

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 In the matter of the Petition)
of Level 3 Communications,)
4 LLC for Arbitration Pursuant) Docket No. UT-023042
to Section 252(b) of the)
5 Telecommunications Act of) Volume III
1996, with Qwest Corporation) Pages 32 to 121
6 Regarding Rates, Terms, and)
Conditions for)
7 Interconnection)
_____)

8
9 An arbitration in the above matter was held
10 on October 29, 2002, from 9:30 a.m to 11:50 a.m., at
11 1300 South Evergreen Park Drive Southwest, Room 206,
12 Olympia, Washington, before Administrative Law Judge
13 DENNIS MOSS.

14 The parties were present as follows:
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17 QWEST CORPORATION, by JOHN M. DEVANEY,
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23
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25 Joan E. Kinn, CCR, RPR
Court Reporter

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1 P R O C E E D I N G S

2 JUDGE MOSS: Good morning, everyone. I will
3 document for the record my name is Dennis Moss, and I am
4 substituting for Judge Schaer who was called away at the
5 last moment, and I will be hearing the arbitration
6 proceeding today in the matter involving Level 3 and
7 Qwest, Docket Number UT-023042.

8 We have the pre-filed testimony and exhibits.
9 Mr. Hunt's exhibits include his pre-filed Direct
10 Testimony, which is marked for identification as Exhibit
11 Number 1. His Diagram of Level 3's Interconnection with
12 Qwest in Seattle, Washington, and I have marked that for
13 identification as Number 2. An Opinion and Order of the
14 Arizona Corporation Commission, Decision Number 63550, I
15 have marked as Number 3. And I have marked as Number 4
16 for identification a Letter of August 2nd, 2002, from
17 J.W. Kure to M.H. Dortch, Including Attachments. And as
18 5 for identification I have marked Mr. Hunt's Rebuttal
19 Testimony.

20 For Qwest, Mr. Brotherson's testimony,
21 pre-filed Direct Testimony is Number 11, and his
22 Rebuttal Testimony is Number 12. We also have seven
23 potential cross-examination exhibits for Mr. Brotherson,
24 and I will just indicate that I have marked those as 13
25 through 19 in the order tendered, and I'm sure we will

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1 be discussing those individually to the extent they are
2 used in the cross-examination.

3 And I have passed a copy of the exhibit list
4 out to everyone, so please refer to them by the numbers
5 that I have assigned to them for purposes of offering
6 them for admission or other reference.

7

8 (The following exhibits were identified as
9 cross-exhibits in conjunction with the testimony of
10 LARRY BROTHERRSON.)

11 Exhibit 13 is Qwest Residential Products and
12 Services: Main Residential Line monthly and
13 non-recurring charges by state. Exhibit 14 is Qwest
14 Residential Products and Services: Additional
15 Residential Line monthly and non-recurring charges by
16 state. Exhibit 15 is Qwest Small Business Products and
17 Services: Business Lines. Exhibit 16 is Qwest Small
18 Business Products and Services: Stand-by Line. Exhibit
19 17 is Qwest Small Business Products and Services:
20 Business Line Plus. Exhibit 18 is Qwest Small Business
21 Products and Services: CustomChoice for Business.
22 Exhibit 19 is Qwest Wholesale: Wholesale Dial.

23

24 JUDGE MOSS: All right, we have discussed off
25 the record that Mr. Hunt will take the stand first and

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1 that he will give us a brief summary of his testimony,
2 and we won't need opening statements from counsel.

3 So, Mr. Hunt, if you would take the stand and
4 remain standing, raise your right hand, I will swear you
5 in.

6 (Witness Roger Hunt was sworn in.)

7 JUDGE MOSS: Thank you, please be seated.

8 Actually, I have skipped an important step
9 here this morning, and that is to take the appearances
10 of counsel, and so I should do that now before we
11 proceed with you, Mr. Hunt. Let's start with Level 3.

12 MR. ROGERS: Greg Rogers appearing on behalf
13 of Level 3.

14 JUDGE MOSS: And, Mr. Rogers, I'm not sure if
15 you have previously entered an appearance in this
16 proceeding.

17 MR. ROGERS: I did enter an appearance
18 initially. Rogelio Pena had also entered an appearance
19 but is not able to be here today. He's in Colorado
20 sick.

21 JUDGE MOSS: So you have previously given to
22 the record your pertinent information as to address,
23 telephone, and so forth?

24 MR. ROGERS: Yes.

25 JUDGE MOSS: Okay, fine.

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1 Let's hear from Qwest.

2 MR. DEVANEY: Good morning, Your Honor, John
3 Devaney of the law firm Perkins Coie on behalf of Qwest.

4 JUDGE MOSS: And, Mr. Devaney, your name is
5 familiar, I take it you have entered an appearance
6 previously.

7 MR. DEVANEY: I believe that I have. I will
8 confirm that.

9 JUDGE MOSS: Okay, fine. If you will provide
10 the court reporter with the relevant information at the
11 conclusion.

12 All right, Mr. Hunt has been sworn, do you
13 wish to direct the witness or --

14 MR. ROGERS: I can go ahead and do that, Your
15 Honor.

16 JUDGE MOSS: That would be fine.

17 MR. ROGERS: Thank you.

18

19 Whereupon,

20 WILLIAM PATRICK HUNT III,
21 having been first duly sworn, was called as a witness
22 herein and was examined and testified as follows:

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1 D I R E C T E X A M I N A T I O N

2 BY MR. ROGERS:

3 Q. Can you please state your name, and spell
4 your last name for the record.

5 A. It's William Patrick Hunt, III, H-U-N-T.

6 Q. And by whom are you employed?

7 A. Level 3 Communications.

8 Q. What is your position with Level 3?

9 A. Vice President Public Policy.

10 Q. Have you prepared a brief summary of Level
11 3's position in this matter to present?

12 A. Yes, I have.

13 Q. Can you go ahead and do that.

14 A. Yes.

15 Good morning, Your Honor. On behalf of Level
16 3, I would like to thank the Commission and its Staff
17 for holding this hearing this morning. Level 3 would
18 also commend Qwest and its negotiators for working with
19 us to reduce the number of issues in this proceeding to
20 one.

21 While the numerous citations to FCC rules and
22 cases make this issue appear complicated, it's really
23 quite simple. This dispute is about which carrier will
24 pay for the interconnection facilities deployed on
25 Qwest's side of a point of interconnection to bring the

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1 traffic that originates with Qwest end users to
2 customers on the network of another carrier. The answer
3 to that question should not be difficult or
4 controversial, because it has long been settled by the
5 FCC's Local Competition Rules that an interconnecting
6 carrier is responsible for the costs of the network
7 facilities used on its side of the point of
8 interconnection. Despite challenges to those rules and
9 changes in the intercarrier compensation regime for the
10 termination of ISP bound traffic, the obligation of the
11 originating carrier to bear the cost of bringing its
12 traffic to its side of the point of interconnection
13 remains unchanged.

14 Qwest now seeks to change those rules by not
15 including ISP bound traffic that its customer sent to
16 Level 3's customers from their calculation of relative
17 use. If adopted by this Commission, Qwest's proposal to
18 exclude ISP bound traffic would turn the concept of
19 relative use on its head and shift the financial
20 responsibility for Qwest's network to Level 3 or any
21 other similarly situated carrier, and this shift would
22 occur despite the fact that these interconnection
23 facilities benefit Qwest and its customers.

24 Maybe a short example will help. Under our
25 contract, Level 3 and Qwest have agreed to establish a

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1 single point of interconnection or POI for the exchange
2 of traffic in the LATA. Qwest will deliver those calls
3 placed by Qwest customers to Level 3 at the POI. Level
4 3 will then terminate those calls. Right now all the
5 calls between Qwest end users terminate to ISP customers
6 on Level 3's network. In the absence of any other
7 obligation, Qwest will deliver that traffic over its
8 existing network facilities. Level 3 would be required
9 to pay nothing for those facilities.

10 In a number of instances under the contract
11 when traffic between an end office and the point of
12 interconnection meets a specified threshold, in this
13 case generally a DS1, the CLEC is required to order a
14 dedicated trunk group. In this case Qwest is then
15 allowed to move this existing traffic off its network
16 onto this dedicated facility. Now this request only
17 comes about because Qwest end users have made sufficient
18 number of calls to trigger that threshold, and that
19 threshold allows Qwest to deploy a more efficient
20 network architecture to deliver those calls.

21 Qwest is able to better manage the capacity
22 of its common network by having Level 3 set up these
23 direct trunks. Yet despite the network benefits that
24 Qwest and its customers receive by this arrangement,
25 Qwest does not want to pay for the calls its end users

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1 pay it to carry. Instead, Qwest wants to shift its
2 network costs for these direct trunks to Level 3 even
3 though Qwest does not offer to pay Level 3 for the
4 facilities that Level 3 must deploy on its side of the
5 point of interconnection to ensure that those calls are
6 completed.

7 If the Commission adopts Qwest's position, it
8 will put carriers seeking to compete against Qwest to
9 provide services to ISPs at a competitive disadvantage.
10 That's because Qwest will be able to provide services to
11 its own ISP customers over its existing network
12 facilities without seeking to recover the cost of
13 originating that traffic from its ISP customers. They
14 in effect impose a flat rated originating access on its
15 competition.

16 Level 3 is not seeking to have Qwest pay
17 Level 3 for the facilities used to transport a call from
18 the point of interconnection back to Level 3's customer.
19 That is terminating compensation. We know that the FCC
20 addressed that in the ISP Order on Remand by setting
21 specific compensation structure regardless of the
22 facilities deployed. But in establishing this new
23 terminating compensation structure, the FCC was crystal
24 clear that it did not release a carrier like Qwest from
25 its obligations as an originating carrier, and we

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1 therefore are seeking only to have Qwest bear its own
2 cost of delivering a call placed by a Qwest customer to
3 the interconnection point with Level 3. That's what the
4 FCC rules require. Thank you.

5 Q. Mr. Hunt, do you have before you copies of
6 the documents that have been marked as Exhibits 1, 2, 3,
7 and 4?

8 A. Actually not the ones that have been marked.

9 JUDGE MOSS: Just as they have been
10 identified.

11 A. Yes.

12 Q. As they have been identified, do you have
13 copies of those documents before you?

14 A. Yes.

15 Q. Are Exhibits 1 through 4 the documents that
16 you submitted as your direct testimony in this case?

17 A. Yes, they are.

18 Q. Do you have any corrections to your direct
19 testimony at this time?

20 A. No, I do not.

21 Q. Is your direct testimony then true and
22 correct?

23 A. Yes, I would have the same answers if asked
24 the same questions today.

25 MR. ROGERS: Your Honor, with that, Level 3

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1 would move or would offer Exhibits 1, 2, 3, and 4.

2 MR. DEVANEY: No objection, Your Honor.

3 JUDGE MOSS: There being no objection, they
4 will be admitted as marked.

5 BY MR. ROGERS:

6 Q. Mr. Hunt, do you also have a copy of the
7 document that has been marked as Exhibit 5, which is
8 your rebuttal testimony?

9 A. Yes.

10 Q. Did you cause to have filed in this case
11 rebuttal testimony?

12 A. Yes.

13 Q. Do you have any corrections to your rebuttal
14 testimony at this time?

15 A. Yes. On page 8, line 21, which would be the
16 third one from the bottom, the word agreed should say
17 agree so that the sentence reads, therefore if the
18 Commission does not agree to substitute
19 telecommunications.

20 Q. Do you have any other corrections to be made?

21 A. No, I do not.

22 Q. If I were to ask you the questions that are
23 asked in your rebuttal testimony, would you answer those
24 questions in the same or substantially the same way
25 today?

