligations of Section 251(b)(5). These FCC pronouncements are binding on the Commission, and Level 3 cannot collaterally attack them here.[22]

Level 3 argues that application of this straightforward governing law 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 both misstates the issue before the Commission and ignores the fundamentally different rules that apply when Level 3 leases facilities from

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ISP Remand Order ¶ 78 n.149 (emphasis in original). 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' obligations to perform transport functions. That point has nothing to do with whether Internet traffic should be excluded from relative use for the purpose of determining financial responsibility for trunks that interconnect the networks of different carriers.

[21] In addition to the *ISP Remand Order*, the FCC has ruled on multiple occasions that because Internet traffic is interstate, it is excluded from the reciprocal compensation requirements established by Section 251(b)(5) of the Act. The FCC has issued these rulings in connection with Bell Operating Companies ("BOCs") applications for entry into the long distance market pursuant to Section 271 of the Act, holding repeatedly that Section 251(b)(5) and checklist item 13 of Section 271 do not require an incumbent LEC to pay reciprocal compensation for Internet traffic. *See* Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 02-67, 17 FCC Rcd 12,275 ¶ 160 (2002) ("AT&T and XO also argue that Verizon's refusal to pay reciprocal compensation for Internet-bound traffic violates checklist item 13. The Commission previously determined that whether a BOC pays reciprocal compensation for Internet-bound traffic 'is not relevant to compliance with checklist item 13.'") (footnotes omitted); Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, ¶ 272 (rel. May 15, 2002) ("We reject US LEC's assertions regarding reciprocal compensation for ISP-bound traffic. . . . [U]nder a prior Commission order, ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2)") (footnotes omitted; emphasis added); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, 16 FCC 17,419 ¶ 119 (2001) ("[w]e continue to find that whether a carrier pays such compensation is 'irrelevant to checklist item 13.'") (footnotes omitted); Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance For Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, 16 FCC Rcd 14,147 ¶ 67 (2001) ("[T]he Commission has found that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2); therefore, whether Verizon modified its SGAT to apply reciprocal compensation to Internet traffic is not relevant to compliance with checklist item 13".) (footnotes omitted).

[22] Level 3 significantly overstates that D.C. Circuit's decision in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). It bears repeating that the D.C. Circuit did *not* reverse or vacate the *ISP Remand Order*. It remanded it to the FCC only. Thus, the *ISP Remand Order* remains in full force and effect. Furthermore, the court specifically did not address the FCC's characterization of ISP-bound traffic. *Id.* at 434 ("[W]e do not decide whether handling of calls to ISPs constitutes 'telephone exchange service' or 'exchange access' . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of 'telecommunications' covered by § 251(b)(5) . . . *Indeed, these are only a sample of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not apply § 251(b)(5)*") (emphasis added). Thus, the FCC's categorization of such traffic also remains undisturbed.

Qwest instead of building its own facilities to the point of interconnection. 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 a negotiated 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."[23] 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 Qwest's relative use of the facilities.[24] In that situation, unlike with the mid-span meet arrangement, the point of interconnection demarcation between the parties' networks is irrelevant.

Level 3's argument that applying a relative use calculation to it would "make no sense"[25] is also misleading. Level 3 has agreed in the proposed interconnection agreement that the parties' financial responsibility for entrance facilities and direct trunk transport will be determined based on relative use, regardless of whether those facilities extend beyond either party's point of interconnection. Level 3 has acknowledged this fact in its Petition:

> Level 3 and Qwest have generally agreed that the division of financial responsibility for trunks and facilities used to exchange traffic should be allocated based on the extent to which each Party is originating traffic flowing over those trunks.[26]

Thus, it is beyond dispute that in agreed-upon provisions of their interconnection agreement, Qwest and Level 3 have established that the responsibility for paying for interconnection trunks

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[23] Exhibit B to Level 3's Petition for Arbitration, § 7.1.2.3.

[24] *See id.* §§ 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.

[25] Level 3 Opposition at 3-4.

[26] Petition ¶ 8.

(specifically, direct trunk transport and entrance facilities) will be determined by each party's relative use of the facilities and that direct trunk transport and entrance facilities are co-carrier interconnection facilities that lay *beyond the point of interconnection on Qwest's network*. 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 proposed agreement, to select the Mid-Span Meet POI option under which both parties are obligated to construct facilities to the agreed-to POI, with neither party responsible for any charges associated with the facilities on the other party's side of the POI.

The real issue that Level 3 is presenting to the Commission is not whether it should be responsible for costs on "Qwest's side of the point of interconnection," but whether Level 3 should have to pay anything at all for the interconnection trunks it chooses to lease from Qwest. As Level 3 readily admits, it does not originate *any* traffic on its network, and it acknowledges that it seeks interconnection with Qwest solely to reach its ISP customers.[27] 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, resulting in 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

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[27] Level 3 Opposition 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").

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."[28] 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.

