EXHIBIT NO. _____ (WPH-1T)
WUTC DOCKET NO. UT-023043
OCTOBER 18, 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 **CENTURYTEL OF WASHINGTON, INC.,** PURSUANT TO 47 U.S.C. § 252	**DOCKET NO. UT-023043**

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

OCTOBER 18, 2002

I. BACKGROUND AND INTRODUCTION

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, CO, 80021.

Q: PLEASE DESCRIBE YOUR RESPONSIBILITIES FOR LEVEL 3.

A: As Vice President of Public Policy, I am responsible for developing, implementing and coordinating regulatory policy and governmental affairs for Level 3's North American and European operations. I am also responsible for ensuring the company's regulatory compliance with state and federal regulations, managing the company's interconnection services group and renegotiating municipal franchise and right of way agreements.

Q: PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A: I received a Bachelor of Journalism from the University of Missouri in 1984. I received my Juris Doctor from Western New England College School of Law in 1991. I joined Level 3 in February 1999 as Regulatory Counsel and was promoted to Vice President in January 2000. Subsequently I was promoted to Vice President of Public Policy when the company's Asian, European and North American regulatory groups were combined. Prior to joining Level 3, I spent almost five years at MCI Communications ("MCI"). I joined MCI's Office of General Counsel in 1994 as a commercial litigator. In March of 1996, I joined

MCI's state regulatory group in Denver, Colorado, where I was responsible for securing state certifications in the western United States, supporting arbitrations under the Communications Act of 1934, as amended ("Act"), and prosecuting complaints against U S West Communications, Inc. ("U S West") in Washington and Minnesota.

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

A: Yes. I have submitted testimony to this Commission in connection with an interconnection arbitration between Level 3 and Qwest Corporation. I have also testified before the South Dakota Public Utilities Commission during MCI's state certification proceeding. While at Level 3, I have testified in arbitration proceedings before the California Public Utilities Commission, the Illinois Commerce Commission, the Minnesota Public Utilities Commission, the Michigan Public Service Commission, the Texas Public Utilities Commission, the Colorado Public Utilities Commission, the Arizona Corporation Commission and the North Carolina Utilities Commission. In addition, I submitted testimony in an arbitration between Level 3 and Qwest before the Oregon Public Utilities Commission but did not testify when the parties agreed to submit the record on the pleadings. I have also submitted testimony, but have not yet appeared to testify, in an arbitration proceeding in New Mexico.

I have also testified before the Colorado PUC with respect to Level 3's Declaration of Intent to Expand its service territory to include those areas served by CenturyTel, and before the Public Service Commission of Wisconsin with

respect to an interconnection arbitration between Level 3 and CenturyTel. I also expect that I may testify in arbitration proceedings between Level 3 and Qwest before the Nebraska Public Service Commission and the Public Service Commission of Utah.

Q: PLEASE STATE THE PURPOSE OF YOUR TESTIMONY.

A: My testimony will provide support for Level 3's Petition for Arbitration. Specifically, I will explain why Level 3's positions should be adopted for the following issues:

(1) Whether ISP-Bound Traffic is Subject to Different Interconnection Requirements Under Federal Law?

(2) What is the Proper Definition of Local Traffic?

(3) What is the Proper Treatment of Foreign Exchange or "Virtual NXX" Traffic for Intercarrier Compensation Purposes?

(4) How Should the Parties Define "Bill-and-Keep"?

It is my understanding, based upon the contract as filed by Level 3 with its Petition for Arbitration and subsequent negotiations between the Parties, that these four items are the only issues remaining for consideration by the Commission. I also understand that the Parties continue to negotiate on the remaining issues. Still, I reserve the right to supplement my testimony should any other issues in fact remain unresolved.

Q: PLEASE DESCRIBE THE OPERATIONS OF LEVEL 3.

A: Level 3 operates the world's first international network optimized for IP packet switching technology. This allows information to be transmitted at a far lower

cost. The network includes local metropolitan networks in 36 cities in the U.S. and Europe. The entire network includes an approximately 16,000-mile U.S. intercity and 3,600-mile Pan-European network interconnected by a high-capacity transoceanic cable systems.

Level 3's network employs a "softswitch" technology. A softswitch is a software system running on commercially available servers that provides Level 3 with the ability to offer voice, data, fax and other services over the same Internet Protocol network that carries broadband data services. The United States Patent Office recognized the unique nature of Level 3's soft switch by granting a patent to the company. The patent gives Level 3 the exclusive right to use and license the intellectual property used in its managed modem platform. That platform currently carries each month more than 13 billion minutes of managed modem traffic in the United States.

Q: YOU MENTIONED VOICE AS WELL AS DATA AND FAX SERVICES. DOES LEVEL 3 HAVE PLANS TO PROVIDE VOICE SERVICE?

A: Yes, it does. While Level 3's initial telecommunications offerings have focused on Internet Service Providers ("ISPs") and resold long distance, Level 3 anticipates broadening our service offerings to include some voice services as soon as 2003.

Q: DOES LEVEL 3 PROVIDE ANY OTHER SERVICES?

A: Yes. In addition to the services discussed, Level 3 is a growing provider of Internet backbone services, IP transport, private lines, collocation, dark fiber, conduits and wavelengths. Our diverse customer set includes nine out of 10 of

the world's largest telecommunication carriers, three out of five of the largest cable providers in the United States and wireless carriers serving more than 158 million subscribers.

II. ARBITRATION ISSUES

A. ISSUE 1: ISP-BOUND TRAFFIC

Q: CAN YOU SUMMARIZE THE DISPUTE WITH RESPECT TO ISSUE 1?

A: Yes. Issue 1 is a dispute over whether Level 3 is entitled to an interconnection agreement with CT under Sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), for the exchange of ISP-bound traffic. Level 3 believes that the most relevant order of the Federal Communications Commission ("FCC") and related caselaw make clear that the FCC has set up different rules for ISP-bound traffic *only* with respect to intercarrier compensation rates. In all other respects, ISP-bound traffic is subject to the same rules that otherwise govern the exchange of traffic between local exchange carriers ("LECs"). CT takes the position that the FCC's order establishes exclusive jurisdiction over ISP-bound traffic for *all* purposes, that local interconnection rules do not apply to the exchange of such traffic, and that the Commission cannot rule with respect to the arrangements between the parties for the exchange of ISP-bound traffic.

Q: WHAT IS YOUR REACTION TO THE CT POSITION?