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1 A. Yes, I would.

2 MR. ROGERS: With that, Your Honor, Level 3
3 would offer Exhibit 5.

4 MR. DEVANEY: No objection.

5 JUDGE MOSS: There being no objection, it
6 will be admitted as marked.

7 MR. ROGERS: At this point, we would offer
8 Mr. Hunt for cross-examination.

9 JUDGE MOSS: All right.

10 Mr. Devaney.

11 MR. DEVANEY: Thank you, Your Honor.

12

13 C R O S S - E X A M I N A T I O N

14 BY MR. DEVANEY:

15 Q. Good morning, Mr. Hunt.

16 A. Good morning, sir.

17 Q. Mr. Hunt, I have a fairly brief
18 cross-examination for you, and although the testimony of
19 both witnesses in this case have a fair amount of legal
20 discussion, I'm going to do my best to try to stay away
21 from the law.

22 A. Okay.

23 Q. Although I'm sure we'll cross that line once
24 or twice.

25 Level 3 is in the business of serving ISPs or

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1 Internet service providers here in Washington; is that
2 correct?

3 A. Well, that's one line of customer Level 3
4 provides services to. We provide other services as
5 well.

6 Q. Okay. But you do provide services to ISPs in
7 Washington, correct?

8 A. Yes, we do.

9 Q. And Level 3 does not serve any residential
10 customers in Washington; is that correct?

11 A. That's correct, we don't.

12 Q. And also does not serve any business
13 customers other than ISPs in Washington; is that
14 correct?

15 A. Are you referencing basic local exchange
16 service?

17 Q. Yes.

18 A. Yes, that would be correct.

19 Q. And because Level 3 does not serve any basic
20 local exchange customers in Washington, it doesn't
21 originate any traffic in this state; is that correct?

22 A. That's correct.

23 Q. And so the way Level 3 makes its money from
24 ISPs is it delivers Internet traffic to them, correct?

25 A. No, we -- well, I don't know that I -- I

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1 think I know where you're going. I think it's maybe a
2 choice of words. We deliver local phone calls made by
3 ISP customers to a modem bank or some location that the
4 ISP has provided, and we may or may not provide
5 transport then to the Internet. Kind of depends on what
6 the ISP has asked us to do.

7 Q. But the basic service that you offer ISPs is
8 getting Internet traffic to them; is that correct?

9 A. Yeah, dial-up Internet access is one of the
10 main components we provide to ISPs.

11 Q. And to get that traffic, to deliver it to
12 your ISP customers, you need to interconnect with Qwest
13 in Washington; is that right?

14 A. That's correct.

15 Q. And that's why Level 3 orders interconnection
16 trunks from Qwest, correct?

17 A. Well, under the contract the way I understand
18 it, we have to order -- well, let me ask you, are you
19 talking about the interconnection trunks between our
20 switches or the actual dedicated facilities that are in
21 dispute in this proceeding?

22 Q. The facilities in dispute in this proceeding.

23 A. The way I understand the contract, the
24 parties may elect to order these facilities, but I also
25 understand that there's a threshold of a DS1's worth of

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1 traffic which requires the facility to be deployed.

2 Q. But if Level 3 needs a facility in order to
3 get Qwest's Internet traffic over to Level 3's ISPs, it
4 would come to Qwest and order an interconnection trunk;
5 isn't that right?

6 A. Well, I believe under the contract that's
7 what we're required to do.

8 Q. Okay. But the point is Level 3 needs these
9 interconnection facilities from Qwest to deliver traffic
10 to its ISPs; wouldn't you agree with that?

11 A. Well, we both need the facilities. Qwest has
12 to deliver the traffic that its customer has -- its
13 customer has made a phone call and said deliver a call
14 to this phone number, Qwest has to deliver that call to
15 the Level 3 network. This facility just helps the two
16 carriers get the traffic where it needs to go.

17 Q. And if you didn't order these trunks from
18 Qwest, you wouldn't be able to provide the service to
19 your ISPs of delivering Internet traffic; isn't that a
20 fact?

21 A. I don't think so. I think that Qwest would
22 then have to route the traffic over its own common
23 transport to the POI. I don't know how Qwest would not
24 deliver the traffic to us.

25 Q. Do you agree that these interconnection

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1 trunks provide a benefit to Level 3?

2 A. They provide a benefit to Level 3 and a
3 benefit to Qwest.

4 Q. Under the interconnection agreement, is it
5 correct that Level 3 has the option of interconnecting
6 with Qwest by leasing these trunks or also by building
7 its own facilities?

8 A. I don't recall the exact section of the
9 contract, but generally yes, those are two other options
10 that are available.

11 Q. And if Level 3 were to build its own
12 facilities, isn't that called a mid span meet under the
13 interconnection agreement?

14 A. I would defer to how it defines it in the
15 contract. I mean I have very general knowledge of what
16 a mid span meet would be, so I don't want to -- I would
17 just defer to the contract.

18 Q. All right. But under mid span meet, do you
19 understand that both parties build their own facilities
20 to a common point?

21 A. Yes.

22 Q. And if Level 3 wants to avoid the costs of
23 building its own facilities, another option it has under
24 the interconnection agreement is it can lease facilities
25 from Qwest, correct?

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1 A. I believe that's correct, yes.

2 Q. And it's expensive to build, for Level 3 to
3 build its own facilities, isn't it?

4 A. I have no idea. To be honest, I don't know
5 what it costs to put up an interconnection trunk.

6 Q. But by leasing trunks from Qwest, Level 3 can
7 avoid the costs of building its own facilities; isn't
8 that right?

9 A. That would be correct, yes.

10 Q. And would you agree that when Level 3 leases
11 facilities from Qwest instead of building its own
12 facilities that it is required to pay Qwest for leasing
13 those facilities?

14 A. That would be correct, yeah.

15 Q. And, in fact, the Telecommunications Act of
16 1996, here's where I'm crossing the line into a legal
17 question, but it does require that an ILEC like Qwest
18 provide interconnection but also that it be compensated
19 for the interconnection; would you agree with that?

20 A. It establishes just and reasonable costs I
21 think or what is now known as TELRIC. But yes, correct,
22 they get paid for the facilities they provide.

23 Q. And the payment coming from the CLEC
24 according to the Act and the FCC rules should be based
25 on the cost of the facility that Qwest is providing;

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1 isn't that right?

2 A. What rule would you reference me to?

3 Q. 252(d)(1) of the Act.

4 A. I'm sorry, do you have one? I like to see.

5 Q. We don't need to pursue it further. If you
6 don't know the answer to that, then the rule speaks for
7 itself.

8 A. There's a general obligation, yeah.

9 Q. A general obligation to what?

10 A. Be compensated, but I would leave it to the
11 language of the statute.

12 Q. Okay, very well.

13 Now would you agree with me that under Level
14 3's proposal in this case to include Internet traffic in
15 relative use of facilities, Level 3 wouldn't pay Qwest
16 anything for interconnection facilities it orders from
17 Qwest?

18 A. This interconnection facility that it runs
19 from the POI to an end office with ISP bound traffic
20 originally included in the calculation, Qwest would not
21 be paid by Level 3 for that facility as we stand today
22 with the traffic that Level 3 delivers.

23 Q. So Level 3 would order the facility from
24 Qwest, Qwest would have to build it and install it, and
25 Level 3 would pay nothing for it; isn't that correct?

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1 A. I would disagree that Qwest has to build and
2 install it. It probably already exists within your
3 network.

4 Q. In some cases it might have to build and
5 install it though, right?

6 A. Might.

7 Q. If Qwest had to do that, under your proposal,
8 Qwest wouldn't be paid, correct?

9 A. Qwest would not be paid given the ISP bound
10 traffic that's on the facility now, although Qwest would
11 have the benefit of having moved that traffic off its
12 common network and putting it on a dedicated facility.

13 Q. Just to be clear, I want to make sure you
14 answer my question, under Level 3's current operations
15 in Washington where it doesn't originate any traffic, if
16 it ordered a trunk from Qwest and Qwest had to put the
17 trunk in or even if the trunk existed already, Level 3
18 would pay nothing to Qwest for that trunk; isn't that
19 correct?

20 A. Mr. Devaney, I think there's actually
21 language in the contract that says if a facility doesn't
22 exist about who has the financial responsibility for
23 paying for that. I think that generally, let's just
24 take the question of relative use. Because Level 3
25 right now only provides traffic, terminating traffic to

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1 ISPs, and that traffic would originate on Qwest's
2 network, Level 3 would not be compensating Qwest for
3 that interconnection trunk.

4 Q. Okay, thank you.

5 A. I think the question of building the trunk
6 though is already -- is covered in another section of
7 the contract.

8 Q. Very well.

9 I take it that Level 3 assesses monthly
10 charges to its ISPs customers; is that right?

11 A. How would you define monthly?

12 Q. Just tell me, how does Level 3 charge its ISP
13 customers?

14 A. It's a very general, very high level, we
15 charge them per port, terminate the calls to a port, and
16 then they buy certain arrangements of could be transport
17 if they want us to take the traffic to another location
18 that they have, or if we put it on the Internet, it
19 could be dedicated Internet access. That can be limited
20 by the amount of capacity they use, or it can be what we
21 call burstable, and if their usage exceeds what they
22 purchase, we provide the excess for whatever fee is
23 agreed to.

24 Q. Does Level 3 include in its charges to ISPs
25 the cost of facilities Level 3 acquires to get Internet

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1 traffic onto its network to deliver the ISPs?

2 A. Are you referring to on the other side of the
3 point of interconnection?

4 Q. Yes.

5 A. Okay. I don't know.

6 Q. And that's certainly something Level 3 could
7 do if it desired; isn't that right?

8 A. I mean very generally I'm sure all of our
9 network costs, we spent \$13 Billion building our
10 network, I'm sure all of those costs are being recovered
11 somewhere.

12 Q. So it's possible that the interconnection
13 costs that we're talking about today are already covered
14 in the rates that Level 3 charges its ISPs; isn't that
15 right?

16 A. I would, you know, I would say it's possible,
17 but only because the way you framed your question.

18 Q. Do you know if they are recovered?

19 A. I don't.

20 Q. As you have articulated in your testimony and
21 your summary, Level 3's current position is that this
22 issue is governed by the FCC's recip comp rules,
23 reciprocal compensation rules; is that right?

24 A. Well, thanks for saying that I articulated
25 anything, but we think that this whole rule is -- this

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1 whole situation is governed by the interconnection rules
2 and the recip comp rules.

3 Q. And specifically you believe that Rule 703(b)
4 of the FCC's reciprocal compensation rules prevents
5 Qwest from recovering costs of facilities on its side of
6 the POI, the point of interconnection, correct?

7 A. That is correct.

8 Q. Would you take a look, please, at your direct
9 testimony, which is Exhibit Number 1, and in particular
10 page 9.

11 A. Okay.

12 Q. I'm sorry, bear with me one moment, if you
13 will.

14 A. Sure.

15 Q. In your direct testimony, isn't it correct
16 you took the position that this dispute was not governed
17 by the FCC's reciprocal compensation rules?

18 A. Where would you -- I would like you to --
19 could you just refer me to the reference in my
20 testimony?

21 Q. I wrote down a page number, and if you bear
22 with me one second, I think I may have written down the
23 wrong number.

24 MR. DEVANEY: So, Your Honor, if I could have
25 30 seconds to find the reference.

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1 JUDGE MOSS: Take your time, Mr. Devaney, I
2 don't think we're going to have a long hearing today.

