EXHIBIT NO. _____ (WPH-5T)
WUTC DOCKET NO. UT-023042
OCTOBER 16, 2002

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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

REBUTTAL TESTIMONY OF WILLIAM P. HUNT ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC

OCTOBER 16, 2002

Q: PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS FOR THE RECORD.

A: My name is William P. Hunt, III. I am Vice President of Public Policy for Level 3 Communications, LLC ("Level 3"). My business address is 1025 Eldorado Boulevard, Broomfield, Colorado 80021.

Q: ARE YOU THE SAME WILLIAM P. HUNT WHO FILED TESTIMONY IN THIS DOCKET ON OCTOBER 9, 2002?

A: Yes, I am.

Q: WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A: In my testimony, I will address the statements made by Qwest witness Larry Brotherson with respect to the exclusion of "Internet-related" traffic from relative use calculations.

Q: QWEST ARGUES THAT THIS COMMISSION SHOULD ADOPT QWEST'S PROPOSAL BECAUSE IT HAS ALREADY ADOPTED VIRTUALLY IDENTICAL LANGUAGE FOR QWEST'S STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS ("SGAT"). (BROTHERSON DIRECT AT 5.) DO YOU AGREE THAT THE COMMISSION SHOULD ADOPT QWEST'S LANGUAGE ON THE BASIS THAT THE LANGUAGE IS INCLUDED IN QWEST'S SGAT?

A: No. Under the Communications Act of 1934, as amended ("Act"), this Commission has jurisdiction to arbitrate interconnection disputes between an incumbent local exchange carrier ("ILEC") and a requesting carrier, *e.g.*, Qwest

and Level 3.[1] It is also charged with resolving the issues set forth in Level 3's Petition and Qwest's Response based on the evidence presented in this arbitration.[2]

The negotiation and arbitration process is distinguishable from the SGAT process. Under the Act, Qwest may choose to offer "a statement of terms and conditions that [it will] generally offer[] within" Washington.[3] The SGAT is more like a tariff than an individually negotiated interconnection agreement. While Qwest may make the standard terms and conditions in its SGAT available to all requesting carriers in Washington, Level 3 is not required to interconnect with Qwest under the SGAT. Rather, Level 3 is entitled to negotiate and arbitrate its own individual interconnection arrangements, based on Level 3's business plan, its priorities, and the business compromises it is willing to make as part of the negotiation process. If the Commission were to resolve every arbitration issue by adopting Qwest's SGAT language, that would make the negotiation and arbitration provisions superfluous. Congress could not have intended such a result.

Q: PLEASE RESPOND TO QWEST'S ALLEGATION (BROTHERSON DIRECT AT 7) THAT THE COMMISSION HAS ALREADY ADDRESSED AND REJECTED THE ARGUMENTS LEVEL 3 HAS MADE IN THIS PROCEEDING.

A: Qwest alleges that the CLEC parties in the SGAT proceeding raised the same arguments that Level 3 raises here. I disagree. As I understand it, Qwest's SGAT proceeding included a whole host of issues, not just the issue of excluding ISP-

[1] 47 U.S.C. § 252(b).
[2] 47 U.S.C. § 252(b)(4).
[3] 47 U.S.C. § 252(f)(1).

bound traffic from the relative use calculation. Further, Level 3 itself did not participate in the SGAT proceedings. In contrast, Level 3's arbitration is focused solely on the relative use issue as it applies to Level 3.

While I have not reviewed all of the voluminous pleadings in Docket UT-003013, I reviewed the Commission's *32nd and 38th Supplemental Orders*[4] as well as the AT&T & XO petition for reconsideration on the relative use issue. Based on my review, I believe that AT&T and XO made two limited arguments– (1) that Qwest misreads FCC Rule 51.709(b) to replace the word "traffic" with the phrase "telecommunications traffic" and (2) that the *ISP Order on Remand*[5] did not disturb Qwest's interconnection obligations. While my initial testimony raises both arguments, Level 3 has also demonstrated that:

(1) the *ISP Order on Remand* does not classify ISP-bound traffic as "interstate exchange access;"