A: CT's position is based upon an erroneous interpretation of federal law. Since this issue has already been discussed in briefs filed in this arbitration, I will provide only an overview of this issue. In short, the Act, the FCC's rules and orders implementing the Act, and the court decisions reviewing those FCC decisions are

clear that state commissions have jurisdiction over all interconnection arrangements among all telecommunications carriers. The FCC has preempted the states only on the discrete issue of setting intercarrier compensation rates for ISP-bound traffic.

Sections 251 and 252 of the Act govern interconnection, without limitation, between telecommunications carriers. Section 251 imposes on *all* telecommunications carriers a general duty to interconnect, and imposes additional obligations on certain classes of service providers, such as LECs and incumbent LECs.[1] And Section 252 grants to the state commissions the authority to approve or reject *all* interconnection agreements and to mediate and arbitrate *all* interconnection disputes involving incumbent LECs.[2] Essentially, they give the state commissions jurisdiction over all interconnection-related disputes, regardless of the nature of the interconnection requested under Section 251, and regardless of the telecommunications services – intrastate, interstate, or ISP-bound.

The FCC – in its *ISP Order on Remand* – did carve out the authority to set intercarrier compensation rates for ISP-bound traffic, under one particular subsection of Section 251. But the FCC was crystal clear in stating that it was *not* changing the scope of how ISP-bound traffic is exchanged between carriers under the other subsections of Section 251, or to limit the state commissions' jurisdiction beyond the issue of setting intercarrier compensation rates.

[1] 47 U.S.C. § 251.

[2] 47 U.S.C. § 252.

Specifically, the FCC emphasized in footnote 149 of its *ISP Order on Remand* that its establishment of the 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."[3] This contradicts CT's assertion that by taking jurisdiction over ISP-bound traffic and setting up interim intercarrier compensation rules, the FCC intended to push ISP-bound traffic differently *for all purposes*. Indeed, if the FCC had intended to take ISP-bound traffic outside of the existing interconnection rules, it would have established alternative interconnection rules, just as it established alternative intercarrier compensation rules.

Q: IS LEVEL 3 REQUESTING PAYMENT OF RECIPROCAL OR OTHER INTERCARRIER COMPENSATION FROM CT UNDER SECTION 251(b)(5)?

A: Level 3 has not requested payment of reciprocal compensation under Section 251(b)(5), or payment of any other terminating intercarrier compensation by CT. Despite CT's best efforts to characterize it otherwise, this dispute is not about Level 3 collecting intercarrier compensation for a large volume of one-way traffic – the FCC's central concern in the *ISP Order on Remand*. This dispute is about

[3] *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, 9188, ¶ 78 n.149 (2001) ("*ISP Order on Remand*"), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom v. FCC*").

Level 3 interconnecting with CT's local networks to provide telecommunications services to ISPs and to ensure that consumers – particularly rural ones – have adequate, competitive access to Internet connectivity and a choice of providers.

Q: YET CT IS SEEKING TO CHARGE LEVEL 3 FOR TRAFFIC ORIGINATING ON CT'S NETWORKS. COULD YOU EXPLAIN WHY SUCH CHARGES ARE IMPROPER?

A: Yes. In an effort to collect access charges, CT has tried to turn this into an intercarrier compensation dispute by demanding originating compensation. But, as discussed under Issue 3, the *ISP Order on Remand* makes clear that CT is not entitled to originating compensation. And the FCC explicitly prohibits carriers from charging for origination.[4]

Q: ARE THERE ANY OTHER BASES FOR REJECTING CT'S POSITION?

A: Yes. The Commission should also reject CT's position because it encourages a discriminatory result. Enhanced service providers, of which ISPs are a subset, often purchase local services from LECs. Indeed, based upon my experience in the industry, I would expect that CT itself has a number of ISP customers (including perhaps affiliated ISPs) to whom it offers local services such as PRI-ISDN, Direct Inward Dial lines, foreign exchange, or some other comparable service or combination thereof. To my knowledge, LECs like CT do not set up separate networks to handle ISP-bound calls from their customers – rather, even though the calls are of a hybrid intrastate-interstate nature for jurisdictional

[4] *See* 47 C.F.R. § 51.703(b) (stating that "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network").

purposes, CT would route these calls destined for its own ISP customers over the same local network used to handle any call originated by its end-user customers. Nor is it likely that CT has a separate agreement or separate trunk groups with Southwestern Bell Telephone ("SWBT"), for example, just to handle calls placed by CT customers to SWBT-served ISPs and vice versa in a shared local or extended area service ("EAS") area. Thus, even though CT may handle its own calls to its own ISP customers as local, and even though CT may handle ISP-bound calls exchanged with neighboring LECs as local (or EAS), CT is demanding that Level 3 set up a separate, more expensive interconnection architecture and work under a different interconnection agreement to handle traffic destined for Level 3-served ISPs.[5]

Q: ISN'T THIS APPROPRIATE GIVEN THAT LEVEL 3 WILL ONLY BE SERVING ISPs UNDER THIS AGREEMENT?

A: Not at all. While it is true that Level 3's initial customers will be ISPs, that doesn't mean that the exchange of traffic should be subject to different terms and conditions than would apply to the exchange of local traffic. (The exception, of course, is intercarrier compensation rates, the one area in which the FCC expressly required a different set of rules.) In fact, when you consider how CT might handle traffic on its own network or the exchange of ISP-bound traffic with other carriers, it becomes clear that CT's position penalizes Level 3 just because

[5] I should note that Issue 1 deals only with the generic question as to whether locally-dialed calls placed by customers of one carrier that are destined for ISP customers of another carrier are subject to the same network interconnection rules as other locally-dialed traffic exchanged between the companies. Questions relating to the physical location of the ISPs, and how that may affect intercarrier compensation, are dealt with as a separate matter in this arbitration under Issue 3.

Level 3 only happens to serve ISPs. Carriers like Qwest and other neighboring LECs, and perhaps even other competitors who provide both dialtone and ISP-oriented services, all could use their local facilities under their local interconnection agreement to exchange all locally-dialed traffic (ISP-bound or otherwise) between them. Furthermore, CT could continue to use its own local facilities to handle traffic destined for its own ISP customers. But CT would deny Level 3 a local interconnection agreement because of the ISP-bound nature of its traffic. The Commission should not sanction a regime under which CT could grant itself or other LECs a preference in the exchange of traffic.

Q: COULD YOU PLEASE EXPLAIN WHY LEVEL 3 OPPOSES CT'S "INFORMATION ACCESS TRAFFIC AGREEMENT"?