3 MR. DEVANEY: Thank you.

4 BY MR. DEVANEY:

5 Q. Page 12, thank you for bearing with me there.
6 You have testified as we have just agreed that this
7 issue is governed by the FCC's reciprocal compensation
8 rules at page 12 of your direct testimony, Exhibit 1, I
9 think they're lines 4 or maybe 5 and 6, it's hard to
10 tell, you say:

11 Qwest is applying a rule for reciprocal
12 compensation when reciprocal
13 compensation is not an issue.

14 That's not consistent with what you have said
15 today, is it?

16 A. Mr. Devaney, I don't know if I'm on the right
17 page as you. I'm on page 12, you said lines 5 through
18 7, my direct or my rebuttal?

19 Q. This is in your direct, and the question
20 reads:

21 Please explain the problem with the
22 reasoning underlying the Commission's
23 determination of Qwest's position.

24 A. It's on my page 11, okay.

25 Q. And in responding to that question, you say:

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1 Qwest is applying a rule for reciprocal
2 compensation when reciprocal
3 compensation is not an issue.

4 A. Yes.

5 Q. Do you see that?

6 A. Yes.

7 Q. What is your position; is this governed by
8 the reciprocal compensation rules of the FCC, or is it
9 not?

10 A. I understand. No, we're -- in the ISP remand
11 order, which settled the question of how this traffic
12 was to be treated or compensated for, the FCC
13 established or reiterated Footnote 149 that the
14 interconnection obligations of carriers did not change.
15 Our position is as it's set out in the briefs. It's
16 really kind of an amalgamation of both, because you have
17 a hybrid service.

18 Q. Well, here you're saying that the FCC's
19 reciprocal compensation rules should not apply as I read
20 that sentence, and is that your position, that this
21 issue is not governed by the FCC's reciprocal
22 compensation rules?

23 A. I stick with my testimony, yes, as the
24 testimony is written.

25 Q. So this is not governed by Rule 703(b) of the

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1 FCC's recip comp rules; is that correct?

2 A. No, I would disagree. We have put out how we
3 think the Rules 703(b), 709, depending upon the
4 positions that everybody has set forth.

5 Q. So you are saying now that this is governed
6 by the reciprocal compensation rules; is that right?

7 A. It's exactly as it is in the testimony.

8 Q. Under Level 3's proposal in this case, if
9 Level 3 were to originate traffic to the Qwest network,
10 wouldn't Level 3 end up paying for costs on Qwest's side
11 of the POI?

12 A. Yes.

13 Q. And that's consistent with 703(b), isn't it?

14 A. That's consistent with what the parties have
15 negotiated and how we believe you would apply the
16 relative use rules.

17 Q. So in this case, despite your position here
18 today, Level 3 and Qwest have agreed that Level 3 will
19 pay costs on Qwest's side of the POI; isn't that right?

20 A. Yeah, carrier, you know, one -- the
21 Telecommunications Act does allow carriers to agree to
22 certain interconnection arrangements, and they can go
23 beyond the rules if they wish. The dispute here is, and
24 we don't have any dispute about that part, the dispute
25 is about whether ISP bound traffic is included in the

0059

1 calculation of relative use.

2 Q. Okay, so just to be clear, there is an
3 agreement between the parties in this case that Level 3
4 can be responsible for costs on Qwest's side of the POI;
5 isn't that correct?

6 A. For the traffic that Level 3 originates, yes.

7 Q. Okay. Changing the subject slightly,
8 Mr. Hunt, we're almost done, do you know when retail
9 rates were set here in Washington?

10 A. No, I do not.

11 Q. Have you ever analyzed any of the evidence
12 from the last rate case that Qwest had here in
13 Washington?

14 A. No.

15 Q. Do you know when wholesale rates were set
16 here in Washington?

17 A. Are you referring to the TELRIC rates after
18 the Act passed?

19 Q. Yes.

20 A. It was like '97, I believe, late '96, '97.

21 Q. Have you analyzed any of the evidence that
22 was presented in support of those existing wholesale
23 rates?

24 A. No.

25 Q. Do you know if Level 3 participated in either

0060

1 the retail rate case or wholesale cost docket?

2 A. Since Level 3 started in 1997, I severely
3 doubt that we were involved in those.

4 Q. Okay. You're aware that the wholesale cost
5 docket has actually been going on and is still pending;
6 did you know that?

7 A. If that's -- I will accept that, yeah.

8 Q. And I take it Level 3 has not participated --

9 A. No.

10 Q. -- in any phases of the docket?

11 A. No.

12 Q. So I take it as you sit here today, you don't
13 know what costs went into Qwest's retail rates or its
14 wholesale rates that exist today; is that right?

15 A. That would be correct, yeah.

16 Q. I think you acknowledge in your testimony,
17 and I just want to be sure that you agree with this,
18 that the Washington Commission has rejected Level 3's
19 position in this case with respect to relative use; is
20 that right?

21 A. Can you refer me to the testimony?

22 Q. Well, let me just ask you straightforward
23 then.

24 A. Okay.

25 Q. Are you aware that the Washington Commission

0061

1 in the cost docket, its recent Part B order, said that
2 Internet traffic must be excluded from calculations of
3 relative use?

4 A. Yes, I am aware of that.

5 Q. Are you aware that the Washington Commission
6 roughly a month ago affirmed that ruling on petitions
7 for reconsideration?

8 A. Yes, I am.

9 Q. And as you sit here today then, Level 3 is
10 asking this Administrative Law Judge to depart from
11 those Commission rulings, isn't it?

12 A. Yes, we are.

13 MR. DEVANEY: Thank you, that's all I have.

14 JUDGE MOSS: Any redirect?

15 MR. ROGERS: Yes, Your Honor, just a few
16 questions.

17

18 R E D I R E C T E X A M I N A T I O N

19 BY MR. ROGERS:

20 Q. Mr. Hunt, you were asked a series of
21 questions about the possible alternative method of
22 interconnection at the mid span meet alternative.

23 A. Yes.

24 Q. Do you recall that line of questioning?

25 A. Yes, I do.

0062

1 Q. Mr. Devaney asked you whether it was
2 expensive for Level 3 to build facilities to establish
3 mid span meet points of interconnection?

4 A. That's correct.

5 Q. Later in your testimony you referenced the
6 expense that Level 3 has made in building its network;
7 do you remember --

8 A. Yes.

9 Q. -- making that reference? What was the
10 number that you referred to?

11 A. \$13 Billion.

12 Q. And so Level 3 has made a significant
13 investment to build its network; isn't that fair to say?

14 A. That's correct.

15 Q. Going back to the comparison to between a mid
16 span meet arrangement and establishing a point of
17 interconnection at a tandem using direct trunk transport
18 facilities, as Level 3 has chosen to do, in your mind,
19 does the point of interconnection, the significance of
20 the point of interconnection change in any way depending
21 on which alternative we might choose?

22 A. No.

23 Q. Can you explain what the point of
24 interconnection represents in either one of those
25 scenarios?

0063

1 A. It is the demarcation point between the two
2 companies' networks and kind of establishes who has
3 financial responsibility for the traffic on its side of
4 the POI and the responsibility to bring the traffic to
5 the POI.

6 Q. So is it fair to say that Level 3's position
7 with respect to what the point of interconnection
8 represents, that is that it's a financial and physical
9 demarcation point, is consistent whether you apply the
10 mid span meet point of interconnection alternative or a
11 leased trunk transport interconnection alternative?

12 A. The parties will determine where that POI is,
13 yes.

14 Q. So it really should have no effect at all on
15 the determination of the parties' financial
16 responsibilities in this matter?

17 MR. DEVANEY: Your Honor, I'm going to object
18 to the leading nature of the redirect in this question.

19 JUDGE MOSS: Let's try to be a little more
20 direct in our questions, okay.

21 BY MR. ROGERS:

22 Q. Should it have any effect on the parties'
23 financial responsibilities?

24 A. I don't believe so.

25 Q. Later you were asked about Level 3's

0064

1 arguments about what the applicable law is that should
2 be considered in this case. What would you describe the
3 most relevant law to be?

4 A. The Local Competition Order which establishes
5 the rules for how parties will interconnect their
6 networks, the ISP Remand Order which reaffirmed Footnote
7 149 that ISP bound traffic -- I mean the fact that we
8 made ISP bound traffic bill and keep did not change any
9 of the carrier's obligations to interconnect at a local
10 point.

11 Q. Did you also in your testimony refer to the
12 TSR Wireless case and to the Virginia arbitration
13 decision?

14 A. Yes, TSR Wireless established, I will
15 summarize, that every carrier was responsible for
16 bringing traffic to its own point of interconnection,
17 and that position was reaffirmed in the Verizon or what
18 is called the Virginia arbitrations.

19 Q. You were then asked whether Level 3 was
20 attempting to exclude the rules on reciprocal
21 compensation or not; do you remember that?

22 A. Yes.

23 Q. Would you agree that Level 3's argument is an
24 alternative argument that is a reaction to what Qwest
25 has argued with respect to the application of the

0065

1 reciprocal compensation rules?

2 A. Yes.

3 Q. Can you explain?

4 A. I'm sorry, Mr. Rogers, could you rephrase
5 your question?

6 Q. Is it fair to say that Level 3's position in
7 the arguments that it has set forth with respect to the
8 reciprocal compensation rules and Rule 51.703(b) in
9 particular are an alternative argument?

10 A. Correct.

11 Q. And that alternative is set forth based on
12 the arguments that Qwest has made?

13 A. Correct.

14 Q. Is it fair to say that what we are saying is
15 that if you accept a certain portion of Qwest's argument
16 and then you apply the rules, the rules dictate an
17 alternative result than what Qwest is proposing?

18 A. Yes.

19 MR. DEVANEY: Your Honor, I'm going to object
20 and ask that the question and the answer be stricken on
21 the basis that it's leading. It also clearly calls for
22 legal conclusions.

23 JUDGE MOSS: Well, we don't need to go
24 through the formality of striking, but the questions are
25 exceedingly leading, and it became apparent to me that

0066

1 the witness did not on his own have the ability to
2 answer your prior question, and you put the answer in
3 his mouth through your next follow-up question, and
4 that's just not going to help us, because it's not going
5 to create a record to which I can give weight. So you
6 need to ask the witness questions directly that do not
7 suggest the answer and see what he has to say about it.
8 You can, of course, make whatever arguments you want on
9 brief.

10 MR. ROGERS: Okay, Your Honor.

11 BY MR. ROGERS:

12 Q. Mr. Hunt, we talked about or Mr. Devaney
13 asked you about Level 3's interpretation of the relative
14 use rule.

15 A. Yes.

16 Q. Can you give us a brief summary of what Level
17 3's interpretation of the relative use rule is?

18 A. Well, each --

19 MR. DEVANEY: Your Honor, I'm sorry, I'm
20 going to object again. This is beyond the scope of my
21 direct, or cross rather. Also it is clearly set forth
22 in Mr. Hunt's testimony, written testimony, and this is
23 just a regurgitation of testimony already in the record
24 that I didn't even ask about.

25 MR. ROGERS: Your Honor, I would respond if I

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1 may.

2 JUDGE MOSS: Go ahead.

3 MR. ROGERS: I started with a question asking
4 if he recalled Mr. Devaney's line of questioning about
5 Level 3's interpretation, so I don't see how the
6 objection can be that it's beyond the scope of cross.

7 MR. DEVANEY: Well, I never asked him a
8 question about 709(b) ever.

9 JUDGE MOSS: Well, doesn't Mr. Hunt's
10 testimony cover Level 3's view of 709(b) and what it
11 provides? We really don't need to reiterate what's in
12 his pre-filed testimony, and I think a couple of your
13 questions have asked him to do that. We just don't need
14 it if it's already there.

