BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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

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Level 3 Communications, LLC, ("Level 3"), through its undersigned counsel, submits this Post-hearing Brief in support of its proposed resolution of the issue in its interconnection arbitration with Qwest Corporation ("Qwest").

I. SUMMARY OF FACTS AND LEVEL 3'S POSITION

Level 3 establishes a point of interconnection ("POI") with Qwest in each LATA. Tr. at 40-1, 85. Because the volume of traffic exchanged between carriers may frequently justify dedicated transport facilities, Qwest typically requires (as it has under this Agreement) the deployment of "direct trunk transport" facilities ("DTTs") from certain Qwest end offices directly to the POI it establishes with a competitive local exchange carrier such as Level 3.[1] Tr. at 41. These facilities sit entirely on the Qwest network, on Qwest's side of the POI.[2] WPH-5T at 9. Because the DTTs are dedicated to traffic between Qwest and Level 3, they are configured so that traffic to the Level 3 network, as well as traffic from the Level 3 network, if any, travel over these facilities. Both carriers benefit from the establishment of these facilities. Tr. at 48-9, 91-2, 95. The "relative use" factor apportions the financial obligations for these facilities based upon the relative percentage of calls each party's customers originate. WPH-1T at 4-5.

Level 3 established local interconnection to provide direct inward dialing capability to its Internet Service Provider ("ISP") customers in Washington and presently serves no customers that originate traffic. Tr. at 46-7. Today, all traffic that travels over the DTT facilities on Qwest's network is originated by Qwest customers and is terminated to Level 3's ISP customers. Tr. at 41. Further, Qwest has ISP customers of its own who may purchase services from local and/or intrastate tariffs, Qwest rates locally dialed calls from its end users to ISPs as local, and Qwest reports revenue from ISPs as intrastate revenue for separations purposes. WPH-5T at 11, Tr. at 98-101, Level 3 Cr. Exh. 19. Qwest also offers a product called "Wholesale Dial" which is

[1] The parties have agreed to establish DTTs only once a threshold of one DS1's worth of traffic for three consecutive months from the originating party's end office to its tandem is reached. *See* Section 7.2.2.1.3 of the Agreement.

[2] Although Level 3 has made a significant investment to build its own network, Qwest does not compensate Level 3 for the facilities Level 3 deploys on its side of the POI. Tr. at 42, 62.

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a wholesale dial-up Internet access service sold to ISPs much like Level 3's service. Level 3 Cr. Exh. 19.

The issue before this Commission is simple—who is responsible for the costs of bringing a call placed by a Qwest customer over the Qwest network to the POI. These costs can be divided into three categories; Non-recurring Charges, Recurring charges, and "True-up" Charges, if any. WPH-1T at 9-10. It is Level 3's position that when 100% of the traffic carried over these facilities is originated by Qwest, under binding Federal Communications Commission ("FCC") rules, Level 3's relative use of these facilities would be 0% and Qwest may not charge Level 3 either non-recurring or recurring charges for these facilities. Should the percentage of relative use change in the future, because a true-up mechanism is burdensome and difficult to apply, any new factor should apply prospectively. WPH-1T at 31.

II. SUMMARY OF ARGUMENT

FCC "rules of the road," including 47 C.F.R. § 51.703(b),[3] permit Level 3 to select a single POI per LATA and require both Qwest and Level 3 to deliver their originating traffic to that POI at no charge to the other carrier.[4] In the *ISP Order on Remand*, the FCC explicitly affirmed that these interconnection rules continue to apply to ISP-bound traffic.[5] Nevertheless,

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[3] Hereafter, all references to 47 C.F.R. will be cited as "FCC Rule xx" or "Rule xx."

[4] *See* 47 C.F.R. § 51.703(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1042, 1062 (1996) (subsequent history omitted) ("*Local Competition Order*"); *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) ("*Texas 271*"); *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al*., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) (*"TSR Wireless"*), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM")*; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 52 (Wireline Comp. Bureau, rel. July 17, 2002) ("*Federal Arbitration Order*").

