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February 13, 2004

BY OVERNIGHT MAIL and ELECTRONIC MAIL

Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 98504

Re: Dockets: UT-033062, 043008, 033063
In the Matter of an Amendment to the Interconnection Agreement Between Verizon Northwest, Inc. f/k/a GTE Northwest Incorporated and respectively, MCI Worldcom Communications, Inc., MCImetro Access Transmission Services, LLC and MCI Worldcom Communications, Inc. as Successor to Rhythms Link, Inc.

Dear Ms. Washburn:

Enclosed for filing in the above referenced docket is an original and 19 copies of the Comments of Level(3) Communications, LLC. Please file stamp the designated copy and return it in the self-addressed stamped envelope.

Thank you for your attention to this matter. Should you have any questions, feel free to contact me.

Regards,

Jonathan S. Frankel
Counsel for Level(3) Communications, LLC

cc: William Hunt, Level(3)
Gary Tucker, Level(3)
Richard Thayer, Level(3)
Russell Blau, SBSF
Tamar Finn, SBSF
Joan Gage, Verizon

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of an Amendment to the Interconnection Agreement Between Verizon Northwest, Inc. f/k/a GTE Northwest Incorporated and respectively, MCI Worldcom Communications, Inc., MCImetro Access Transmission Services, LLC and MCI Worldcom Communications, Inc. as Successor to Rhythms Link, Inc.	)))))))	UT-033062 (MCI Worldcom) UT-043008 (Successor to Rhythms) UT-033063 (MCImetro)

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC ("Level(3)"), by its undersigned counsel, respectfully submits the following comments in response to the Applications of Verizon Northwest, Inc, f/k/a GTE Northwest, Incorporated ("Verizon") for the approval of a negotiated interconnection agreement ("Applications") with respectively, MCI Worldcom Communications, Inc. ("Worldcom"), MCImetro Access Transmission Services, LLC ("MCImetro") and MCI Worldcom Communications, Inc., as successor to Rhythms Link, Inc. ("Rhythms") (collectively "MCI").[1] All three Applications in the above referenced dockets were filed with the Washington Utilities and Transportation Commission ("Commission") on January 26, 2004.

1. Introduction and Statement of Interest

The issue before the Commission is whether to approve or reject the proposed amendment to the Interconnection Agreement submitted by Verizon and MCI, under the standards of 47 USC § 252(e)(1) and (2). Unlike most interconnection agreements submitted to this Commission for approval, the instant amendment is not a stand-alone document, but is only part of a broader settlement of disputes between the respective parent companies of MCI and Verizon, in the context of the MCI bankruptcy reorganization.

[1] The three Applications between Verizon and respectively, Worldcom, MCImetro and Rhythms are substantively identical. The Applications were filed in separate dockets identified in the caption above.

On or about December 19, 2003, MCI asked the Bankruptcy Court overseeing its reorganization to approve a comprehensive settlement of intercarrier compensation disputes between itself and Verizon.[2] According to that filing, MCI and Verizon settled a series of long-standing reciprocal compensation disputes covering at least twelve different jurisdictions. Among the elements of the settlement, Verizon agreed to make a cash payment to MCI of $169 million; both parties dismissed all outstanding litigation relating to reciprocal compensation issues; and both parties agreed to file interconnection agreement amendments (including the one pending before this Commission) implementing "a three-year rate regime between MCI and Verizon for local traffic, including VNXX, UNE-P, and ISP-bound traffic[.]"[3] The Bankruptcy Court approved the settlement agreement on December 29, 2003, and the parties subsequently filed the agreed-upon amendments with this Commission and the regulatory agencies in each of the other jurisdictions identified in Exhibit A to the amendment.

Since the amendment was negotiated voluntarily by the two applicants, the applicable standard is set forth in § 252(e)(2)(A), which provides that a State commission

> may only reject—
>
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—
>
> > (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> >
> > (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity[.]

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2 *In re WorldCom, Inc.*, Chapter 11 Case No. 02-13533(AJG), Motion for Entry of an Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Seeking Approval of a Settlement Agreement with Verizon Communications, Inc. (Bankr.S.D.N.Y. filed Dec. 19, 2003).

3 *Id.* at 5.

For the reasons discussed in the following sections, Level(3) does not suggest that the amendment should be rejected pursuant to this statutory standard. Because the amendment represents a private settlement of disputed issues between two parties, it may be consistent with the public interest even though, as will be shown, its terms are quite different from those that would be appropriate in an arbitrated agreement implementing the requirements of Federal law. If, however, the Commission finds that the amendment can be approved, it nonetheless should make clear that its approval is limited to the unique circumstances relating to the negotiated settlement between Verizon and MCI, and does not create a precedent for any other carriers.

Level(3) is a competitive telecommunications carrier, authorized by this Commission to provide local exchange and interexchange communications services within North Carolina, and is a party to its own Interconnection Agreement with Verizon. Level(3) therefore has an interest in assuring that the terms of Verizon's agreements with other carriers are not discriminatory, and are in compliance with applicable legal requirements, including the public interest standard of § 252(e)(2)(A)(ii).

2. Certain Terms of the Proposed Amendment are Inconsistent with Requirements of Federal Law

The proposed amendment would significantly change the arrangements for inter-carrier compensation between Verizon and MCI. As Level(3) will show, several of the amended terms would be inconsistent with the regulations adopted by the FCC to implement 47 USC § 251(b)(5) and other statutory provisions relevant to the amendment. Level(3) recognizes that 47 USC § 252(a)(1) specifically permits carriers to negotiate voluntary interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251." Thus, the fact that the amendment is inconsistent with § 251 standards is not *per se* grounds for rejecting it. Nonetheless, the Commission must reject the amendment if it is not "consistent with the public

interest, convenience, and necessity," § 252(e)(2)(A)(ii), and therefore may consider whether the adoption of non-conforming compensation terms violates that standard.