15 MR. ROGERS: What I'm trying to do, Your
16 Honor, is to respond to questions that were posed in
17 cross-examination in such a way that or essentially what
18 is asked in such a way that it asked for Level 3's
19 position on the Relevant Use Rule. And so while it is
20 certainly in the direct and rebuttal testimony of
21 Mr. Hunt, I would ask that he be afforded the
22 opportunity to respond to the questions that were asked
23 on cross.

24 JUDGE MOSS: And to what question and answer
25 are you specifically referring?

0068

1 MR. ROGERS: The line of questioning that had
2 to do with what Level 3's financial responsibilities are
3 depending on -- essentially that it has agreed to the
4 principle of relative use was the line of questioning,
5 that the parties agree to relative use, we simply
6 disagree about what that means. And so that's what I'm
7 looking to explore with Mr. Hunt.

8 JUDGE MOSS: Isn't that essentially a legal
9 argument, Mr. Rogers?

10 MR. ROGERS: It is, but it's wrapped up in
11 what the interconnection -- the traffic flows are
12 between the two parties, and that's essentially what I'm
13 seeking to have Mr. Hunt explain is how the traffic
14 flows determine the financial responsibilities of the
15 parties.

16 JUDGE MOSS: Well, if we want to talk about
17 the traffic flows, we can ask about that, although I
18 understood that he had already answered that question
19 and that he had responded, and, of course, I don't think
20 it's any contest about the facts in the case, that the
21 nature of the traffic flow is a Qwest customer calling
22 ultimately to an ISP that is a Level 3 customer and that
23 Level 3 is not originating any traffic in Washington.
24 That's what I understood the prior testimony to be in
25 terms of the nature of the traffic. Now if I'm confused

0069

1 about that, we might want to explore it, but.

2 MR. ROGERS: I think you're accurate in that
3 description. What I have been seeking to do I guess is
4 take that a step further to ask Mr. Hunt to explain what
5 that means with respect to relative use and who then
6 bears the financial responsibility for the facility in
7 question.

8 JUDGE MOSS: All right, I will let you
9 explore that a little bit. But I do want to caution
10 that the redirect should be limited to the scope of the
11 cross-examination. That's its purpose, of course, is
12 to rehabilitate any points that you feel like may have
13 been detrimental to your position as developed through
14 the cross-examination, so let's try and do that. And we
15 don't want to spend an excessive amount of time having
16 legal positions argued or presented by a witness,
17 because you all can do that on brief. And frankly, in
18 reviewing all the testimony yesterday in preparation for
19 the hearing, it did strike me that a very dominant
20 portion of it, and I will say this applies to both
21 witnesses, is essentially legal argument. I recognize
22 we have two witnesses who are legal regulatory policy
23 experts; that's not really evidence. Evidence concerns
24 facts, and that's what I'm most interested in hearing.
25 And to the extent there are facts that are not developed

0070

1 through the pre-filed testimony or facts that need to be
2 clarified through cross or redirect, that's what we're
3 here to do.

4 So I have probably wasted more time going
5 through all that than we saved, but I would like us to
6 try to confine the examination of the witnesses in the
7 fashion that I have described.

8 MR. ROGERS: Okay.

9 JUDGE MOSS: But I will let you go ahead and
10 see where we get.

11 THE WITNESS: Excuse me, can I close this
12 blind?

13 JUDGE MOSS: Oh, sure, I'm sorry.

14 MR. DEVANEY: Your Honor, while Mr. Hunt is
15 -- I guess he's done doing that, but can I make one
16 brief comment in response to your statement about the
17 testimony?

18 JUDGE MOSS: Sure.

19 MR. DEVANEY: Qwest concurs that the
20 testimony is predominantly, if not exclusively, legal in
21 nature, and I just wanted to be sure that you are aware,
22 and I trust that you are, that Qwest has pending a
23 dispositive motion in this case because we have thought
24 all along that this is a legal issue that's settled by
25 Washington Commission precedent and the ISP order --

0071

1 JUDGE MOSS: I have read all the papers in
2 the file.

3 MR. DEVANEY: Okay, I just wanted to -- I
4 know that it was just handed off and I --

5 JUDGE MOSS: I'm assuming that I'm here this
6 morning because Judge Schaer has at this juncture at
7 least not ruled on that.

8 MR. DEVANEY: Correct.

9 JUDGE MOSS: So we will go forward.

10 MR. DEVANEY: Okay.

11 JUDGE MOSS: Okay, thank you.

12 BY MR. ROGERS:

13 Q. Mr. Hunt, do you recall being asked a series
14 of questions about the fact that Level 3 has agreed to
15 share the costs of facilities on Qwest's side of the
16 POI?

17 A. Yes.

18 Q. You were then asked whether it was Level 3's
19 position that Level 3 would not be responsible for
20 facilities on Qwest's side of the POI?

21 A. Yes.

22 Q. Do you remember that?

23 A. Yes.

24 Q. Can you explain how those two, or the
25 answers, Level 3's position to those two questions,

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1 relate to one another?

2 A. The concept of relative use obviously is that
3 as parties use the facility, they will build in
4 compensation for the use of the facility, and it's based
5 on the traffic that a carrier originates. So as Level 3
6 begins to send traffic back Qwest's way, then we would
7 anticipate to pay something for that part of the
8 facility. There's a benefit to both parties in doing
9 that. If you took even kind of Qwest's position here,
10 if Level 3 signed up a call center in Seattle, for
11 example, as a customer and there was an ISP bound
12 traffic on that trunk or there was all one-way traffic
13 going to Level 3 from Qwest, then Qwest would be paying
14 100% of the traffic based on that call flow, because
15 Level 3 isn't sending traffic back the other way if it's
16 a call center. It's the same type of traffic as ISP
17 bound traffic in how it flows and how it would go over
18 the network.

19 Q. You were asked a series of questions about
20 whether you were familiar with the cost cases and the
21 cost case history in Washington.

22 A. Yes.

23 Q. And you essentially said you were not
24 familiar with those cases?

25 A. Yeah, not an expert, not in any detail.

0073

1 Q. Are you aware, however, that Qwest offers
2 residential local exchange service?

3 A. Yes.

4 Q. And is it your understanding that part of
5 that residential local exchange service includes the
6 ability to access the Internet?

7 A. Yes, it is.

8 Q. How do people do that generally?

9 A. Same way in which they reach a Level 3
10 customer. Their computer modem would have a number that
11 the call would terminate. It would originate from the
12 computer, travel over the Qwest network, and be
13 terminated at wherever Qwest determines it should be
14 terminated.

15 Q. Is it your understanding that residential end
16 users pay an extra fee for that ability?

17 MR. DEVANEY: Your Honor, objection as beyond
18 the scope of cross.

19 JUDGE MOSS: I think it is beyond the scope,
20 and it's also covered in his direct testimony or his
21 rebuttal.

22 MR. ROGERS: I have nothing further, Your
23 Honor.

24 JUDGE MOSS: All right, Mr. Hunt -- or I
25 don't suppose we have any recross, do we?

0074

1 MR. DEVANEY: No.

2 JUDGE MOSS: And I don't have any questions
3 for you, Mr. Hunt, so with that, you may step down. We
4 appreciate your testimony today.

5 THE WITNESS: Thank you.

6 JUDGE MOSS: Thank you very much.

7 Why don't we take a morning recess before
8 Mr. Brotherson takes the stand, and everybody can
9 stretch their legs for ten minutes, and we will resume
10 at 10:30 by the wall clock.

11 (Recess taken.)

12 JUDGE MOSS: Mr. Brotherson, if you will
13 remain standing when you get to the stand, we'll swear
14 you in.

15

16 Whereupon,

17 LARRY BROTHERSON,
18 having been first duly sworn, was called as a witness
19 herein and was examined and testified as follows:

20

21 D I R E C T E X A M I N A T I O N

22 BY MR. DEVANEY:

23 Q. Good morning, Mr. Brotherson.

24 A. Good morning.

25 Q. Mr. Brotherson, you have presented two pieces

0075

1 of testimony in this case, your direct which has been
2 marked as Exhibit 11, and your rebuttal which has been
3 marked as Exhibit 12. Do you have corrections to either
4 piece of testimony?

5 A. No, I do not.

6 Q. Are the answers you provided in both pieces
7 of testimony true and correct to the best of your
8 knowledge?

9 A. They are.

10 MR. DEVANEY: Your Honor, we would ask that
11 Exhibits 11 and 12 be entered into the record.

12 MR. ROGERS: No objection, Your Honor.

13 JUDGE MOSS: Hearing no objection, they will
14 be admitted as marked.

15 MR. DEVANEY: Thank you, Your Honor.

16 BY MR. DEVANEY:

17 Q. Mr. Brotherson, you have a brief summary, I
18 believe; is that right?

19 A. I do.

20 Q. Please proceed.

21 A. Well, first I would say that I was present
22 during Mr. Hunt's summary, and I concur with a
23 considerable amount of his summary other than maybe the
24 conclusions drawn at the end of it, and that is that we
25 are basically down to one issue, which is relative use.

0076

1 Relative use is how to calculate the credit a CLEC
2 receives on a bill for LIS trunks. And the way the
3 process works is a CLEC comes to Qwest and says, I want
4 to order LIS trunks to these communities, Aberdeen,
5 Bellingham, Olympia, what have you, and Qwest provides
6 the LIS trunks. And the reason I gave those as examples
7 is that it's important for purposes of context to
8 remember that a CLEC in Washington can order a
9 connection, a single point of connection in the LATA,
10 which is to say that they can through a single point of
11 connection order LIS facilities to every community in
12 Washington within that LATA. So a CLEC such as Level 3
13 can order LIS trunks to Aberdeen or Bellingham or
14 wherever, and Qwest bills the CLEC, in this case Level
15 3, for those LIS trunks. But Qwest then issues a credit
16 against that bill for any use that Qwest makes to
17 deliver local calls back to Level 3, telecommunications
18 services. And the issue at the heart of this debate is
19 whether or not Internet traffic, which the FCC has ruled
20 is interstate in nature, should be included in those
21 calculations thereby giving a credit to Level 3 for
22 Internet calls that Qwest customers make.

23 If the Interstate traffic, and I don't think
24 there's any dispute by the parties that the FCC has
25 ruled that Internet traffic is interstate, if the

0077

1 Internet traffic is included in those calculations, then
2 in essence Level 3 could request a LATA wide network be
3 provided by Qwest and no payment then made by Level 3.
4 The heart of the dispute then boils down to the two
5 dueling paragraphs that the parties have proposed.
6 Qwest's language makes clear that the relative use
7 calculations do not include interstate traffic,
8 intrastate traffic, and Internet traffic, that it's just
9 going to include local. And the language that Level 3
10 proposes in their contract language includes -- makes a
11 point of including Internet traffic in the relative use
12 calculations.

13 The Qwest proposed language is the
14 appropriate language for several reasons, not the least
15 of which is the fact that it tracks with what the
16 Washington Commission has done now in two cost dockets.
17 I think the original cost docket ruled that ISP traffic
18 was not included in the relative use calculations. I
19 think the XO motion for reconsideration again asked the
20 Washington Commission, and the Washington Commission
21 again reaffirmed that fact. And then it was also the
22 language in the Qwest SGAT language which the Washington
23 Commission approved. So on three different occasions
24 now they have looked at that question.