A: There are four significant problems with the proposed Information Access Traffic Agreement ("IATA").

First, the IATA treats ISP-bound traffic differently from local traffic for interconnection purposes, in clear contravention of FCC rules and orders that differentiate ISP-bound traffic for intercarrier compensation purposes *only*.[6] For example, the IATA would force Level 3 to set up a separate interconnection network with CT, without reference to what would be required in a local interconnection network. Under CT's proposed IATA, Level 3 would have none of the Section 251 rights available, such as the ability to choose interconnection

[6] *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, 9187 ¶ 78 n.149 (2001) ("*ISP Order on Remand*"), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

points or to obtain cost-based transport. Instead, of specifying one interconnection point per LATA, or per serving area, or even per local calling area, the IATA provides no interconnection standards and gives CT sole discretion to reject any Level 3-proposed interconnection architecture. This could result in Level 3 having to trunk to every CT end office in the serving area, or in prolonged anticompetitive delay as the parties haggle over interconnection details. Moreover, Appendix A of the IATA requires Level 3 to establish interconnection at special access rates, as compared to the cost-based interconnection facility rates that "non-rural" ILECs are obligated to provide under FCC rules and orders. As discussed in my direct testimony and below, the FCC made clear even in adopting new rules for ISP-bound intercarrier compensation that carriers remain subject to interconnection obligations under Section 251 of the Act. CT should not be permitted to dictate the terms of interconnection for the exchange of ISP-bound traffic by pretending that such traffic is no longer subject to Commission jurisdiction or governed by federal interconnection rules.

Second, the IATA would allow CT to impose certain (unspecified) originating usage charges on certain ISP-bound calls. As will be discussed in the context of Issue 3, this is contrary to the FCC's directive that where a new entrant and ILEC begin exchanging ISP-bound traffic after the first quarter of 2001, the intercarrier compensation for that exchange of ISP-bound traffic shall be "bill and keep." In other words, even as CT looks to the FCC's *ISP Order on Remand* for its erroneous jurisdictional arguments about interconnection, it overlooks the specific intercarrier compensation requirements that were the focus of that order.

Third, it should be noted that IATA's focus on "information access" traffic is inappropriate given that the FCC's reliance upon this term prompted the reviewing court to reverse and remand the *ISP Order on Remand*. As will be discussed further in briefs, the court in *WorldCom v. FCC* rejected the FCC's justification for considering ISP-bound traffic as "information access" under Section 251(g) of the Act, and the Court sent the matter back to the FCC for further consideration as to whether there were other grounds for removing ISP-bound traffic from the scope of Section 251(b)(5).[7] The parties should not structure an agreement around a term that was the primary cause for a reviewing court to remand a FCC order.

Finally, CT's IATA is discriminatory. It requires a CLEC that serves ISPs to set up a separate network (through the use of higher cost special access interconnection facilities) to handle ISP-bound traffic. This imposes additional costs on competitors and introduces incredible inefficiencies and is in contravention of federal law. To my knowledge, CT serves its own ISP customers out of its local service tariffs, and does not maintain a separate network to route calls to them – rather, it would use the same local network that is used to route any other locally-dialed call to route calls to its own ISP customers. Thus, requiring that a competitor set up a separate, distinct, and higher cost trunking network just for the exchange of ISP-bound traffic would result in discrimination against the CLEC and the ISPs it serves.

[7] *WorldCom*, 288 F.3d at 434.

Q: WHAT IS YOUR RECOMMENDATION WITH RESPECT TO ISSUE 1?

A: While more detailed legal arguments have been presented in the briefs, it is clear that the Commission has continuing jurisdiction to arbitrate and resolve interconnection disputes relating to ISP-bound traffic, based upon the express reference in the FCC's *ISP Order on Remand*. In light of that clarification from the FCC, and in light of the fact that ISP-bound traffic is routed as local on LEC networks and between interconnected LECs today, the Commission should find that the exchange of ISP-bound traffic between CT and Level 3 is governed by the interconnection provisions of Section 251 and 252 and related FCC and Commission rules and orders.

B. ISSUE 2: DEFINITION OF LOCAL TRAFFIC

Q: CAN YOU SUMMARIZE THE DISPUTE WITH RESPECT TO ISSUE 2?

A: Yes. Level 3 objects to certain terms that CT has proposed as exclusions to the definition of "Local Traffic." Specifically, Level 3 objects to the use of the terms "Internet" and "Internet Protocol based long distance telephony" in defining what does not constitute Local Traffic. Level 3 also objects to the second sentence in CenturyTel's definition, which attacks so-called "Virtual NXX" or foreign exchange-type traffic. However, the question of foreign exchange-type traffic is addressed as a separate issue (Issue 3), so the focus of Issue 2 is on the terms "Internet" and "Internet Protocol based long distance telephony."

Q: WHAT IS LEVEL 3'S OBJECTION TO THE USE OF THESE TERMS?

A: Our first objection is to the vagueness of these terms. Nothing in the Agreement would indicate what "Internet" might mean as compared to "Internet Protocol

based long distance telephony" as compared to "Information Access" as compared to ISP-bound traffic. Given the importance of defining Local Traffic correctly, it is difficult to understand how CT could expect Level 3 to accept undefined terms. Because CT has failed to provide any definitions to support these terms, the Commission should reject CT's position and direct the Parties to delete these references.

Q: DO YOU HAVE ANY OTHER OBJECTIONS TO THE USE OF THESE TERMS IN THE AGREEMENT?

A: Yes. While it isn't clear – even after two rounds of testimony and one hearing in another state – what CT means precisely by the terms it wants to include, CT's intent is unmistakable. CT is attacking the provision of various Voice Over the Internet or Voice Over Internet Protocol services through its "catch-all" language. The problem again, however, is that in using such vague terms, CT would paint all IP-enabled voice communication services with an overly broad and sweeping regulatory brush without considering the precise nature of each service. By contrast, the FCC has taken a very cautious approach to how it will identify and regulate these different kinds of voice services, indicating that a case-by-case analysis is a better means of deciding the issue than a broad statement imposing switched access charges.

Q: CAN YOU PROVIDE MORE BACKGROUND ON THE FCC'S FINDINGS IN THIS AREA?