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, n.149 (2001) ("*ISP Order on Remand*"), *remanded WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied.*

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Qwest attempts to avoid these rules because it asserts that they do not apply to Internet-related traffic (Qwest's term for ISP-bound traffic). Although Qwest relies on the *ISP Order on Remand* and FCC Rules to support its position, Qwest misapplies and misreads both and ignores the important impact of the D.C. Circuit's decision in *WorldCom v. FCC.*

Qwest argues that Internet-related traffic is excluded from the rules of the road by the exception in FCC Rule 51.701(b)(1) for "interstate or intrastate exchange access." Qwest, however, does not even claim that Internet-related traffic is "interstate… exchange access," but asserts that Internet-related traffic must be excluded because it is jurisdictionally "interstate" or "interstate access" traffic. This sleight-of-hand ignores the fact that "exchange access" is a statutorily defined term and that the FCC has not concluded that Internet-related traffic is "exchange access." Qwest's argument based on the definition of "telecommunications traffic" must therefore fail.

Moreover, Qwest's reliance on FCC Rule 51.709(b) is inapposite. In the first instance, 51.709(b) is focused primarily upon terminating compensation—not the originating responsibilities at issue here. By its express terms, the rule makes clear that Level 3 must pay for two-way facilities only to the extent that Qwest uses the facilities to *terminate* traffic that is originated by Level 3's customers. Nothing indicates that FCC Rule 51.709(b) was intended to override FCC Rule 51.703(b)'s prohibition on charges for facilities Qwest uses to carry traffic originated by its customers.

Even if, as Qwest argues, FCC Rule 51.709(b) governs pricing for facilities used to originate traffic from Qwest's end offices to its POI with Level 3, it does not require that Internet-related traffic be excluded from a relative use calculation. First, it refers to "traffic," not "telecommunications traffic," so the scope of traffic to be included in 51.709(b)'s relative use calculation is not limited by the exceptions to the definition of "telecommunications traffic." However, even if "traffic" were equated with "telecommunications traffic," after *WorldCom v.*

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FCC there is no longer any basis for excluding Internet-related traffic from "telecommunications traffic." Because all of the traffic (or telecommunications traffic) at issue in this case is being generated by Qwest's customers when they make local calls to connect to ISPs, this rule, when applied correctly, does not support Qwest's position. The only circumstance under which Level 3 could be required to pay for a portion of these facilities would be if a Level 3 local customer was initiating the calls and Qwest used the facilities to *terminate* Level 3's traffic. The Commission should adopt Level 3's position and find that Internet-related traffic must be included in the relative use calculation.

III. ARGUMENT

A. THE COMMISSION'S PRIOR RULING CAN BE DISTINGUISHED

Under the Act, this Commission has jurisdiction to arbitrate the interconnection dispute between Qwest and Level 3.[6] It is also charged with resolving the issues set forth in Level 3's Petition and Qwest's Response based on the evidence presented in this arbitration.[7] Level 3 is entitled to negotiate and arbitrate its own individual interconnection arrangements, based on its business plan, priorities, and the business compromises it is willing to make as part of the negotiation process. If the Commission were to resolve every arbitration issue by adopting Qwest's Statement of Generally Available Terms ("SGAT") language, that would make the negotiation and arbitration provisions superfluous. Congress could not have intended such a result.

Although the Commission previously adopted Qwest's position on relative use, Level 3 was not a party to that proceeding.[8] And, as the Commission recognized,[9] it will revisit this

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[6] 47 U.S.C. § 252(b).

[7] 47 U.S.C. § 252(b)(4).

[8] *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirty-Second Supplemental Order, etc., (Wa. UTC June 21, 2002) ("*UNE Rates Decision*").

[9] *Id.* at ¶ 113.

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decision as further judicial and federal regulatory review occurs. At most, the prior decision is a form of precedent to be reversed or distinguished here.

In this proceeding, Level 3 has presented factual evidence and substantive legal arguments that support Level 3's position and that the Commission did not consider previously. First, the Commission's earlier analysis did not consider binding FCC *interconnection* rules, such as FCC Rule 51.703(b), which require Qwest to deliver its originating telecommunications traffic to the POI at no charge to Level 3. Second, the Commission improperly applied a *terminating* compensation rule, FCC Rule 51.709, to require the sharing of costs for *interconnection* facilities according to the relative *local* traffic flow over that facility. As discussed herein, 51.709 relates *only* to the amount of compensation that an interconnecting carrier owes a providing carrier for using dedicated transport facilities to transport traffic that the paying carrier originates. Moreover, the local/non-local distinction is no longer recognized under FCC rules. Third, other arbitration decisions not considered by the Commission, including the *Federal Arbitration Order* and decisions by the Arizona and New York commissions and the Minnesota arbitrator, support Level 3's position.