First, the amendment is inconsistent with the FCC's rules governing compensation for delivery of dial-up Internet traffic, by providing for a "blended" rate of compensation that may allow MCI to collect a higher rate of compensation than other carriers for that traffic. The actual computation of the blended rate relies upon data (not available to the Commission or any third party) about the traffic exchanged between MCI and Verizon on a nationwide basis in December, 2003, so that the actual blended rate is unknown, but it may be as high as $.00165 per minute until June 14, 2004, and as high as $.00120 during the following year. (Amendment at 2 and Exhibit B.) This blended rate will apply to both local voice traffic and dial-up Internet traffic, among other things. Under the FCC's rules, however, the compensation rate for dial-up Internet traffic has been capped at $.0007 per minute since June 2003.[4] The amendment therefore potentially permits MCI to collect a higher rate of compensation on dial-up Internet traffic than is available to other carriers under the FCC rules.[5]

Second, the amendment provides that all Voice Over Internet Protocol ("VOIP") traffic will be defined as "Telecommunications Services" for purposes of the amendment, and treated as telecommunications traffic for inter-carrier compensation (including access charge) purposes.

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

[5] When the FCC adopted its rate cap on dial-up Internet traffic, it specifically held that this traffic was outside the scope of § 251(b)(5), and therefore that compensation for this traffic could *not* be the subject of interconnection agreements, negotiated or otherwise. *ISP Order on Remand*, para. 82. On appeal, however, the U.S. Court of Appeals for the District of Columbia Circuit specifically repudiated the FCC's legal theory excluding dial-up Internet traffic from the scope of § 251(b)(5), but left the compensation rules in place during remand proceedings. *WorldCom.* It is therefore unclear, in light of the remand, whether parties even have the legal right to negotiate agreements that deviate from the rate levels prescribed by the FCC.

(Amendment at 6-7, 12.) It specifically calls for the billing of access charges on VOIP traffic that originates or terminates outside the applicable Verizon local calling area. (*Id.* at 7.) Although the FCC admittedly has left the regulatory status of VOIP traffic quite unclear, it has stated expressly that at least some forms of VOIP do not appear to be telecommunications services.[6] The definition of this traffic as "telecommunications" for purposes of the amendment therefore contradicts another provision of the amendment stating that "Telecommunications Services" has the same meaning in the amendment as in the Telecom Act. (Amendment at 10.) This contradiction renders the amendment ambiguous, and potentially unenforceable. Further, if an entity that transmits VOIP is not providing telecommunications service, then it is not a "carrier" and is not subject to the payment of access charges under the FCC's interpretation of its access charge rules, *even if* the VOIP traffic has an interstate origin or destination.[7] The amendment, therefore, would appear to allow Verizon or MCI to collect switched access charges on some traffic that is not subject to those charges under FCC rules.

Further, the issue of classification of VOIP services and the application of access charges is currently pending before the FCC.[8] Even if the Commission finds it appropriate for MCI and Verizon to agree on how VOIP traffic will be treated *as between these two parties* in advance of

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[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, at 44-45 (rel. April 10, 1998).

[7] *MTS and WATS Market Structure*, 97 FCC 2d 682, 711-22 (1983), *aff'd in principal part and remanded in part, National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, 3 FCC Rcd. 2631, 2633 (1988); *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, at paras. 342-344 (1997), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[8] *Pleading Cycle Established For Petition Of Level 3 For Forbearance From Assessment Of Access Charges On Voice-Embedded IP Communications*, WC Docket No. 03-266, Public Notice, DA 04-1 (Wireline Comp. Bur. released Jan. 2, 2004).

an FCC ruling, the Commission should declare expressly that this private agreement will not serve as a precedent to bind any other party.

3. Other Factors Affecting Approval or Rejection of the Amendment

As noted above, the mere fact that the amendment is inconsistent with provisions of the federal Telecommunications Act is not *per se* grounds for rejection. The Commission may reject the amendment only if it discriminates against third parties, or if it is contrary to the public interest.

Because Level(3) is not privy to all the facts and circumstances surrounding the amendment, it is not in a position to suggest that approval would be consistent with the public interest. As a general matter, settlement of lawsuits is in the public interest, because it conserves both judicial and private resources.[9] The Commission must determine whether the benefits arising from settlement of the litigation between Verizon and MCI outweigh any potential harms resulting from the parties' deviation from the requirements of federal law in their agreement.

What is clear, though, is that the amended agreement between Verizon and MCI arises out of circumstances unique to those parties, and cannot be a model for interconnection arrangements for any other carrier. If the Commission does approve the amendment, it should make clear that its approval is limited to those unique circumstances, and is not a precedent for any future interconnection arbitration that it may conduct. As a general matter, Commission approval of a negotiated interconnection agreement is not a finding that the terms of the agreement comply with federal law (since, as noted above, the Telecom Act specifically permits parties to deviate from Section 251 requirements in negotiated agreements). In this particular case, that is even more strongly true, because the instant amendment is so closely tied to the

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[9] *See, e.g., Bank of America Nat. Trust and Sav. Ass'n v. U.S.*, 23 F.3d 380, 383 (Fed. Cir. 1994).

settlement of litigation in this and other jurisdictions, and because the amendment's terms so clearly diverge from the provisions of Section 251.

4. Conclusion

For the foregoing reasons, if the Commission finds it appropriate to approve the amendment submitted by Verizon and MCI, it should expressly state that the terms negotiated by these two parties are not necessarily in compliance with Section 251 and cannot serve as a precedent for any future arbitration conducted under that provision of federal law.

Respectfully submitted,

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