A: Yes. In its *Report to Congress*, the FCC *declined* to make any determination about whether phone-to-phone Internet Protocol telephony is a

telecommunications service.[8] Specifically, the FCC cautioned that it is not appropriate to "make any definitive pronouncements in the absence of a complete record focused on individual service offerings."[9] By excluding all Internet and IP services from the definition of local traffic, CT's proposal would ignore this and other FCC directives.

Q: WHY DID THE FCC ADVOCATE A CASE-BY-CASE APPROACH TO ANALYZING THE NATURE OF "INTERNET" OR "INTERNET PROTOCOL"-BASED SERVICES?

A: Any characterization of an evolving service for regulatory purposes without a detailed analysis would be futile and prejudicial to the provider's interests. As the FCC noted:

> [w]e defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.[10]

The FCC also observed that given the wide array of services that can be provided using packetized voice technology, it needs to consider if its definition of the service "accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology."[11]

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[8] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶90 (rel. April 10, 1998) ("*Report to Congress*").

[9] *Id.*

[10] *Id.*

[11] *Id.*

Q: CAN YOU EXPLAIN FURTHER THE COMPLICATIONS ASSOCIATED WITH THE "ONE SIZE FITS ALL" ANALYSIS ADVOCATED BY CT?

A: The Commission must consider how CT's broad and vague language may result in a misclassification of traffic. For example, while CT's definition would exclude "Internet" from "Local Traffic," how does one then regulate a call that is placed through a consumer's modem to someone else located (either physically or by virtue of foreign exchange-type service) in the same local calling area? How does one regulate a call placed over an IP-enabled cable modem to the florist down the street? What about an IP-enabled service that allows a consumer to place a call while at the same time engaging some kind of enhanced functionality?

The potential mistreatment of hybrid services is particularly important because it is likely that new services on IP networks will be hybrids, *i.e.*, imbuing voice service with the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" in the form of faxes, e-mails, voicemail, and video. Under CT's broadly drafted and overly simplistic proposal, these innovative services would be impermissibly excluded from a Local Traffic definition (and likely brought therefore under the "switched access" umbrella).

Q: IS THIS INTERCONNECTION AGREEMENT ARBITRATION AN APPROPRIATE FORUM FOR DECIDING HOW "INTERNET" OR "INTERNET PROTOCOL" SERVICES SHOULD BE REGULATED?

A: No. There are several reasons that the Commission should decline to impose switched access regulation on IP telephony in this arbitration proceeding.

First, this kind of expedited proceeding doesn't permit time to develop an adequate fact-based record or to make the kind of detailed examination called for by the FCC in its *Report to Congress*. If it pursues CT's invitation, the Commission is faced here with the prospect of deciding to regulate an entirely new category of services based upon testimony, briefs, and hearings that all come within a matter of weeks in a bilateral proceeding that addresses other complex issues.

Second, addressing the issue in a bilateral proceeding raises significant nondiscrimination and equal protection concerns. The ruling in this arbitration will bind only CT and Level 3. Excluding certain kinds of traffic from the definition of Local Traffic (and thereby perhaps placing it within the category of exchange access traffic) would do so without the benefit of a record that could be established in a generic proceeding open to all service providers – LECs, interexchange carriers, and Internet Protocol telephony providers. The Commission should not permit CT to establish such far-reaching precedent in an arbitration against a single carrier; if this issue is truly of concern to the Commission, it can address it in a proceeding devoted to this topic, or better yet, monitor and participate in the FCC's consideration of this issue.

Third, it is dangerous to address only one piece of the regulatory puzzle. If the Commission were to rule as CT requests, it would have to find that Internet Protocol telephony is a telecommunications service for purposes of access charges. The classification of Internet-based services raises many complicated

and overlapping issues, with implications far beyond access charges.[12] What might be considered subject to access charges under CT's definition could in fact come in many different flavors – such as a phone-to-phone, IP-enabled-phone-to-phone, computer-to-phone, phone-to-computer, or computer-to-computer transmission delivered to a World Wide Web address, an Internet Protocol address not on the World Wide Web, or a North American Numbering Plan number. Yet this proceeding does not permit the Commission to consider the host of other regulatory requirements that would be imposed on Internet Protocol telephony service providers based on a telecommunications classification. If the Commission, contrary to Level 3's recommendation, decides to address this issue prior to a FCC determination, the Commission must at least examine all relevant issues in a proceeding open to all affected parties before determining that Internet Protocol telephony is a telecommunications service subject to access charges.

Q: WHAT HAS THE FCC SAID WITH RESPECT TO IP TELEPHONY SINCE ISSUING ITS *REPORT TO CONGRESS*?

A: The FCC has had several opportunities to revisit the question of how IP-enabled services should be regulated. In early 1999, Qwest (then U S West) requested that the FCC issue a declaratory ruling that phone-to-phone IP telephony be considered subject to switched access charges.[13] While Qwest may have been

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[12] *See* "Powell: Time to 'Retool' the FCC", *ZDNet: eWEEK*, Mar. 29, 2001; Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session - WTPF (March 7, 2001) (emphasis added) ("Ness Remarks"). Copies of these documents are attached to my testimony as Exhibits WPH-2 and WPH-3, respectively.

[13] *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed April 5, 1999).

hoping to push the FCC to regulate IP telephony where it had been unwilling to do so in the *Report*, the FCC's lack of action on the Qwest petition tells the story. Since Qwest's petition was filed more than three years ago, the FCC has not taken *any* action – the petition sits on the shelf, without so much as a public notice inviting comment. The FCC's silence on the Qwest petition – a request that largely mirrors the one put forth by CenturyTel – speaks volumes as to how the FCC has exercised the kind of caution and restraint it talked about in the *Report to Congress.*

Q: SO HAS THE FCC BEEN SILENT ON IP TELEPHONY ALTOGETHER?

A: No. In fact, even as the FCC let the Qwest petition sit, it has clarified its "hands-off" stance with respect to IP telephony in several other proceedings, consistent with the approach first taken in the *Report to Congress*. For example, in an attempt to reduce the reporting requirements placed on interstate common carriers, the FCC consolidated a number of worksheets carriers complete to support various federal programs. When the FCC proposed the consolidated worksheet, it included language that would have required carriers to report revenue from "calls handled using Internet technology as well as calls handled using more traditional switched circuit techniques."[14] The FCC removed this language when it adopted the final consolidated worksheet:

> As noted by certain commenters, this Commission in its *April 10, 1998 Report to Congress* considered the

[14] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

> question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony.[15]

One key point is that, in this quotation, the FCC considered itself to have an "existing treatment of Internet and IP telephony." That treatment, which is the exemption of Internet services and IP telephony services from access charges, continues today. In fact, in a recent Notice of Proposed Rulemaking to consider reforms of existing intercarrier compensation mechanisms, the FCC confirmed that IP telephony "is exempt from the access charges that traditional long-distance carriers must pay."[16] Given this recent clarification of the state of the law and the fact that the FCC has announced its intent to engage in a detailed examination of any reform at the federal level, the Commission should decline CT's invitation to delve into this topic in the context of this expedited bilateral arbitration proceeding.