(2) Qwest may not exclude ISP-bound traffic from the category of telecommunications traffic by calling it "interstate access" or "interstate" traffic;

(3) Rule 51.709(b) primarily addresses Level 3's ability to charge Qwest for terminating Qwest-originated traffic, but implicit in the Rule is an understanding of Qwest's obligation to deliver its originating traffic to the POI with Level 3;

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[4] *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirty-Second Supplemental Order, etc., (Wa. UTC June 21, 2002) at ¶ 113 ("*32nd Supplemental Order*"); *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirty-Eighth Supplemental Order, etc., (Wa. UTC Sept. 23, 2002) at ¶¶ 61-64 ("*38th Supplemental Order"*).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Remand, *Intercarrier Compensation for ISP-Bound Traffi*c, CC Docket No. 99-68, Report and Order, ¶1 (rel. Apr. 27, 2001) ("*ISP Order on Remand*") (emphasis in original), *remanded sub nom. WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied ("WorldCom")*.

(4) Qwest is legally obligated as the originating carrier to deliver ISP-bound traffic to the POI with Level 3;

(5) the policies underlying the *ISP Order on Remand* do not support Qwest's position; and

(6) ISP-bound traffic is treated as "local" traffic in almost every regulatory respect, except for intercarrier compensation for the transport and termination of ISP-bound traffic *from the Point of Interconnection ("POI") to the called ISP*.

Q: IS THERE ANYTHING ELSE YOU NOTICED IN THE UT-003013 ORDERS THAT SHOULD BE DISTINGUISHED?

A: In the *38th Supplemental Order*, the Commission summarized Qwest's position at paragraph 63 as follows:

> Rather, 47 C.F.R. 51.709(a) establishes that reciprocal compensation applies to the transport and termination of "telecommunications traffic," and 47 C.F.R. 51.709(b)(1) defines "telecommunications traffic" as not including interstate access traffic. Furthermore the ISP Order on Remand concludes that ISP-bound traffic is interstate in nature. Therefore, 47 C.F.R. 51.709(b) does not include ISP-bound traffic.

This summary is not an accurate interpretation of the FCC's rules. First, it is important to note that 51.709(a) deals with state commission authority in setting reciprocal compensation rates for the transport and termination of telecommunications traffic. For that reason it is notable that the FCC specifically used the term "telecommunications traffic," so that it would be clear that state commissions could not set rates for terminating information access traffic that would conflict with the interim rate regime the FCC put in place in the *ISP Order on Remand*. (Of course, it was the FCC's reliance on "information access" to

exclude ISP-bound traffic from reciprocal compensation that ultimately led to the decision being remanded.)

Next, the summary incorrectly says "47 C.F.R. 51.709*(b)(1)* defines "telecommunications traffic" as not including *interstate access* traffic."(Emphasis added). There appears to be a typographical error in this sentence because Rule 51.701(b)(1) defines "telecommunications traffic". More importantly however, the decision to adopt Qwest's position incorrectly relies upon the term "interstate access" when that term is not used in 51.701(b)(1). Qwest repeats this erroneous position in Mr. Brotherson's testimony. Brotherson at 11. This is a very significant point because the types of traffic that are specifically excluded from the definition have very specific regulatory treatment attached to them and one cannot simply paraphrase terms of art such as "interstate or intrastate exchange access, information access, and exchange services."

As a threshold matter, Qwest is required to show that ISP-bound traffic falls into one of the specific and express exclusions from that definition – "interstate or intrastate exchange access, information access, and exchange services" – in order to prevail. Making up a term that sounds like one of the terms used in the rule does not provide sufficient grounds to rule in Qwest's favor.

Q: DOESN'T THE *WORLDCOM* DECISION AFFECT THAT ANALYSIS?

A: Yes, it does, because the D.C. Circuit found the FCC failed to demonstrate that ISP-bound traffic is "information access" under Section 251(g), the grounds on which the FCC based its argument in the *ISP Order on Remand* to exclude ISP-bound traffic from "telecommunications traffic." Thus, it is not enough to just call ISP-bound traffic "interstate access" – ISP-bound traffic must in fact be "interstate or intrastate exchange access" (or one of the other exclusions noted

above) in order for the analysis provided by Qwest and adopted in the *38th Supplemental Order* to be consistent with the governing federal rules.