25 I think it's also important on a policy level

0078

1 to bear in mind that when the FCC ruled in its ISP order
2 why reciprocal comp was not appropriate, they talked
3 about the improper subsidies and distorted incentives
4 that reciprocal comp on ISP traffic could create and how
5 that was not in keeping with the Act. I think those
6 same policy considerations, that is to say improper
7 subsidies and distorted incentives, come into play when
8 you look at whether or not it is appropriate to include
9 ISP traffic in the transport calculations, in the
10 relative use calculations for LIS traffic or LIS trunk
11 bills. Because the net effect then is to ask Qwest to
12 build a LATA wide network for Level 3 and for Level 3 to
13 have no financial stake and no payments for that network
14 in order for them to receive this Internet traffic for
15 their ISP customers. So I think those same policy
16 considerations that were present in the recip comp order
17 are present in the issue in this case, which is whether
18 or not ISP traffic should be included in the relative
19 use calculations.

20 I think that pretty well summarizes my
21 position.

22 Q. Okay, thank you, Mr. Brotherson. And just
23 for the record, when you use the term CLEC, that's
24 C-L-E-C, all caps.

25 A. Yes.

0079

1 MR. DEVANEY: Mr. Brotherson is available for
2 cross.

3 JUDGE MOSS: All right. And I believe the
4 other term, LIS, that's L-I-S, local interconnection
5 service, it's the acronym, we're in an acronym laden
6 industry here.

7 All right, Mr. Rogers, I think the witness is
8 available for cross-examination.

9

10 C R O S S - E X A M I N A T I O N

11 BY MR. ROGERS:

12 Q. Good morning, Mr. Brotherson.

13 A. Good morning, Mr. Rogers.

14 Q. Is it fair to say that Qwest has
15 characterized FCC Rule 51.709(b) as the relative use
16 rule?

17 A. I believe that's correct.

18 Q. You would agree that this arbitration has to
19 do with a fundamental disagreement about what the
20 relative use rule -- how the relative use rule works in
21 practice?

22 A. By in practice, I think I would agree that it
23 hinges on whether or not the Interstate ISP traffic
24 should be included in the relative use calculations.

25 Q. Okay. If we can look at the text of Rule

0080

1 51.709(b), that's where I would like to begin, and you
2 have it in your direct testimony at page 10, I believe.

3 JUDGE MOSS: It's in my page 11.

4 Mr. Brotherson, if your copy is the same as mine, the
5 answer actually begins on 10, but the language itself is
6 on 11.

7 THE WITNESS: Bear with me just a second, I'm
8 using my printer copy which I have been told numerous
9 times by Ms. Anderl not to do.

10 JUDGE MOSS: Word processing software does
11 present its challenges.

12 A. Yes, I see that.

13 BY MR. ROGERS:

14 Q. The term telecommunications traffic does not
15 appear anywhere in this rule; is that correct?

16 A. By rule, you mean -- it's in the definition
17 section that starts out the whole provision, but in this
18 paragraph?

19 Q. I mean Rule 51.709(b) specifically.

20 A. No, it's not in that paragraph.

21 Q. Even though telecommunications, the term
22 telecommunications traffic does not appear in the
23 relative use rule of 51.709(b), you go on to argue that
24 the definition of telecommunications traffic is
25 critical. Is that fair to say?

0081

1 A. That's true.

2 Q. And the definition of telecommunications
3 traffic is provided at 51.701(b)(1); is that right?

4 A. That's right.

5 Q. On page 11, what I've got as page 11, you
6 give the definition of telecommunications traffic as
7 stated in Rule 51.701(b)(1).

8 A. Correct.

9 Q. Can you read that definition.

10 A. You want me to read the definition out of the
11 rules?

12 Q. Yes, if you could.

13 A. This is called sub part H, Reciprocal
14 Compensation for Transport and Termination of
15 Telecommunications Traffic, 51.701 Scope of Transport
16 and Termination Pricing.

17 Q. Excuse me, I'm mostly just interested in what
18 you have set out in your testimony.

19 A. 701(b).

20 Q. (b)(1), correct.

21 A. (Reading.)

22 Telecommunications Traffic. For

23 purposes of this sub part,

24 telecommunications traffic means

25 telecommunications traffic exchanged

0082

1 between a LEC and a telecommunications
2 carrier other than a CMRS provider
3 except for telecommunications traffic
4 that is interstate or intrastate
5 exchange access, information access, or
6 exchange services for such access.

7 Q. Thank you.

8 Going back to your direct testimony at page
9 11 immediately following where you provided that
10 definition, you state:

11 Under this definition, any traffic that
12 is "Interstate or intrastate access or
13 information access".

14 A. Yes.

15 Q. What is that a quote of?

16 A. The definition above except for
17 telecommunications traffic that is interstate or
18 intrastate, exchange access, information access, or
19 exchange access services for such access. It's a
20 paraphrase. Perhaps quotation is not the appropriate
21 symbol.

22 Q. So, in fact, it's not a quote of the
23 definition, is it?

24 A. No, the quote is the Footnote 20, which is
25 directly above it.

0083

1 Q. Okay.

2 A. I think that should be a single quote, a
3 paraphrase.

4 Q. The paraphrase extracts the term exchange
5 from the portion of the definition that says interstate
6 or intrastate exchange access, correct?

7 A. Yes.

8 Q. The ISP Remand Order which Qwest relies upon
9 for its argument that Internet traffic is interstate in
10 nature doesn't exclude interstate exchange access, does
11 it?

12 MR. DEVANEY: Your Honor, I'm going to
13 register an objection on two grounds. One is that these
14 questions are asking for interpretations of statutes,
15 FCC orders. And the second is the parties' positions on
16 these statutes and the ISP Remand Order are clearly
17 spelled out in both parties' pre-filed testimony, and
18 again all we're doing here is going through pre-filed
19 testimony. There's nothing new that's being added here.
20 So on those grounds, I object to this line of
21 questioning.

22 JUDGE MOSS: All right, well, I'm going to
23 overrule the objection, and I will do so on the basis
24 that my understanding is that Mr. Brotherson, like
25 Mr. Hunt, is being tendered essentially as a policy and

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1 legal expert in this area, and so questions relative to
2 his expertise in that sense I think are appropriate.

3 However, I do want to say, Mr. Rogers, that
4 to the extent this is simply a recapitulation of what's
5 in the testimony, which is a fair amount of what you
6 have done for the last few minutes, I have read the
7 testimony, I have it before me, it's part of the record,
8 so we don't need to just emphasize points in the
9 testimony. That can be done on brief.

10 To the extent you wish to impeach something
11 that's been said in here or otherwise show that the
12 witness may have some information that bears on some of
13 the things that have been said in here that is not
14 evidence from the face of the testimony itself, then of
15 course that's fine.

16 So I'm going to let you proceed for the
17 moment, but again we just don't want to spend an
18 excessive amount of time just simply repeating things
19 that are already before us. Thank you.

20 BY MR. ROGERS:

21 Q. Mr. Brotherson, do you remember the question
22 that was posed to you?

23 A. I'm not sure now. Could you repeat it,
24 please.

25 Q. The question is, isn't it correct that the

0085

1 ISP Remand Order does not exclude interstate or
2 intrastate exchange access from the definition of
3 telecommunications traffic?

4 A. I don't have that order in front of me, and
5 so if -- I know that the FCC ruled it was interstate
6 traffic and not local traffic. I don't know if the term
7 exchange access was used. I think that the reference
8 was whether this traffic was local or interstate, and
9 they used those terms respectively, and I'm not sure if
10 that specific phrase that you have just quoted was in
11 the order or not.

12 Q. I would like to turn your attention to what I
13 have as the beginning of -- it's the bottom of page 24
14 of your direct, or excuse me, it must be your rebuttal.
15 The lead-in question just for reference is:

16 Mr. Hunt argues that Qwest has agreed to
17 implement a single POI per LATA; do you
18 agree?

19 A. I see the question, yes.

20 Q. The answer begins with:
21 Qwest has agreed to establish a single
22 POI per LATA.

23 Is that correct?

24 A. Correct.

25 Q. You then go on to testify on page 25 that

0086

1 Qwest does not agree to a single POI per LATA for
2 Internet traffic among other types of traffic.

3 A. Correct.

4 Q. Is that right?

5 A. Correct.

6 Q. Can you point me to the place in the
7 agreement that that is set forth, that Internet traffic
8 somehow allows Qwest not to apply a single POI per LATA?

9 A. Yes, it's the paragraphs that we're disputing
10 here today, that the calculations specifically exclude
11 Internet traffic from the calculations of relative use.
12 I think it's also in the definitions section of the
13 interconnection agreement for LIS or local
14 interconnection service, which I don't have in front of
15 me, but it defines local service.

16 Q. Okay.

17 A. In the contract.

18 Q. So is it fair to say that Qwest agrees that
19 its position with respect to the relative use dispute
20 does away with the treatment of the establishment or
21 interconnection architecture of one POI per LATA?

22 A. No, it doesn't do away with it at all. A
23 CLEC can order a LIS trunk, as I testified earlier, to
24 Bellingham, a CLEC can order a LIS trunk to Aberdeen.
25 You know, of the original proposal, and one which the

0087

1 FCC dissuaded the CLEC or the RBOCs from continuing, but
2 the original proposal was that a CLEC should have a
3 point of presence in each local calling area, and the
4 FCC made it fairly clear to the RBOCs if they wanted
5 271, I guess, that that was not going to be the
6 requirement, that a CLEC only had to have one switch and
7 one point of interconnection to serve an entire LATA.

8 And so Level 3 under the agreement can order
9 a LIS trunk to any community in the Seattle LATA or any
10 community in the Spokane LATA from a single point of
11 interconnection. I think the only issue that remains
12 then is whether or not the facilities that Level 3 would
13 order and be billed for receive a credit for just local
14 traffic or receive a credit for local traffic plus
15 dial-up Internet traffic.

16 Q. If Level 3 had a single POI per LATA for
17 handling local traffic, Qwest local calls would be
18 brought to that single point of interconnection at no
19 cost to Level 3, correct?

20 A. That's absolutely correct. I think Mr. Hunt
21 gave the example of a call center, and if it was a local
22 call center, then it would be from Bellingham or
23 Aberdeen or anywhere, Qwest would deliver its customers'
24 local calls to that single point.

25 Q. But in the situation where Qwest's

0088

1 residential end users originate Internet related calls,
2 Qwest will not bring those calls to the point of
3 interconnection that's been established free of charge?

4 A. Well, free of charge I think would be the
5 qualifying phrase. I think the LIS facilities would be
6 there, the traffic would flow to the single point of
7 connection, but a credit would not be issued to Level 3
8 for those calls on their LIS bill.

9 Q. So isn't the practical effect that Level 3
10 would be required to establish a point of
11 interconnection in essence at every single Qwest end
12 office because it is required to pay for those dedicated
13 trunk transport facilities?

14 A. No, I certainly wouldn't look at it that way.
15 I think the CLECs argued I think early on that they
16 shouldn't be required to let's say put a 5E switch in
17 every community, that they might only have a few hundred
18 customers in a particular locale, that they ought to be
19 able to serve all of the LATA from a single switch in
20 let's say downtown Seattle, and that they could then go
21 out through these local interconnection service LIS
22 trunks to pick up those calls.

23 And that is possible through the
24 interconnection arrangement that Qwest offers, and
25 clearly there's no dispute with Level 3 and Qwest that

0089

1 for a truly local call from one local subscriber in
2 Olympia who is a Qwest customer to a local subscriber in
3 Olympia who is a Level 3 customer that Qwest would haul
4 that call back to Seattle and deliver it to Level 3 if
5 that's where their switch was located. I think the
6 ability to have a single point in the LATA exists, the
7 only debate is whether or not there's a credit issued on
8 the ISP traffic.