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[15] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

[16] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001), at ¶133.

Q: WHAT COURSE OF ACTION DO YOU RECOMMEND?

A: I recommend that the Commission look to the cautious approach taken by the FCC with respect to deciding the regulatory classification of voice services that may rely upon the Internet or Internet Protocol-enabled functionalities.

The Commission should be particularly wary about deciding this issue in the context of a quick-paced bilateral arbitration proceeding. By declining to rule that all "Internet" or "Internet Protocol" communications are excluded from the definition of Local Traffic, the Commission will not preclude CT (or any other interested party, for that matter) from coming to the Commission later to prosecute an allegation that any particular service is or is not Local Traffic. Level 3 therefore recommends that this Commission, like other state commissions that have previously considered this issue,[17] defer judgment on the regulatory classification of these kinds of services until the FCC has examined this question further and after a more complete record can be developed.

Oddly, this is the same approach advocated by a CT witness in reply testimony filed on October 16, 2002 in the Texas arbitration between CT and Level 3 involving the same four issues being arbitrated here. Specifically, Mr. Wesley Robinson, in reply testimony filed earlier this week on behalf of CT in Docket No. 26431 in Texas, states that "[t]his case is simply about dial-up services to ISPs and the Commission should not address Level 3's VOIP arguments." Mr. Robinson adds, "the Commission could not make any factual determinations in this proceeding regarding the appropriate regulatory treatment

of such services." Yet it is CT who was insisting on including language in the contract that made this an arbitration issue. It appears that CT itself has now reconsidered its position as to whether these issues should be part of this interconnection arbitration, and for the reasons expressed by CT's own witness in Texas and the other reasons explained above, the Commission should strike CT's vague and overreaching references to "Internet" and "Internet Protocol-based long distance telephony" from the final agreement.

C. ISSUE 3: FOREIGN EXCHANGE OR "VIRTUAL NXX"

Q: WHAT IS IN DISPUTE WITH RESPECT TO ISSUE 3?

A: Issue 3 is a dispute between the Parties over the proper intercarrier compensation methods to apply to the exchange of calls originated by a CT customer that are destined for an ISP customer of Level 3 if that ISP customer does not maintain a physical presence in the rate center with which the ISP's telephone number is associated. Level 3's position is that, for several legal, policy, economic, and network-related reasons, CT is not entitled to originating access with respect to these calls. CT's position is that these calls are interexchange in nature such that originating access charges are due. This is, in short, a dispute over the proper compensation arrangements for what has been called at times "Foreign Exchange" traffic or "Foreign Exchange-type" traffic or "Virtual NXX" traffic.

[17] These decisions will be cited and discussed in Level 3's briefs in this docket.

Q: IS THIS A DISPUTE OVER TERMINATING COMPENSATION DUE TO LEVEL 3?

A: No. While the Commission is all too familiar with the prior battles between ILECs and CLECs with respect to whether reciprocal compensation is due for calls placed to ISPs, Level 3 is not seeking such compensation here. Level 3 recognizes that the FCC's *ISP Order on Remand* resolves the question of whether CT must pay terminating compensation to Level 3 for such calls. Specifically, because the parties did not exchange any ISP-bound traffic during the first quarter of 2001, this represents a "new market" for Level 3 such that Level 3 cannot seek compensation from CT for completing calls placed by CT customers. Level 3 recognizes that the FCC's *ISP Order on Remand* establishes a "bill-and-keep" compensation mechanism for this traffic.

Q: TURNING BACK TO WHAT IS IN DISPUTE, WHAT IS LEVEL 3'S REACTION TO CT'S DEMAND THAT ORIGINATING ACCESS CHARGES APPLY TO THE EXCHANGE OF SO-CALLED "VIRTUAL NXX" OR "FOREIGN EXCHANGE-TYPE" TRAFFIC?

A: CT's position should be rejected for at least four reasons.

First, as discussed below and in the testimony of Level 3 witness Gates, from a functional perspective, the services that Level 3 would deliver to ISPs in the CT serving area are no different than those that ILECs have delivered for years to their own foreign exchange customers, and are no different than other comparable ISP-targeted services that many ILECs market today. While the network architecture may be different and the scope of the service coverage

wider, the functionality delivered from the customer's perspective is no different at all – the customer gets a telephone number in a serving area where the customer has no physical presence. Applying originating access charges to CLEC-delivered competitive responses to ILEC foreign exchange services would be discriminatory and result in a regulatory-created competitive advantage for ILEC provision of such services.

Second, CT's position that originating access charges apply is misplaced. As explained below, the FCC has found that in circumstances such as these – where a CLEC and ILEC have not exchanged traffic prior to the effective date of the *ISP Order on Remand* – the appropriate compensation mechanism for the exchange of ISP-bound traffic is bill-and-keep. Bill-and-keep is also consistent with the decisions of this Commission with respect to FX-type traffic.

Third, CT's position is contrary to the efficient workings of a competitive telecommunications marketplace. As Mr. Gates explains, CT's position would penalize competitors for deploying different kinds of networks, and generate regulatory-imposed costs that will frustrate the delivery of competitive services to consumers.

Fourth, as Mr. Gates discusses further, CT's claim that originating access charges are needed is contradicted by the fact that it will incur no more cost in originating a call to a Level 3 customer using a foreign exchange-type telephone number than CT would incur in originating a call to a similarly situated customer of another LEC, or to a Level 3 customer who has a physical presence in the rate

center in question. CT's position is based not upon cost recovery needs, but upon a thirst for subsidy-laden access revenue streams.

Q: PLEASE DISCUSS YOUR FIRST POINT – THAT THE KIND OF FOREIGN EXCHANGE-TYPE SERVICE THAT LEVEL 3 MAY PROVIDE TO SOME ISPs IS A FUNCTIONAL EQUIVALENT TO ILEC-PROVIDED SERVICES.