C. The FCC Decisions Upon Which Level 3 Relies Do Not Relate To Treatment Of Internet-Bound Traffic Or Relative Use Of Interconnection Facilities That The Incumbent LEC Provides.

A centerpiece of Level 3's analysis is an FCC order issued more than two years ago in *TSR Wireless v. U S WEST Communications, Inc.* That case involved the unique issue of whether the FCC's reciprocal compensation rules apply to "one-way" 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.

In *TSR Wireless*, the complainant paging carriers asserted that the FCC's rules relating to reciprocal compensation applied to them and that under Rule 51.703(b), incumbent LECs were prohibited from charging the paging carriers for the costs of one-way interconnection trunks used to carry *local* paging calls that originated on the incumbent LECs' networks. The paging carriers based their claim on the express language of then-existing Rule 51.703(b): "A LEC may not assess charges on any other telecommunications carrier for *local* telecommunications traffic that originates on the LEC's network."[29] Significantly omitted from Level 3's discussion of the case, the paging carriers limited their claim to local calls and did not claim that incumbent LECs were prohibited from charging for the interconnection facilities used to carry *interstate* calls.[30] As the FCC described their claim, the carriers were seeking to establish that Rule 51.703(b) prohibits incumbent LECs "from charging CMRS

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[28] *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).

[29] *TSR Wireless* at ¶ 3 (emphasis added).

[30] *See, e.g., id.* at ¶ 11 (Complainant Metrocall requesting ILECs to cease charging for "facilities used for *local* transport" (emphasis added)).

providers, including paging providers, for *local telecommunications traffic* that originated on the LECs' networks."[31]

In ruling for the paging carriers, the FCC established only that Rule 51.703(b) prohibits incumbent LECs from charging paging carriers for facilities used to carry local telecommunications traffic originating on the incumbent LECs' networks.[32] Nothing in the order precludes incumbent LECs from assessing charges for facilities used to carry *interstate* 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 and *not* "telecommunications traffic" in the *ISP Remand Order*,[33] should be excluded from relative use calculations for two-way trunk facilities. Furthermore, because Internet traffic is interstate, the restriction on incumbent LEC facility charges in *TSR Wireless* could not possibly apply in this case. 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.

Contrary to Level 3's claim, it is the *ISP Remand Order* 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 Commission. Because the FCC's determination in the *ISP Remand Order* is conclusive, Level 3 continues to ignore that the "rules of the road" it espouses do not apply to traffic that is not "telecommunications traffic," such as ISP-bound traffic.

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[31] *Id.* 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).

[32] *TSR Wireless* at ¶ 18. The FCC ruled that incumbent LECs 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.

[33] *ISP Remand Order* ¶¶ 52, 57-58.

Level 3's reliance on the FCC Wireline Competition Bureau's *Verizon Arbitration Order* is equally misplaced.[34] Level 3 cites only one paragraph of the voluminous order, and that discussion is unrelated to the issue of relative use calculations and whether Internet traffic is a component of those calculations. Level 3 cites paragraph 67 of the *Verizon Arbitration Order* claiming "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."[35] Level 3 claims that the FCC rejected Verizon's "proposal" because "it was not consistent with the FCC's interconnection rules."[36] A complete reading of the discussion reveals that the issue before the Bureau was whether it could determine the rates *CLECs* charged for transporting Verizon's telecommunications traffic on *CLEC-provided* transport facilities. Although the issue before the Bureau dealt neither with relative use calculations under Rule 709(b) nor with the issue of whether Internet-bound traffic is "telecommunications traffic," Level 3 also misstates the Bureau's conclusions. The Bureau did not "reject" Verizon's proposal because it "was not consistent with the FCC's interconnection rules."[37] Rather, the Bureau recognized that "Verizon raised serious concerns about the apportionment of costs caused by competitive LECs' choice of points of interconnection," but determined that it did not have authority to determine CLEC rates sitting as an arbitrator on behalf of the Virginia Corporation Commission.[38] In short, the single paragraph Level 3 cites out of context has nothing to do with the issue currently in dispute between the parties.[39]

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[34] Level 3 Opposition at 11. For the benefit of the Commission, the *Verizon Arbitration Order* is an order of the Wireline Competition Bureau of the FCC, not of the FCC as a whole.

[35] *Id.*

[36] *Id.*

[37] Level 3 Opposition at 11.

[38] *Verizon Arbitration Order* ¶ 69.

[39] Level 3 also relies upon a decision from a previous arbitration with Qwest in Arizona in support of its arguments. Level 3 Opposition at 17. This decision is not persuasive authority. First, the Arizona Commission rendered its decision before the FCC issued its *ISP Remand Order* and, therefore, the decision Level 3 cites did not

D. Discovery And A Hearing Are Unnecessary Because No Material Facts Are In Dispute And The Commission Is Bound By The FCC's Determination That ISP-Bound Traffic Is Interstate In Nature.