9 Q. On this point throughout your testimony you
10 give the example of an alternative interconnection
11 arrangement, the meet point arrangement, that would
12 allow for the relative use application that Level 3
13 seeks. Would you agree with that?

14 A. That that's in my testimony, yes, I would
15 agree. It's also in the interconnection agreement.
16 That is an alternative that's available to Level 3, but
17 we have never disputed that Level 3 has a right to order
18 LIS trunks and we would install them. I mean it's not a
19 requirement that Level 3 build.

20 Q. Maybe I can be clearer. The meet point
21 interconnection arrangement, Qwest says that if that
22 type of interconnection is used, Qwest would agree that
23 it is responsible for its facilities on its side of the
24 point of interconnection, correct?

25 A. On its side of the meet point. As an

0090

1 alternative to Qwest building a LIS facility, and I will
2 use Bellingham as an example -- let me back up. Meet
3 point is in there because meet point arrangements have
4 been present with independent telephone companies for 50
5 years where an independent telephone company, I don't
6 happen to know one off the top of my head in Washington,
7 but a community in Washington that's owned by an
8 independent telephone company and Qwest would choose to
9 interconnect their two networks so their customers could
10 call each other. Rather than one company building the
11 entire facility, historically the two parties would
12 negotiate a meet point, and they would each build to
13 that point, thereby sharing the cost of the facility.
14 If they each build a portion of the underlying facility,
15 then they would bear the costs up to that meet point.

16 That is an alternative to Level 3 as well.
17 In lieu of asking Qwest to put in a LIS trunk and then
18 leasing that facility from Qwest, Level 3 and Qwest
19 could agree, and I will use Bellingham as the example,
20 that Level 3 would build to a certain meet point, Qwest
21 would build to a certain meet point, they would both
22 have then invested capital in building the network. And
23 therefore I guess in theory you would say Level 3 could
24 lease on the Qwest piece and Qwest could lease on the
25 Level 3 piece of what they both built, but the net

0091

1 effect on a negotiated meet point is each party builds
2 to the meet point and then doesn't bill the other party.

3 Q. But the net effect of what Level 3 is
4 requesting to do is exactly that, isn't it, that Level 3
5 proposes that the point of interconnection be the
6 financial and physical demarcation point of each of our
7 networks?

8 A. No, the demark between the two networks is
9 where Level 3's single point of interconnection within
10 the LATA begins. But then the question becomes in the
11 meet point example, for example, in the contract would
12 be how do you get to Bellingham or how do you get to
13 Aberdeen, and there are several options available. One
14 is you can order LIS facilities, which means Qwest will
15 put in the facilities, and a CLEC can lease at a flat
16 per month rate distance sensitive. Or the CLEC, in this
17 case Level 3, and Qwest in lieu of ordering a LIS
18 facility could each build part of the way to Bellingham
19 or Aberdeen. That would be the context in which a meet
20 point would be used.

21 Q. At page 11 of your rebuttal, if you could
22 turn there, at line 6 specifically.

23 A. Okay.

24 Q. At line 6 you acknowledge that both parties
25 benefit from the interconnection arrangement.

0092

1 A. Right.

2 Q. Both parties benefit fundamentally because
3 both parties have end users that are trying to reach
4 each other either to make or receive a call that is
5 placed by the other parties' end user; is that fair?

6 A. That would be a fair general statement. I'm
7 not sure in the Level 3 situation where it's just in the
8 Internet business if there's any customers from Level 3
9 calling Qwest, but it is true that Qwest customers would
10 want to reach whoever is providing them their Internet
11 service.

12 Q. And those would be customers of Level 3's,
13 correct?

14 A. The Internet provider would be a customer of
15 Level 3 in your hypothetical. I mean they would be
16 connected to the Level 3 switch.

17 Q. Right, I think we're in agreement.

18 A. Okay.

19 Q. In order to have the most efficient
20 interconnection between the parties, the parties have
21 agreed in our interconnection agreement to work jointly
22 to monitor the amounts of traffic that are being placed
23 from Qwest's end users and to have the facilities in
24 place to handle the requisite volumes of traffic; is
25 that fair to say?

0093

1 A. Yeah, that's a true statement. Internet
2 traffic in particular tends to demand a lot of trunks,
3 because a caller can log on and, as opposed to a toll
4 call, stay on for hours at a time or leave their
5 computer on and walk away. I mean it can be up the
6 entire time, and when that happens, that ties up that
7 circuit or that trunk to the ISP port, and that
8 necessitates ordering a lot of trunks to the ISP
9 business for both Qwest or Level 3, whoever is hauling
10 traffic to an ISP.

11 Q. But that caller that is creating that traffic
12 is a Qwest end user in our situation, correct?

13 A. Correct, or an independent telephone company
14 or another CLEC. But if the ISP is connected to Level
15 3, whoever has local service somewhere in the state of
16 Washington to get to that ISP will have to go through
17 Level 3.

18 Q. Assuming the ISP is a Level 3 customer, of
19 course?

20 A. Yes. So Qwest customers would be one, could
21 be some of the customers that call that. Let's say
22 using AOL as an example, if they are AOL subscribers and
23 AOL is connected to the Level 3 soft switch, then a
24 Qwest customer will have to dial a number that will
25 route it to the Level 3 switch.

0094

1 Q. Level 3 has no control over the behavior of
2 the Qwest end user; that's fair to say, correct?

3 A. I'm not sure what you mean.

4 Q. Level 3 doesn't control when that customer
5 can place a call?

6 A. To its ISP?

7 Q. To its ISP.

8 A. No.

9 Q. Level 3 doesn't control how long that
10 customer decides to stay on line with its ISP?

11 A. No.

12 Q. These are services that are sold by Qwest
13 that that end user is using, correct, to initiate that
14 call and stay on line?

15 A. Well, a customer can be an individual, or an
16 end user can be a customer of a number of different
17 providers. In other words, I can buy my local service
18 from Qwest, I can buy my -- in which case I am a local
19 customer of Qwest. I can buy my long distance from
20 Sprint, and when I'm making a long distance call with
21 Sprint I am a customer of Sprint's even though I am also
22 a local customer of Qwest. I can be a subscriber of AOL
23 for Internet service, and when I dial up AOL I am a
24 customer of the ISP for my Internet service. If I,
25 Larry Brotherson, were to dial up AOL in Denver where I

0095

1 live, nothing would happen, because I don't subscribe to
2 that particular provider, so not being a customer I
3 couldn't get in. So you can be a customer of an ISP,
4 you can be a customer of a long distance carrier, you
5 can be a customer of a local service provider, and you
6 would use the same telephone in all instances.

7 Q. Under our agreement, the parties have
8 acknowledged that it's in both parties' interest to have
9 sufficient interconnection facilities in place to handle
10 the volumes that are created by Qwest end users making
11 these Internet calls, correct?

12 A. Sure, we would not want blocked traffic if at
13 all possible.

14 Q. So Level 3 doesn't simply order facilities to
15 serve its ISP customers, does it?

16 A. Oh, I think it does.

17 Q. It's agreed, didn't we just agree that the
18 parties have agreed to establish the requisite amount of
19 interconnection facilities?

20 A. Well, Level 3 would order the LIS trunks, and
21 Level 3 would presumably want to order sufficient LIS
22 trunks to handle the call volumes, and Qwest would want
23 to make sure that there were sufficient facilities there
24 to provide those LIS trunks or to provide that order.
25 So both parties would want the facilities to be

0096

1 sufficient to handle the traffic flow, and the only
2 thing they would debate is how they're paid for.

3 Q. Qwest has taken the position in this
4 arbitration that Internet traffic is interstate in
5 nature, correct?

6 A. Qwest has taken the position that the FCC has
7 ruled a couple, six or seven times now that it's
8 interstate in nature.

9 Q. I'm just curious what those six or seven are
10 now that you have trotted out that number.

11 A. Well, of course, we've got the ISP Remand
12 Order, but in I think five or six of the 271 decisions,
13 they have reaffirmed that ISP traffic is interstate in
14 nature.

15 Q. But you haven't cited any of those in your
16 testimony, have you?

17 A. No.

18 Q. Qwest would agree that Internet traffic is
19 most typically initiated by a local call; would you
20 agree with that statement?

21 A. Could you repeat it, please?

22 Q. Would you agree that dial-up Internet access
23 is most often initiated with a local call?

24 MR. DEVANEY: Your Honor, I'm going to object
25 to this line of questioning on the grounds that, number

0097

1 one, this is all set forth in the testimony of the
2 parties again. And number two, essentially it's a
3 collateral attack on the FCC's conclusion that Internet
4 traffic is interstate. Mr. Rogers is trying to
5 demonstrate that if you call a local number that by
6 definition the call has to be local. But, in fact, the
7 FCC expressly considered this in the ISP Remand Order
8 and ruled that the traffic is interstate. So I object
9 on both grounds, that number one, it's in the testimony,
10 number two, it's a collateral attack. That's not the
11 best part of the Hobbs Act of the FCC's conclusion that
12 this is Interstate traffic.

13 JUDGE MOSS: Well, the Hobbs Act evidentiary
14 objection is a new one to me, but I think I will
15 overrule the objection and let it go on for now.

16 MR. DEVANEY: Thank you, Your Honor.

17 JUDGE MOSS: Mr. Rogers, please proceed.

18 A. When you use I think you said predominantly
19 local, normally the way you access for dial-up purposes
20 as opposed to a high speed or broadband, normally the
21 way you access an Internet provider for dial-up services
22 is to dial a telephone number which is assigned by a
23 local telephone company. However, whether or not that's
24 a local call depends upon what local exchange the
25 customer resides in. And so when I lived at my previous

0098

1 address, I had an 800 number to reach my ISP, because
2 the ISP was in a different local calling area than where
3 my computer was at. You can -- so sometimes there's an
4 FX line, sometimes there an 800 number. If the end user
5 and the ISP are in the same local calling area, then it
6 would be a local call for that end user.

7 BY MR. ROGERS:

8 Q. Qwest advertises multiple products as local
9 exchange products that allow its end users who purchase
10 those products to access the Internet; is that fair to
11 say?

12 A. Yes, I think -- yes, we have a number of
13 local service. If the ISP is in your local calling
14 area, we'll get you there, as will DSL, which is not a
15 dial-up service, it's a high speed service. I'm trying
16 to think of what some of the others would be, but yeah,
17 we have a number of ways you can reach an ISP.

18 Q. There are multiple business line products
19 that address the fact that people want to use local
20 exchange service for Internet access purposes?

21 A. Sure.

22 Q. And Qwest advertises the ability to install
23 additional lines if people desire them for Internet
24 access purposes?

25 A. It's good for business.

0099

1 Q. Qwest also offers services to ISPs, does it
2 not?

3 A. Yes, we sell, as does Level 3, we sell
4 connections to ISPs to our network.

5 Q. You sell ISDN, PRI services out of a local
6 tariff; is that accurate?

7 A. Yeah, the ISDN product is in the local --
8 well, it's not in the interstate tariffs. I don't know
9 if it's in the intrastate or local exchange side of the
10 Washington tariffs. I would have to look at that. But
11 in any event, it's in the Washington tariffs, not the
12 interstate tariffs that we file with the FCC.

13 Q. It's an intrastate tariff?

14 A. Correct.

15 Q. That contains PRI services?

16 A. Correct.

17 Q. And PRI services are services that are
18 oftentimes sold to ISP customers by Qwest; is that
19 right?

20 A. It is probably far and away the predominant
21 product that an ISP would buy from Qwest to connect to
22 the network.