A: Mr. Gates will cover this in more detail, with a comparison of ILEC services and CLEC services. However, at a high level, one should think about this from the customer's perspective. The fact is that a customer purchasing a service called "foreign exchange" from an ILEC (or, say, Wholesale Dial for Qwest-served ISPs or CyberPOP or IPRS for Verizon-served ISPs) is receiving the same service benefit that it would be receiving from Level 3's service – the ability to obtain a telephone number and a local dialing presence in a location where the customer does not have a physical presence.

Q: WHAT ABOUT THE FACT THAT THE ILECs MAY PROVIDE THEIR FOREIGN EXCHANGE AND FOREIGN EXCHANGE-LIKE SERVICES THROUGH A DIFFERENT TECHNOLOGY OR NETWORK DESIGN THAN COMPETITORS OFFERING SO-CALLED "VIRTUAL NXX" SERVICES?

A: It would be discriminatory to prohibit a service based solely upon the way in which a carrier provisions that service to its customers. New entrants design networks differently from ILECs, but that doesn't necessarily change the basic functionality delivered to customers. For example, the fact that an ILEC may

have a dedicated line running between the home exchange and the foreign exchange doesn't change the fact that the customer does not have a physical presence in the foreign exchange. Any policy that prohibits a foreign exchange-like service – the assignment of telephone numbers to a customer who is not physically located in the exchange to which the telephone number is assigned – based merely upon the way in which the carrier's technology and/or network supports that service would be discriminatory and would punish new entrants and incumbents for innovation.

The New York Public Service Commission summarized this well in considering disputes between independent ILECs and CLECs with respect to ISP-bound foreign exchange-type calls. Specifically, the New York commission found that foreign exchange service should not be defined by "call competition technology," but rather foreign exchange service should be defined "operationally, i.e, making local service possible in an exchange where the customer has no physical presence."[18] The New York commission further noted that an operational focus was more appropriate than a technological focus because "the architecture of new entrant networks will differ from that of incumbents and . . . CLECs need not replicate the incumbent's service offerings, rate centers, or customer mix."[19]

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[18] *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, Case 00-C-0789, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates (N.Y.P.S.C. Sept. 7, 2001) ("*September 2001 New York Order*"), at 4.

[19] *Id*.

Q: HAS THE WASHINGTON COMMISSION ADDRESSED THE ISSUE OF SO-CALLED VIRTUAL NXX OR FX-LIKE TRAFFIC EXCHANGE BEFORE?

A: No, it has not. On August 19, 2002, this Commission denied a request by the Washington Independent Telephone Association for a declaratory ruling with respect to Virtual NXX or FX-like traffic. Instead, the Commission sought suggestions on how it might address these matters.

Q: HAVE OTHER STATES ADDRESSED THE QUESTION OF WHETHER CLEC VIRTUAL NXX AND OTHER FOREIGN EXCHANGE-LIKE SERVICES ARE A FUNCTIONAL EQUIVALENT TO ILEC FOREIGN EXCHANGE SERVICES?

A: Yes. Mr. Gates discusses some of these decisions and Level 3 will address others in its brief. A notable decision was in Texas, in which a number of CLEC brought complaints against SWBT, which were consolidated in Docket No. 24015. The Texas Commission was asked to consider how "FX type traffic" should be classified for intercarrier compensation purposes and how a carrier should be compensated for terminating FX type traffic originated by another carrier. Like the New York Public Service Commission, the Texas arbitrators found that "[f]rom the perspective of FX customers, ILEC-provided FX service and CLEC-provided FX-type service serve the same intended purpose. . . . While the Arbitrators recognize that FX and FX-type services are provisioned differently, due to differences between ILEC and CLEC network architectures and local calling scopes, the Arbitrators are not persuaded that the differences in

provisioning methods should mandate different classification and/or compensation."[20] The Arbitrators further found that "in reviewing the historical treatment of FX service by and between ILECs, FX service has been treated like exchange service."[21] The Arbitrators concluded that all ISP-bound traffic, "whether provisioned via an FX/FX-type arrangement or not, is subject to the compensation mechanism contained in the FCC's ISP Remand Order."[22] The Arbitrators therefore found that, despite SWBT's claims that access charges should be payable on all FX-type traffic, the question of what compensation was due to the ILEC had been settled by the FCC's *ISP Order on Remand*, and that the decision with respect to what compensation was due in the exchange of FX-type traffic would be limited to the question of "non ISP-bound traffic."[23] The Texas Arbitrators then found that non ISP-bound FX-type traffic should also be exchanged on a "bill and keep" basis because that was how ILECs had historically handled local and EAS calls – including FX calls – exchanged between their networks.[24]

From a policy perspective, the fact that commissions throughout the United States have reached the conclusion that ILECs and CLECs are offering a functionally equivalent foreign exchange-type service, coupled with the fact that

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[20] *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, Revised Arbitration Award (Tex. P.U.C. Aug. 28, 2002) ("*FX-Type Complaint Award*"), at 30.

[21] *Id*. at 36.

[22] *Id*. at 30-31.

[23] *Id*. at 31.

[24] *Id*. at 57-58.

ILECs in Washington offer foreign exchange services and FX-like services today without having them considered interexchange in nature, should lead the Commission to reject the position that similar services provided by CLECs are interexchange in nature.

Q: WHAT ABOUT THE FACT THAT LEVEL 3 MAY ASSIGN TELEPHONE NUMBERS TO ISP CUSTOMERS IN MORE DISTANT LOCATIONS THAN THE NEXT EXCHANGE OR A FEW EXCHANGES AWAY?

A: As a preliminary matter, I should note that Level 3's intention is to provide solutions for its customers that leverage the technological efficiencies of its network. In large part because of the nature of IP transport, customer location is less important than it might be in a circuit switched environment. Moreover, as the second point in my introduction to this issue indicated, one should recall that the traffic in question would be ISP-bound in assessing the jurisdiction and appropriate intercarrier compensation mechanism for the exchange of this foreign exchange-type traffic.

Q: TURNING TO YOUR SECOND POINT, WHY DOES THE FACT THAT THIS TRAFFIC WOULD BE ISP-BOUND IN NATURE MATTER?