In fact, as a result of the *WorldCom* decision, ISP-bound traffic is *not* excluded from the definition of "telecommunications traffic" at all. Qwest never explains in its testimony how the *WorldCom* decision affects the analysis. That is a fatal mistake for Qwest because the *ISP Order on Remand* cannot be viewed independently from the *WorldCom* decision.

Qwest is correct that the FCC tried to exclude ISP-bound traffic from the definition of "telecommunications traffic", but as noted above, Qwest is not correct that the FCC intended to include "telecommunications traffic" in 51.709(b). The FCC ruled in the *ISP Order on Remand* that *all* telecommunications are subject to the requirements of section 251(b)(5). The FCC then ruled that section 251(g) excludes certain types of traffic from section 251(b)(5), including ISP-bound traffic. Consequently, the FCC rewrote the definition of "telecommunications traffic" in connection with reciprocal compensation requirements by doing two things: first, it eliminated the restriction that reciprocal compensation applies only to "local" traffic; second, it added language taken from section 251(g) to identify types of traffic that were excluded from reciprocal compensation obligations: "interstate or intrastate exchange access, information access, and exchange services for such access."

The D.C. Circuit in *WorldCom* rejected the FCC's second step. It ruled that section 251(g) does not provide the FCC with the authority to exclude ISP-bound traffic from section 251(b)(5). Therefore, as a result, ISP-bound traffic is *not* excluded from the definition of "telecommunications traffic" in Rule 51.701.

Q: WHAT ARE THE CONSEQUENCES OF THAT DECISION?

A: The *WorldCom* decision means that references to "telecommunications traffic" in the reciprocal compensation rules include ISP-bound traffic. As a result, even if the Commission agreed to insert "telecommunications traffic" into 51.709(b), Qwest is still required to bring ISP-bound traffic to the POI with Level 3 and may not charge Level 3 for the facilities used to do so. This is because Rule 51.703 says "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." Following *WorldCom*, this rule necessarily includes ISP-bound traffic.

Q: WHAT IF "TRAFFIC" IN 51.709(B) IS NOT "TELECOMMUNICATIONS TRAFFIC"?

A: As stated before, basic principles of statutory construction dictate that Qwest may not substitute the phrase "telecommunications traffic" for the word "traffic" in Rule 51.709(b). Qwest seeks to make this substitution specifically in attempt to exclude ISP-bound traffic from the Rule. Because "traffic" is necessarily broader than "telecommunications traffic," any limitation on "telecommunications traffic" would not apply to the "traffic." Even if "telecommunications traffic" were still viewed to exclude ISP-bound traffic after *WorldCom*, it should be noted that the exclusion of ISP-bound traffic would not apply to "traffic" in Rule 51.709(b). Therefore, if the Commission does not agreed to substitute "telecommunications traffic" for "traffic" as Qwest proposes, it must find that ISP-bound traffic cannot be excluded from the relative use factor.

Q: ARE THERE OTHER FACTUAL DIFFERENCES BETWEEN THIS PROCEEDING AND THE SGAT?

A: Yes. At this time, Level 3 does not originate any traffic in Washington. I am not aware that either AT&T or XO had similar factual circumstances and, based on what little I know about their businesses, it seems unlikely that they would not originate any traffic in Washington.

Q: BECAUSE LEVEL 3 DOES NOT ORIGINATE ANY TRAFFIC IN WASHINGTON TODAY, WOULD QWEST'S PROPOSED APPLICATION OF THE RELATIVE USE PRINCIPLE CREATE A CONFLICT WITH FCC RULES?