23 Q. There are other products, however, that Qwest
24 offers to ISPs, are there not?

25 A. Yes, there are different kinds of high

0100

1 bandwidth products. I think PRI is probably the most
2 popular because it provides certain signaling
3 capabilities that lets the Internet provider identify
4 the caller, cross check the passwords against the
5 calling telephone number, and things like that.

6 Q. Is the Qwest wholesale dial service a
7 separate service from PRI services?

8 A. Yeah, that would -- excuse me, yes, that
9 would be a product where an ISP -- I would equate
10 wholesale dial with kind of like an 800 number. An ISP
11 pays a premium so that customers in other local calling
12 areas can reach the ISP without incurring a toll charge.
13 The ISP, in fact, pays the cost of that call rather than
14 the end user.

15 Q. Meaning you're collecting a monthly recurring
16 charge from ISPs for wholesale dial service?

17 A. Correct, they would pay -- the ISP would pay
18 us so that someone in Aberdeen can dial a Seattle ISP
19 and not be billed a toll charge.

20 Q. And you described it as like an 800 service.
21 Are they making local calls with this product, or are
22 they making 800 calls with this product?

23 A. Perhaps it would be more akin to an FX would
24 be a better analogy. It would be a product where the
25 parties in Aberdeen would pay a -- would dial a local

0101

1 number, and it would be the ISP who pays the transport
2 to get from Aberdeen back to Seattle through this
3 wholesale dial-up product.

4 Q. Have you had a chance to look at the exhibits
5 marked as Exhibits 13 through 19 that Level 3 has
6 offered as exhibits up to this point?

7 A. You know, I reviewed the file, but I'm not
8 sure by number I know which ones we're talking about, so
9 if somebody could -- were they attached to Mr. Hunt's
10 testimony?

11 Q. No, they were submitted as potential
12 cross-examination exhibits, and they are the Qwest
13 products that we have been talking about generally,
14 including the wholesale dial product and residential and
15 business local exchange products.

16 A. Yes, I did review those. I don't have a copy
17 here in front of me.

18 MR. ROGERS: If I might just have a moment,
19 Your Honor.

20 BY MR. ROGERS:

21 Q. Is there any reason to think that those
22 printouts from Qwest's Web site are inaccurate for any
23 reason? Do they accurately describe Qwest products that
24 are offered?

25 MR. DEVANEY: Your Honor, obviously if he's

0102

1 going to be asked that question, he needs to see the
2 printouts.

3 JUDGE MOSS: I'm wondering, Mr. Rogers, if
4 we're simply building a foundation here to offer these
5 and if perhaps we might simply have these stipulated
6 into the record and avoid an unnecessary line of
7 questions.

8 MR. ROGERS: If we can do that, I would love
9 to do that.

10 JUDGE MOSS: Mr. Devaney, is that a
11 possibility to avoid a line of questions, or might you
12 have some objection to --

13 MR. DEVANEY: Certainly no problem
14 stipulating to authenticity, but I would renew my
15 objection that these are not relevant, because they all
16 go to trying to demonstrate that Internet traffic is
17 indeed local, when the FCC has conclusively ruled that
18 it's interstate.

19 JUDGE MOSS: Well, we're not going to cut off
20 Mr. Rogers' opportunity to make that argument --

21 MR. DEVANEY: Very well.

22 JUDGE MOSS: -- regardless of what rulings
23 might have been made that would defeat it. And so if
24 there's no problem with these particular exhibits, I
25 would rather save time.

0103

1 MR. DEVANEY: I have no objection.

2 JUDGE MOSS: All right, fine, then you can --

3 MR. ROGERS: I would offer these into
4 evidence if I may, Your Honor.

5 JUDGE MOSS: All right, they will be admitted
6 as marked on the stipulation of the parties, and if you
7 have questions about the specific exhibits, of course
8 you will need to tender them to the witness so that he
9 has them before him.

10 MR. ROGERS: Thank you, Your Honor.

11 BY MR. ROGERS:

12 Q. Mr. Brotherson, on page 12 of your direct
13 testimony, and it's as I have marked that page 12, and I
14 think I have the same issue as you do with the printout
15 off of my word processor.

16 JUDGE MOSS: This is the direct?

17 Q. This is direct testimony, the question that
18 was posed is, what policy concerns did the FCC express.

19 A. I have that question.

20 Q. Your argument at this point in your direct
21 testimony is that the FCC adopted a policy to prohibit
22 regulatory arbitrage for the termination of Internet
23 traffic by CLECs. Is that a fair general
24 characterization of your argument?

25 A. It is.

0104

1 Q. At the bottom of, or excuse me, at what I
2 have as line 13 of that page, you state:

3 The improper effects, the FCC concluded,
4 arise from the fact that reciprocal
5 compensation permits carriers to recover
6 their costs "not only from their end
7 user customers but also from other
8 carriers".

9 A. Yes.

10 Q. Qwest is seeking to collect revenue from
11 Level 3 for carrying -- for the facilities that carry
12 Internet traffic originated by Qwest end users, correct?

13 A. Correct.

14 Q. And we have established that Qwest end users
15 pay Qwest for local services that allow them to place
16 those calls, correct?

17 A. If it's in the local calling area, correct.

18 Q. So isn't it accurate to say that Qwest not
19 only collects from their end users, but is also seeking
20 to collect from other carriers in this situation in
21 Qwest's application of their relative use rule?

22 A. No. The reason that's not correct is that if
23 an ISP comes to Qwest and says, I want people in
24 Aberdeen to be able to reach me, AOL, without making a
25 toll call, I want people in Bellingham to reach AOL in

0105

1 Seattle without making a toll call, Qwest charges the
2 ISP for the ability -- for the cost of hauling those
3 calls to the ISP. We may not charge the end user, but
4 that's because the ISP has paid for the transport. The
5 PRI products are priced at what would essentially be a
6 private line rate to get to Aberdeen. The wholesale
7 dial product again is a toll substitute that would let
8 an Internet provider offer services to customers in
9 these other locations. But the ISP is going to pay
10 Qwest so that those customers in those communities can
11 make a local call.

12 Under Level 3's proposal, Level 3 would have
13 Qwest provide those facilities -- we would provide those
14 facilities to an ISP, but they would have to pay for
15 them. Under Level 3's proposal, Level 3 would ask that
16 Qwest provide those facilities to Level 3 but not pay
17 for them, so that now the ISP can have the customers in
18 Aberdeen or Bellingham or whatever can reach AOL without
19 a toll call. But in this instance, Qwest is not
20 compensated by either the ISP if they were our customer
21 or Level 3 if they were the Level 3 customer even though
22 these are interstate calls or non-local calls.

23 Q. On page 13, the next page, you go on to
24 discuss the policy concerns further at line 13. You
25 state:

0106

1 Level 3 is precisely the type of carrier
2 the FCC singled out in its ISP Remand
3 Order as causing market distortions and
4 engaging in regulatory arbitrage.

5 A. Yes.

6 Q. Are you aware that the FCC specifically
7 relied upon Level 3's agreements with all other RBOCs
8 except Qwest in setting its rate regime?

9 A. I'm not sure what the -- the short answer is
10 no. I'm not sure what rate regime is or what these
11 other agreements are.

12 Q. You're familiar with the rate regime that was
13 adopted in the ISP Remand Order, are you not?

14 A. Oh, yes, yes, that rate regime of the formula
15 for Internet traffic, yes.

16 Q. The formula and the rates themselves?

17 A. Correct.

18 Q. Are you aware that the FCC in a footnote
19 specifically relied upon three separate agreements that
20 Level 3 executed with SBC, Verizon, and BellSouth for
21 the basis of its rates?

22 A. No, I was not. I knew they said that to do
23 away with that recip comp would be in essence rate
24 shock, and it was going to be a phase out, and they
25 looked at different ways to phase those out, and

0107

1 presumably Level 3's proposal is the one they opted for
2 if that's your agreement.

3 Q. So the ISP Remand Order was a decision meant
4 to address regulatory arbitrage for terminating minutes
5 of use for terminating Internet traffic, correct?

6 A. The pricing regime, if that's the term we're
7 going to use, basically said that no new entrants could
8 receive recip comp if they hadn't been up until then.
9 But for those companies who had built their business
10 model in part on receiving recip comp for ISP traffic,
11 there would be a phase out of that over I think it was a
12 three year period, and there was a formula to accomplish
13 that.

14 Q. Okay. And you're not debating that the rates
15 that were ultimately adopted for the interim period were
16 very close and the structure was very similar to Level
17 3's agreements with other carriers?

18 A. I don't know. If that's what the footnote
19 says, I'm assuming that's the basis for it. I don't
20 know.

21 Q. Level 3 has proposed language in Section
22 7.3.1.1.3.1 that contains an example.

23 A. I think we have, by the way, the person in
24 the room who came up with that numbering system.

25 Q. I think I have given the section accurately,

0108

1 but my point is that Level 3 has proposed an example of
2 how relative use would work. Do you --

3 A. I see the example.

4 Q. -- know what I'm referring to?

5 A. Yes, it's in my direct testimony in bold.

6 Q. Setting aside the parties' different
7 understandings of how relative use ought to apply as it
8 relates to Internet traffic, Qwest has not provided an
9 example of how relative use will work in practice, has
10 it, in its language?

11 A. No.

12 Q. Has Qwest proposed a definition of relative
13 use anywhere in the agreement?

14 A. I don't recall if it's in the definition
15 section or not.

16 Q. Is there anything that you can point me to
17 that describes that relative use means that the
18 originating carrier is responsible for the cost of the
19 facilities to carry that originating traffic?

20 A. I guess I would refer you to the contract, to
21 the Qwest proposed language that says the provider of
22 the LIS two-way facility, all right, will initially
23 share the cost of the facility by assuming a relative
24 use factor. I mean do you want me to read the
25 paragraph? If you read through that language, I think

0109

1 it says how the relative use works. The one party
2 orders the facility, they're billed for it, but they're
3 given a credit based upon the actual minutes of use for
4 non-Internet related traffic that the other party uses
5 for originating calls.

6 Q. My concern is that I don't believe that
7 anywhere in Qwest's language is the term originating
8 used.

9 MR. DEVANEY: Your Honor, object that there
10 is no question there.

11 Q. Can you point me to anywhere in Qwest's
12 language?

13 A. (Reading.)

14 The nominal charge to the other party
15 for the use of the entrance facility EF
16 as described in Exhibit A shall be
17 reduced by this initial relative use
18 factor. Payments by the other party
19 will be according to its initial
20 relative use factor for a minimum of one
21 quarter.

22 And then it talks about how the initial, this
23 is when there's no history, how the initial factor is
24 this 50/50.

25 The initial factor will continue for

0110

1 both bill reduction and payments until
2 the parties agree to a new factor based
3 upon actual minutes of use data for
4 non-Internet related traffic to
5 substantiate the change in that factor.

6 If either party demonstrates with
7 non-Internet related data that actual
8 minutes of use during the first quarter
9 justify a relative use factor other than
10 50%, the parties will retroactively true
11 up.

12 I don't see it in the language that I have
13 included in my testimony. I think we would have to go
14 back to the other language in the section to get us --
15 the other language in the contract to get us to where it
16 will walk us through that process.

17 Q. You believe that somewhere in the contract
18 there's a description of what relative use means?

19 A. I don't know if there's a definition. I
20 believe that the contract language walks the parties
21 through how the payment for the LIS trunks works itself
22 through, which is that the CLEC or one party orders the
23 LIS facilities, they're billed for them, but they're
24 given a credit by the other party's use of the
25 facilities. And I can't -- I included the disputed

0111

1 paragraphs that we had teed up in the petition, but I
2 didn't include the entire section on LIS and the
3 calculations for LIS.