A: The FCC has confirmed on several occasions – most recently in April 2001 – that it considers ISP-bound traffic to be interstate in nature. Therefore, the physical presence of an ISP should not matter in determining the intercarrier compensation mechanism that applies to an ISP-bound call. Indeed, in justifying the interstate jurisdiction of ISP-bound traffic, the FCC explicitly stated that it would be perplexing to consider the jurisdiction of ISP-bound traffic based upon the

location of the modem banks. Specifically, the FCC acknowledged that "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis. . . . The 'communication' taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases, or bulletin board contributors. *Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists.*"[25]

Q: SO YOU DISAGREE WITH CT'S CONTENTION THAT THE CALL TO AN ISP MUST TERMINATE TO A MODEM BANK LOCATED IN THE SAME LOCAL CALLING AREA AS THE ORIGINATING PARTY?

A: Yes. In fact, it is interesting to witness the evolution of ILEC arguments about ISP-bound traffic. For years, in order to avoid paying reciprocal compensation, the ILECs argued that a call to an ISP does not terminate in the local calling area. Having prevailed in their efforts to have the FCC adopt this argument, the ILECs now turn around and argue that despite its interstate nature, in order to avoid paying access charges to the carrier serving the originating caller, an ISP-bound call *must* terminate to modem banks located in the same rate center where the telephone number is assigned. In other words, for the past several years, the ILECs have said that location of the modem banks did not matter *for purposes of terminating compensation due to the CLEC*, but now they argue that the location of the modem banks is all that matters *for purposes of originating compensation*

[25] *ISP Order on Remand* at ¶¶ 58 and 59 (emphasis added).

due to them. If the call is interstate in nature as the ILECs always have argued, where the ISP falls on this continuum should not matter. This is particularly true since the ISP's location has no effect on what Level 3 and CT pay one another. Under FCC rules, the exchange of ISP-bound traffic between CT and new entrants like Level 3 is subject to a bill-and-keep compensation arrangement for intercarrier compensation purposes. Under these rules, CT is not entitled to originating access with respect to ISP-bound traffic, nor is Level 3 entitled to any terminating compensation from CT. Notably, this is consistent also with a recent Arbitrator's decision in Texas in Docket No. 24015, where the Arbitrators noted that the FCC's *ISP Order on Remand* established the compensation mechanism applicable to ISP-bound traffic "whether provisioned via an FX/FX-type arrangement or not."[26] To my knowledge, as will be discussed further in briefs, every other state to consider the question of so-called "virtual NXX" ISP-bound traffic has reached the same conclusion – that the FCC's *ISP Order on Remand* resolves all questions relating to the rates for intercarrier compensation for such traffic.

Q: PLEASE EXPLAIN IN MORE DETAIL WHY ORIGINATING ACCESS IS NOT THE APPROPRIATE COMPENSATION MECHANISM FOR ISP-BOUND FOREIGN EXCHANGE-TYPE TRAFFIC.

A: There are two legal and policy reasons that originating access should not be applied with respect to ISP-bound virtual NXX or foreign exchange traffic. First, it should be noted again that the Level 3 customers with telephone numbers in the

[26] *FX-Type Complaint Award* at 31.

CT serving area would be ISPs – thus, the focus should be on what the FCC has established as an intercarrier compensation regime for ISP-bound traffic. CT and Level 3 did not exchange any traffic during the first quarter of 2001. Under the FCC's intercarrier compensation minute and growth caps, this means that all ISP-bound traffic exchanged between CT and Level 3 is subject to bill-and-keep.[27] In its *ISP Order on Remand*, the FCC defined bill and keep as:

> an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network.[28]

Under this ruling, CT should not be able to charge Level 3 for originating access in connection with the exchange of ISP-bound traffic.

Q: WHAT ABOUT CT'S CONTENTION THAT THE FCC INTENDED ONLY TO SET COMPENSATION FOR ISP-BOUND TRAFFIC DESTINED FOR A MODEM BANK IN THE SAME LOCAL CALLING AREA?

A: This is something that can be addressed in more detail in Level 3's briefs, with citations to and discussions of the state commission decisions that have found that the FCC's decision settles this issue with respect to ISP-bound virtual NXX traffic. But, as a general matter, it would be illogical to conclude that traffic destined for an ISP physically located in the local calling area is interstate in

[27] *ISP Order on Remand* at ¶¶ 78, 81.

[28] *Id*. at n.6.

nature (because it goes onto the Internet) and therefore subject to bill-and-keep, while concluding that traffic destined for an ISP located *farther away* is intrastate in nature (regardless of the fact that the call also goes onto the Internet) and therefore is subject to originating access charges. Focusing upon the modem bank locations to determine intercarrier compensation would be contrary to the very reasoning by which the FCC found this traffic to be interstate in the first instance.

Q. WHAT IS THE OTHER REASON THAT ORIGINATING ACCESS IS INAPPROPRIATE FOR THE EXCHANGE OF THIS ISP-BOUND TRAFFIC?

A: The other reason that originating access is inappropriate is because imposing it upon a CLEC who provides virtual NXX services to ISPs would be discriminatory. If the Commission is going to direct Level 3 to pay originating access to CT for terminating foreign exchange calls from CT's customers, then the Commission must set a policy that all carriers, ILECs and CLECs alike, must pay originating access to the carrier whose customer originates the call to the terminating carrier's foreign exchange customer. In other words, the Commission would have to apply that policy to all carriers, not just Level 3.

Q: WILL CENTURYTEL's REGULATED LEC OPERATIONS BE HARMED FINANCIALLY IF IT IS NOT PERMITTED TO COLLECT ACCESS CHARGES ON LEVEL 3'S ISP-BOUND TRAFFIC?

A: No. As Mr. Gates explains, if Level 3 does not provide its FX-like service to its ISP customers, the most likely result will be either that individual end users purchase internet access from CenturyTel, or that they forego internet access

altogether. In neither case will CenturyTel will receive originating access charges for this traffic.

Q: WILL TREATMENT OF VIRTUAL NXX OR FX-LIKE TRAFFIC IN THE MANNER YOU SUGGEST HARM NUMBER CONSERVATION EFFORTS?

A: No. With the exception of the Maine Public Utilities Commission, no state commission has ever found that these kinds of services (including FX service) contribute to number exhaust to any greater or lesser degree than any other service offering. If Level 3 were to reverse its architecture and require customers to place a modem bank in each local calling area, it would still consume numbers for those modem banks. Or, if Level 3 wanted initially to provide voice services in the CT territories, it would receive the same allocation of numbering resources whether it had 10 or 10,000 customers. Thus the offering of either Virtual NXX or FX service by incumbents or new entrants does not cause number exhaust. Moreover, Level 3 tries to choose rate centers that encompass large calling areas in order to minimize its need for telephone numbers to serve ISPs in the same area as compared to an ILEC network. Level 3 further mitigates its affect on numbering resources by following sound number conservation policies, including avoiding contaminating thousand blocks and following sequential number requirements as required by the FCC. Level 3 has also worked to develop a local number portability ("LNP") solution for its softswitch networks – when no solution was commercially available – to allow it to participate in number pooling conservation efforts.