A: Based on Level 3's circumstances and its experience with Qwest's application of relative use, it is my expectation that Qwest would attempt to charge Level 3 for 100% of a facility, on Qwest's side of the POI, that is not used to carry any traffic originated by Level 3. Such an application of the relative use principle to Level 3, would *conflict* with both Rules 51.703(b) and 51.709(b). It would conflict with Rule 51.703(b) because that rule recognizes Qwest's interconnection obligations and requires *Qwest* to bear the cost of the facility used to carry Qwest's originating telecommunications traffic. As I noted in my initial testimony, even if one were to agree with Qwest that the FCC simply forgot to insert the term "telecommunications" in two places in rule 51.709(b) where it uses the term "traffic", Qwest has presented no evidence that ISP-bound traffic fits into one of the three categories that are excluded from the definition of "telecommunications traffic." Contrary to Mr. Brotherson's arguments (at pages 3 and 11), Rule 51.701 (which defines "telecommunications traffic") does not exclude either "interstate access" or "interstate" traffic generally from the category of

telecommunications traffic that is subject to Rule 51.703(b). Therefore, a more careful reading of the applicable rules dictates that the ISP-bound traffic originated by Qwest's end users in fact constitutes "telecommunications traffic" and Qwest is responsible for paying the entire cost of the facility used to carry that traffic to the POI.

Rule 51.709(b) states that the rate charged for terminating the originating carrier's traffic divides the cost of a two-way trunk on Qwest's side of the POI to allocate transport costs to Level 3 only when Level 3 uses that two-way trunk to terminate traffic that originated on Level 3's network. By excluding Internet-related traffic, Qwest's relative use calculation conflicts with this rule because it permits Qwest to charge Level 3 for a portion of a facility that does not carry any traffic *originated* by Level 3 (because Level 3 does not originate any traffic in Washington today). Rule 51.709 does not allow the providing carrier (Qwest) to allocate its costs of origination to the terminating carrier (Level 3). Interpreting Rule 51.709(b) in such a way would directly contravene Rule 51.703(b).

Q: SO YOU WOULD DISAGREE WITH QWEST'S ARGUMENT THAT ADOPTION OF QWEST'S PROPOSAL IS REQUIRED BY FCC RULES?

A: Yes. Qwest's proposal is not consistent with either the FCC rules or the *ISP Order on Remand*. Qwest is trying to twist the FCC's reciprocal compensation rules to escape its interconnection obligations with respect to the origination of its end users' traffic while oversimplifying the *ISP Order on Remand*. When read more carefully and applied correctly, the FCC's reciprocal compensation rules and the *ISP Order on Remand* recognize and incorporate the Qwest interconnection obligations that Level 3 is trying to incorporate in the parties' Agreement. While Qwest is free to charge Level 3 for the facility used to

transport traffic that is *originated* by Level 3 under Rule 51.709(b), that is not what Qwest proposes to do here. In addition, Qwest's proposal is inconsistent with the way Qwest can treat this traffic on its own network and would put Level 3 at a competitive disadvantage vis-à-vis Qwest in providing service to ISPs. Therefore, adopting Qwest's proposal would also be bad public policy.

Q: PLEASE EXPLAIN HOW QWEST IS TREATING ISP-BOUND TRAFFIC INCONSISTENTLY.

A: Qwest acknowledges that ISPs may purchase service from Qwest from Qwest's local exchange tariffs. Qwest reports revenue from ISPs as intrastate revenue for separations purposes. Calls from Qwest end users to ISPs served by Qwest are rated as local calls. Most importantly, Qwest has agreed to carry ISP-bound traffic over the same facilities that Qwest uses to exchange Local/EAS traffic with Level 3. Qwest only classifies ISP-bound traffic as interstate traffic when it tries to shift financial obligations away from Qwest and onto CLECs like Level 3.

Q: PLEASE EXPLAIN WHY ADOPTING QWEST'S PROPOSAL WOULD PLACE LEVEL 3 AT A COMPETITIVE DISADVANTAGE.

A: If the Commission adopts Qwest's language, the Commission would be permitting Qwest to impose originating access charges on Level 3 (on a flat rate basis) that Qwest is prohibited from imposing on ISPs. While the charges Qwest would impose on Level 3 under its relative use calculation may differ from those imposed pursuant to Qwest's access tariffs, the basis underlying the charges is the same. Instead of following the "local model," as Mr. Brotherson calls it (at 15), and recovering the costs of originating Internet-related traffic from its local customers placing the call, Qwest follows the "access model" and seeks to

recover from Level 3 the costs of originating these calls that are placed by Qwest's local customers.