4 Q. Okay. We have sort of talked around the
5 issue that I think we're both aware of, which is if
6 Qwest's language is adopted and Internet traffic is not
7 included, in the specific situation of Level 3 and
8 Qwest's interconnection, you would arrive at a relative
9 use factor of zero.

10 A. Yes.

11 Q. Is there anything in Qwest's language that
12 would tell us exactly what the practical result of a
13 relative use factor of zero is?

14 A. Well, if the credit were zero, the net effect
15 would be there would be no credit on the bill to Level 3
16 for the LIS facilities.

17 Q. So zero in essence means Level 3 is 100%
18 responsible?

19 A. Yes. I mean it's the inverse of no credit
20 against the bill is the same as 100% responsible for the
21 bill.

22 Q. Okay. Likewise, if we had the call center
23 scenario, if Level 3 established a call center where
24 local voice calls were placed and it was all
25 one-directional traffic but they were local voice calls,

0112

1 Qwest would be responsible for 100% of the facilities in
2 question?

3 A. Say that again? I'm sorry, I was rereading
4 my language to see where something was located.

5 Q. If Level 3 had a service that terminated
6 local exchange voice calls such that all of the traffic
7 would flow in the same manner as it does currently with
8 ISP bound traffic, Qwest would pay for 100% of the
9 facilities?

10 A. If it is 100% local calls originating from
11 Qwest customers to Level 3, yes.

12 Q. So it's only the fact that we're talking
13 about Internet traffic that means Level 3 pays for 100%
14 of the facilities in Qwest's mind?

15 A. It's not just Internet traffic. I think our
16 language excludes toll as well. But yes, for our
17 examples it's the Internet traffic, the effect of
18 excluding the Internet traffic would give Level 3 the
19 entire bill or zero credit in the inverse.

20 MR. ROGERS: Okay, I don't have anything
21 further. Thank you.

22 JUDGE MOSS: Any redirect?

23 MR. DEVANEY: Thank you, Your Honor, very
24 briefly.

25

0113

1 R E D I R E C T E X A M I N A T I O N

2 BY MR. DEVANEY:

3 Q. Mr. Brotherson, Mr. Rogers asked you some
4 questions about the fact that Qwest sells some Internet
5 related services and facilities out of local tariffs.
6 Do you recall that?

7 A. I do.

8 Q. In the ISP Remand Order where the FCC
9 concluded that Internet traffic is interstate, did the
10 FCC address that issue; do you recall?

11 A. There was a specific acknowledgment of that
12 in their order where they say, we recognize that the ISP
13 connections are provided out of intrastate tariffs, but
14 nevertheless it is interstate traffic.

15 Q. You also were asked questions by Mr. Rogers
16 about the meaning of the terms telecommunications
17 traffic, that's in quotes, and the term traffic as used
18 in the FCC's reciprocal compensation rules. Do you
19 recall that line of questioning?

20 A. Yes.

21 Q. Do you know whether the FCC amended its
22 reciprocal compensation rules after it issued the ISP
23 Remand Order?

24 A. Yes, they did. I mean they issued the ISP
25 Remand Order, which ruled that ISP traffic was

0114

1 interstate, and then turned around and amended these
2 rules following that decision.

3 Q. Do you know if the rules were intended to
4 implement the decision?

5 A. They were intended to address that decision,
6 so yes, I would take that to mean they wanted -- they
7 were intended to incorporate that decision into the
8 rules, so I would take that to mean that's exactly their
9 intent.

10 Q. And since the ISP Remand Order, are you aware
11 of whether the FCC has opined on whether Internet
12 traffic is subject to the reciprocal compensation
13 provision in 251(b)(5) of the Act and the FCC's
14 Reciprocal Compensation Rules?

15 A. Since the ISP decision?

16 Q. Yes.

17 MR. ROGERS: Your Honor, I would object
18 before the answer is provided. I think if we're going
19 into 271 decisions, we have established that that's
20 beyond the scope of his testimony.

21 JUDGE MOSS: Overruled.

22 A. Yes, I think in response to a question from
23 Mr. Rogers I responded to that as well. I think in
24 several of the 271 decisions they reaffirm that ISP
25 traffic is interstate.

0115

1 Q. And do you know if they address that issue in
2 the Verizon Arbitration Order that Level 3 has cited?

3 A. Yes, that was one of the issues in the
4 Verizon Arbitration Order, and setting aside some other
5 issues that the parties debate about, I think they made
6 a very clear statement that ISP traffic was interstate
7 in nature.

8 Q. And not included in reciprocal compensation?

9 A. Not included in reciprocal comp.

10 MR. DEVANEY: May I have one moment, Your
11 Honor?

12 JUDGE MOSS: Sure.

13 (Discussion off the record.)

14 MR. DEVANEY: Your Honor, that's all I have
15 for Mr. Brotherson. At this time though, I would like
16 to renew Qwest's dispositive motion. I'm not sure if
17 that's necessary to do procedurally, but just to be
18 sure.

19 JUDGE MOSS: Yeah, I'm a little uncertain of
20 what Judge Schaer may have said about it, so as far as I
21 understand, the motion is being carried with the case
22 for the time being, and I will certainly treat it as a
23 live motion. It hasn't been ruled on one way or the
24 other as far as I know, so we're going to get to a
25 conclusion here.

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1 MR. DEVANEY: Thank you.

2 JUDGE MOSS: So one way or another. Although
3 I will add to that, that may have some bearing on our
4 discussion about post hearing process, we'll get to that
5 in a few moments.

6 Mr. Rogers, did you have any recross that was
7 prompted by the redirect?

8 MR. DEVANEY: I think just briefly.

9

10 R E C R O S S - E X A M I N A T I O N

11 BY MR. ROGERS:

12 Q. You have said that the subsequent -- that the
13 FCC has spoken to the nature of ISP bound traffic
14 subsequent to its ISP Remand Order. It's fair to say
15 that what they have said -- what they said in the ISP
16 Remand Order and what they have said subsequently is
17 that it's interstate for the purposes of intercarrier
18 compensation, correct?

19 A. They have certainly said that it's interstate
20 traffic, and they have certainly said it's interstate
21 traffic for purposes of intercarrier compensation. I
22 don't know if they limited it to that, but what you have
23 just said is a true statement.

24 Q. They did limit it to that though, didn't
25 they, in Footnote 149 of the ISP Remand Order?

0117

1 A. I'm not familiar. It's all I can do to
2 remember the order generally without the footnotes.

3 Q. Well, you used the footnote in your
4 testimony, so maybe we can go there.

5 A. All right, let's go back to it. Was that in
6 direct or rebuttal?

7 Q. I'm going to need a minute to find it, so if
8 you will bear with me.

9 A. Okay.

10 Q. It is in your rebuttal testimony at page 23.

11 A. Okay. It's my Footnote 45?

12 Q. It's actually in the text of your testimony.

13 A. Right.

14 Q. At line 13.

15 A. Okay.

16 Q. Can you read that.

17 A. (Reading.)

18 This interim regime affects only the
19 intercarrier compensation, i.e., rates
20 applicable to the delivery of ISP bound
21 traffic. It does not alter carriers'
22 other obligations to transport traffic
23 to points of interconnection.

24 And then Footnote 45. That was a footnote
25 citing the reference to the interim regime for

0118

1 reciprocal comp, interim regime meaning this phase out
2 process for those companies getting paid recip comp.

3 MR. ROGERS: Thank you, I have nothing
4 further.

5 JUDGE MOSS: All right, I believe we're
6 finished with this witness then. Mr. Brotherson, thank
7 you very much for your testimony today, and you may step
8 down from the stand and resume your seat at the table or
9 wherever you're comfortable.

10 All right, do counsel have any summation they
11 would care to give or -- let's be off the record.

12 (Discussion off the record.)

13 JUDGE MOSS: We had a brief off the record
14 discussion about post hearing process here. Mr. Rogers
15 has expressed that Level 3 would prefer to have the
16 opportunity to file a post hearing brief. Mr. Devaney
17 has expressed the idea that the one issue at hand has
18 been adequately briefed at this point. In the interest
19 of ensuring that no one goes away feeling that they have
20 been deprived of an adequate opportunity to argue their
21 case, I think we will continue to allow for the
22 simultaneous post hearing briefs, but we are mindful of
23 the fact that the motion for dismissal or summary
24 determination that was filed by Qwest earlier in this
25 proceeding remains pending. The issue has been argued

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1 in those papers, and those would be part of the
2 consideration insofar as an arbitrator's report is
3 concerned. And so if a party feels it unnecessary to
4 make further argument that would simply be a reiteration
5 of what has previously been argued, then that will not
6 prejudice the party. On the other hand, I will, as I
7 said, allow for what Judge Schaer originally allowed
8 for, which is the simultaneous post hearing briefs. And
9 so if either or both parties elect to file such a brief,
10 they may do so.

11 I do think that those should be short. I
12 don't believe I will impose an arbitrary page
13 limitation. Mr. Rogers, you suggested something in the
14 neighborhood of 10 to 15 pages would be adequate. I, as
15 I usually am, am impressed by counsel's capable work and
16 have confidence that the arguments will be limited to
17 what is necessary and so I won't impose a page
18 limitation, but I also expect the briefs to be
19 appropriate in length to the fact that we have a single
20 issue in dispute, so I will rely on you for that.

21 I'm getting a little ahead of myself here, I
22 had earlier raised the question of whether the parties
23 wanted to make any sort of summation, and then I cut
24 that off with the discussion of post hearing process.
25 So if anybody feels the need for that, I feel like we

0120

1 have had a fairly discreet and brief hearing this
2 morning, I have it well in mind, do either of you feel a
3 need to make a summation?

4 MR. ROGERS: I don't, Your Honor, at this
5 point.

6 MR. DEVANEY: Your Honor, my reaction is only
7 if you think it would be beneficial.

8 JUDGE MOSS: I would not particularly find it
9 beneficial. Again I think I have --

10 MR. DEVANEY: Then my desire is not to give
11 one.

12 JUDGE MOSS: Lunch would be more beneficial.

13 All right, I believe the case calls for an
14 arbitrator's report by November 27th, and so that
15 appears to be the plan based on the Second Supplemental
16 Order that I have here before me.

17 Is there anything else, any other business we
18 need to conduct?

19 MR. DEVANEY: Do we have a date for briefs?
20 I'm trying to remember.

21 JUDGE MOSS: Oh, sorry, yes, you do. The
22 briefs were set for November 8th.

23 MR. ROGERS: Do we have any sense of when we
24 might be able to have a transcript of this hearing?

25 JUDGE MOSS: Let's be off the record.

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1 (Discussion off the record.)

2 JUDGE MOSS: We have had some discussion off
3 the record regarding the desire to expedite, the desire
4 by Level 3 to expedite the transcript, and they will
5 make whatever arrangements are appropriate to their
6 needs with the court reporter following our session
7 today.

8 The briefs will be due on November 8th. I am
9 not prepared to disrupt the procedural schedule that was
10 established at the pre-arbitration conference some weeks
11 ago. So again, we do have the time lines that are
12 established for these types of proceedings that we have
13 to be sensitive to, and I don't recall if there was any
14 waiver of those in this instance or not, but we're
15 looking apparently at a November 27th deadline.

16 Any other business?

17 MR. DEVANEY: Your Honor, just to confirm,
18 there was no waiver in this case.

19 JUDGE MOSS: Oh, okay, thank you. That's the
20 day before Thanksgiving.

21 All right, if we have no further business,
22 then we will close the record, and thank you very much
23 for your efforts today.

24 (Arbitration adjourned at 11:50 a.m.)

25