Q: WHAT IS YOUR RECOMMENDATION WITH RESPECT TO ISSUE 3?

A: My recommendation is that the Commission rule that originating access charges do not apply to the exchange of ISP-bound traffic between CT and Level 3, even where the ISP does not have its modem banks physically located in the rate center to which the telephone number is assigned. As discussed above and in Mr. Gates' testimony, this conclusion is consistent with: (i) the way in which ILECs have handled their own exchange of comparable foreign exchange and foreign exchange-type traffic, (ii) federal law with respect to intercarrier compensation for ISP-bound traffic, (iii) the goal of promoting a competitive telecommunications marketplace, and (iv) the goal of a fair and reasonable interconnection structure where carriers are compensated only to the extent they incur some additional cost because of the interconnection. For these reasons, like the other state commissions that have considered this specific question, the Commission should find that *intercarrier compensation* for ISP-bound traffic is under the FCC's exclusive jurisdiction and therefore subject to the FCC's intercarrier compensation rules, regardless of whether the ISP customer is physically located in the rate center to which its telephone number is assigned.

ISSUE 4: DEFINTION OF "BILL AND KEEP"

Q: WHAT IS THE PARTIES' DISPUTE WITH RESPECT TO ISSUE 4?

A: Level 3 has proposed using the definition of "bill and keep" as used in the most recent pronouncement with respect to this issue – footnote 6 of the FCC's *ISP Order on Remand*. CT objects to this proposal, primarily because of its erroneous

belief that the FCC's order applies only to ISP-bound traffic terminating to a modem bank in the same local calling area as the dialing customer.

Q: WHAT IS YOUR REACTION TO CT'S POSITION?

A: It was not clear to us when the Petition was filed what CT's precise objection to this provision was, other than that CT objected in all respects to including ISP-bound traffic within the scope of this Agreement. After reviewing CT's positions further based upon filings in this and other dockets, it appears that CT's objection is based upon the same primary arguments that it presents with respect to Issue 3 – that the FCC's *ISP Order on Remand* only governs the exchange of ISP-bound traffic where the ISP is in the local calling area, and that therefore the "bill and keep" mechanism under that order is inapplicable to the exchange of foreign exchange-type ISP-bound traffic with Level 3. As discussed in the context of Issue 3, this position is without merit for several reasons – and while I won't go into those reasons again here in much detail, I will summarize them so that they are identified clearly for the purpose of Issue 4. First, it is absurd for CT to contend that the location of the ISP modem banks do not matter for reciprocal compensation purposes – I don't hear CT saying that they will pay us reciprocal compensation if an ISP has modem banks in the local calling area – but to then argue that CT's own compensation for origination should be determined based upon the location of those same modem banks. CT cannot have it both ways. Second, CT's position ignores the fact that – at the urging of ILECs – the FCC actually found the location of ISP modem banks to be irrelevant in determining the jurisdiction of the traffic. To look at the location of the ISP's modem banks

now would be contrary to the FCC's conclusion (and the ILECs' own prior arguments) that the jurisdictional nature of this traffic depends upon the Internet as the destination of the traffic rather than where the modem banks fall into place before that.

Q: WHAT IS YOUR RECOMMENDATION WITH RESPECT TO ISSUE 4?

A: CT has now presented this issue in a manner that effectively ties it to Issue 3. I therefore recommend that the Commission adopt Level 3's proposed definition of "bill and keep" for the same reasons that it should adopt Level 3's proposals with respect to Issue 3. But I would also contend that if the Agreement is going to have a definition of "bill and keep" in it for any reason, it would make sense to look to the FCC's explanation of what that term means, regardless of whether it ultimately applies to the exchange of ISP-bound traffic between the parties or not.

III. SUMMARY

Q. WHAT IS YOUR RECOMMENDATION TO THIS COMMISSION?

A. I would urge the Commission to adopt Level 3's position on each of the issues presented in this arbitration. By allowing Level 3 to enter the CenturyTel markets, the Commission will serve the public interest by promoting a competitive marketplace, customer welfare, and efficiency in the provision of telecommunications services. I understand that these are some of the criteria the Commission will consider when assessing the public interest under Section 24.31 of its Substantive Rules.

Q: HOW DOES GRANTING LEVEL 3's PETITION PROMOTE A COMPETITIVE MARKETPLACE?

A. While the country experienced an enormous build-out of telecommunications infrastructure following the passage of the Telecommunications Act of 1996, the simple truth is that many rural to mid-size markets were passed by. As the industry shakes itself out and looks for the appropriate economic model, the simple truth is that no carrier is going to embark on the sort of wholesale construction of facilities that the industry has experienced in the past. What we will see now is competition on an incremental stage, where companies will deploy their capital in the most economically efficient and promising manner. By granting Level 3's Petition, the Commission will establish a framework through which companies might establish a beachhead in CT's operating territories. Then as economic conditions merit, those companies will develop and expand their service offerings.

Q. HOW DOES GRANTING LEVEL 3's PETITION PROMOTE CUSTOMER WELFARE?

A. By granting Level 3's Petition, the Commission will establish a framework by which initially, Internet service providers will have a choice from whom they purchase local telecommunications services. This will inject price competition into the area of providing service to ISPs and should result in lower prices to the customers of the ISPs. It's important to remember that the end-user customers of the ISP are the same end-user customers of CT.

Q. HOW DOES GRANTING LEVEL 3's PETITION PROMOTE EFFICIENCY IN THE PROVISION OF TELECOMMUNICATIONS SERVICES?

A. Much of CT's opposition to Level 3's Petition has been about imposing the antiquated, inefficient hierarchical network of a regulated monopoly on Level 3. With our technology and state-of-the-art network, Level 3 has deployed one of the most efficient networks ever. Efficient networks mean lower costs to operate and lower costs to consumers. Given the economic reality of today's telecommunications industry, the best way to ensure competition is to allow for the most efficient deployment of networks and the services provided on them. In many respects, I don't think the question should be about why Level 3 provides services it does in a certain way, but why CT has not deployed these new technologies and brought down the costs of the services it provides.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes, it does.