Allowing Qwest to impose originating access on Level 3 would put Level 3 at a competitive disadvantage and it demonstrates yet another way in which Qwest attempts to treat ISP-bound traffic inconsistently to serve its needs. Qwest gains a competitive advantage over the rest of the industry because it would be able to provide services to its own ISP customers without charging them for the costs of originating the traffic from another Qwest end user. In other words, when both the calling party and the called ISP are Qwest customers, Qwest can follow the "local model." But if that same ISP switches its service to Level 3, and that same Qwest end user wants to dial that ISP, Qwest proposes to follow the "access model" and charge Level 3 for Qwest's origination costs. By imposing costs that Qwest may not impose on the Qwest ISP customers on Level 3, Qwest gains a competitive advantage in providing local dial-up Internet services.

Q: IS QWEST CORRECT THAT INTERSTATE PROVIDERS, AS WELL AS INTRASTATE TOLL PROVIDERS, HAVE HISTORICALLY PAID FOR THE TRANSPORT OF INTERSTATE TRAFFIC?

A: Qwest's argument is not correct with respect to calls bound for ISPs. While it is generally true that interstate and intrastate toll service providers have paid for the transport of their interstate and intrastate toll calls, this has not been the case for ISP-bound calls. For ISP-bound calls, under the FCC's Enhanced Service Provider ("ESP") exemption, access charges are not assessed on calls to ISPs, unless the call to the ISP is in fact placed as a toll call. Qwest appears to believe that because another carrier (Level 3) is inserted between Qwest and the ISP, Qwest may ignore the FCC's ESP exemption. I disagree. Again, this shows that

Qwest is seeking to gain an unfair advantage against its direct competitor – Level 3.

Q: QWEST IMPLIES THAT IT WOULD BE UNFAIR TO REQUIRE QWEST TO BEAR 100% OF THE COSTS OF THE INTERCONNECTION FACILITIES ON QWEST'S SIDE OF THE POI. (BROTHERSON DIRECT AT 13) DOES THIS PROVIDE ANY BASIS FOR IGNORING FCC RULES THAT REQUIRE QWEST TO BEAR THE COSTS OF DELIVERING ITS ORIGINATING TRAFFIC TO THE POI?

A: Absolutely not. In effect, Qwest is admitting that because Level 3 does not originate traffic, the two-way trunks really act as one-way trunks in practice. In other words, all of the traffic is flowing from Qwest to Level 3. In this regard, the FCC's *TSR Order* is directly on point. In that order, the FCC affirmed that its general rules apply to one-way traffic from the ILEC to the interconnecting carrier and required the ILECs to bear the entire cost of the facility used to deliver traffic to the interconnecting carrier.[6]

As the New York Public Service Commission found, whether or not the requesting carrier provides traditional local voice services has no impact whatsoever on its rights to interconnection under federal law:

> At issue in this arbitration is the significance, if any, of the fact that Global appears to be overwhelmingly, if not entirely, a carrier for the provision of internet service rather than a partially facilities-based voice competitor. We see no legal, policy or factual basis to draw such a distinction at this time.[7]

[6] *TSR Wireless, LLC, et al. v. U S West Communications, Inc., et. al.,* File Nos. E-98-13, E-98-15, E-98-17, E-98-18, Memorandum Opinion and Order, ¶34 (rel. June 21, 2000) ("*TSR Order*"), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001).

[7] *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006, Order Resolving Arbitration Issues, 9 (N.Y. P.S.C. May 24, 2002).

Level 3 is a requesting carrier that is entitled to interconnect with Qwest under the same federal rules that are applicable to all other requesting carriers. Those rules require that Qwest bear the cost of the facilities from Qwest's end offices to its POI with Level 3 that are used to transport ISP-bound calls originated by Qwest's customers.

Q: ARE THERE OTHER WAYS THAT QWEST MISREADS THE *ISP ORDER ON REMAND*?

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

Q: DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A: Yes.