Level 3 claims that the Commission should take evidence in this case despite the fact that it has already rejected Level 3's arguments as recently as last month.[40] Ironically, although Level 3 claims that the *ISP Remand Order* has no applicability to the parties' dispute, and that the FCC's determination that Internet-bound traffic is interstate is not controlling, it requests discovery on the very issue of whether ISP-bound traffic is "local" or "interstate:"

> *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 jurisdiction. *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*.[41]

However, Level 3 misses the point that discovery on this issue is irrelevant: no amount of discovery will change the fact that the FCC has determined that ISP-bound traffic is *interstate* in nature. Because ISP-bound traffic is interstate traffic, the FCC *precluded* state commissions from

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consider that order. Second, since the Level 3 arbitration, the Arizona Commission recognized in the Section 271 docket that the FCC defined ISP-bound traffic as interstate access traffic outside the bounds of Section 251(b)(5). Decision No. 63977, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Opinion and Order ¶¶ 29-34 (Aug. 30, 2001). Accordingly, the Arizona Commission ordered Qwest to propose language for its Arizona SGAT consistent with the *ISP Remand Order*. *Id.* ¶¶ 30-31, 34. Qwest has done so, and its current Arizona SGAT, like those in all other states, excludes ISP-bound traffic from the provisions relating to relative use for direct trunk transport and entrance facilities. The Arizona Commission has required no change to this language.

[40] Interestingly, at the prehearing conference in this proceeding on September 24, Level 3 strenously contended that discovery in this matter was important and that it intended to propound discovery requests imminently. It did not do so, and waited until October 15 to submit its first set of data requests. Thus, despite this claim of importantance, Level 3 waited until it had responded to Qwest's Motion and filed its direct testimony and until the eve of the parties' rebuttal testimony to propound its discovery.

[41] Level 3 Opposition at 3 (footnotes omitted). As discussed above, the Commission decision Level 3 cites and relies upon was a reciprocal compensation decision rendered by the Commission two years before the FCC issued its *ISP Remand Order*. Therefore, this dated decision does not reflect the current state of the law or the Commission's current views on treatment of ISP-bound traffic.

addressing inter-carrier compensation for such traffic. Accordingly, the discovery Level 3 claims is necessary does not relate to a material fact that would prevent the Commission from granting Qwest's Motion. In other words, regardless what Level 3's purported discovery shows, this Commission cannot deviate from that FCC determination.

To the extent Level 3 believes that ISP-bound traffic is "local" and not "interstate," its exclusive forum under the Hobbs Act was before the D.C. Circuit on appeal of the *ISP Remand Order*. Because the *ISP Remand Order* remains in full force and effect, this Commission cannot find, as Level 3 requests, that ISP-bound traffic is "local." Accordingly, since this is the only issue upon which Level 3 claims a factual record should be made, the Commission should grant Qwest's motion.[42]

III. Conclusion

The Commission has addressed the issue in dispute between the parties in both its cost docket and the Section 271 docket. It has approved Qwest's SGAT, which includes language virtually identical to what Qwest proposes for its agreement with Level 3. Moreover, it stands in strong company with eleven other state commissions that have endorsed similar language for Qwest's SGATs. There is simply no basis to revisit these determinations. The Commission should decide the disputed issue as a matter of law and adopt Qwest's proposed language relating to the relative use calculations that determine the parties' financial responsibility for interconnection trunks.

DATED: October 16, 2002 Respectfully submitted,

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[42] Level 3 also claims that Qwest is attempting to impose "access charges" on Level 3 in violation of the exemption ISPs currently enjoy from access charges. Level 3 Opposition at 17-18. Suffice it to say that Qwest is not imposing any "access charge" on Level 3 or its customers. The issue is allocation of costs for direct trunk transport and entrance facilities. If requiring Level 3 to pay for facilities it orders from Qwest to serve Level 3 customers is an "access charge," then *any* cost of business to Level 3 that may affect how it decides to charge its customers is an impermissible "access charge."

Lisa Anderl
QWEST CORPORATION
1600 Seventh Avenue
Suite 3206
Seattle, Washington 98191
(206) 682-6108
(206) 343-4040 (fax)

John M. Devaney
Kara M. Sacilotto
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the attached **Qwest Corporation's Reply In Support Of Its Motion To Dismiss Or, In The Alternative, For Summary Determination** were served on the following:

By hand delivery and electronic mail:

Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Sally Johnston
Senior Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128

Simon ffitch
Office of the Attorney General
Public Counsel
900 4th Ave. Suite 2000
Seattle, WA 98164

By facsimile, electronic mail and first-class mail, postage prepaid:

Rogelio E. Peña
Peña & Associates, LLC
1919 14th Street, Suite 330E
Boulder, CO 80302

Gregory L. Rogers
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

DATED: October 16, 2002.

PERKINS COIE LLP

By_____
Pam Iverson