B. FCC "RULES OF THE ROAD" REQUIRE CARRIERS TO PAY FOR INTERCONNECTION FACILITIES USED TO BRING THEIR CUSTOMERS' CALLS TO THE POI

Section 251 of the Communications Act of 1934, as amended ("Act"), imposes duties on all telecommunications carriers in order to facilitate competition in telecommunications markets. The parties' positions relate to two different obligations arising under the Act: (1) the obligation to *interconnect* with other carriers under Section 251(c)(2); and (2) the obligation to pay *reciprocal compensation* under Section 251(b)(5) for the transport and termination of calls that originate on one carrier's network and terminate on another carrier's network. The *Minnesota*

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Recommended Decision specifically distinguished this Commission's precedent for failing to recognize this important distinction between interconnection and reciprocal compensation.[10]

In order to understand the distinction between these interconnection and reciprocal compensation obligations, it is helpful to envision the network over which the call passes when a Qwest customer calls a Level 3 customer. By way of example, assume that the Level 3 customer is a local law firm. When the Qwest customer wishes to contact her lawyer, she will initiate the call by dialing a local number from her home or business telephone. The locally dialed call will be routed over Qwest's local network to the Qwest central office that serves the Qwest customer. From there, the call will be switched over Qwest's network (either common facilities or facilities that are dedicated to carrying traffic between Qwest and Level 3) to the POI. From the POI, the call will be routed over Level 3's network until the call is delivered by Level 3 to its customer.

As a second example, assume that the same Qwest customer wishes to place a local call to her ISP so that she can "surf the net." The call will be routed in the same fashion as the call to the Qwest customer's lawyer. The only difference is that, in the case of the ISP-bound call, the customer will place the call from her computer instead of her telephone. As explained below, regardless of whether the law firm or the ISP is the called party, the rules regarding Qwest's *interconnection* obligation—including bearing the costs of Qwest's facilities used to deliver its originating traffic to the POI—remain the same.

Under the Act, each carrier has different responsibilities for the costs associated with carrying these calls, depending on whether the carrier is originating or terminating the call. The first set of rules concerns the obligation of the originating carrier (*i.e*. Qwest) to carry the call to the POI between the two carriers' networks. FCC Rule 51.703(b) incorporates the general principle applicable to financial responsibility for originating traffic: "A LEC may not assess

[10] *Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC P5733,421/IC-02-1372, Arbitrator's Recommended Decision, 9 (Minn. PUC Nov. 1, 2002) ("*Minnesota RD*"). (Attached as **EXHIBIT 1**.)

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charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." Under Rule 51.703(b), Qwest is responsible for routing the call from the Qwest customer to the POI and must absorb all costs associated with the origination of traffic on Qwest's side of the network. Although Qwest recognizes its obligation under this rule for locally dialed voice traffic, it refuses to recognize the same obligation for locally dialed ISP-bound traffic.[11] Tr. at 87-9.

There is nothing in FCC Rules that relieves Qwest of its obligation to deliver its originating traffic to the POI based on the *type* of interconnection (facilities-based or UNE) chosen by Level 3. Whether Level 3 establishes a meet point interconnection arrangement or a UNE interconnection arrangement has no impact whatsoever on the facilities Qwest must provide. Qwest's willingness to bear the cost of these facilities under a facilities-based, meet-point interconnection arrangement but not a UNE-based interconnection arrangement (using DTT UNEs Level 3 purchases from Qwest) is inconsistent with its duty to provide interconnection on rates, terms and conditions that are nondiscriminatory under Section 251(c)(2)(D). Tr. at 49-50, 62-3.

In *TSR Wireless*, the FCC found that ILECs were bound by FCC Rule 51.703(b) to absorb the costs of delivering their customers' traffic to the POI between the ILEC network and the network serving the "exclusively one-way" paging companies.[12] While paging calls may be locally dialed, as the FCC acknowledged, the paging traffic at issue in *TSR Wireless* often crosses state boundaries.[13] Thus, the "interstate" (and one-way) traffic at issue in *TSR Wireless* was analogous to the "interstate" ISP-bound traffic that is at issue in this case. Nevertheless, the FCC found that under FCC Rule 51.703, "the cost of the facilities used to deliver this traffic is

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[11] Qwest also implicitly recognizes the applicability of this rule for locally dialed ISP-bound traffic that is carried on Qwest's common network capacity. Before the threshold for establishing DTT is reached, Qwest carries ISP-bound traffic across its network to its POI with Level 3 at no cost to Level 3.

[12] *TSR Wireless* at ¶ 7.

[13] *Id.* at ¶ 31.

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(303) 415-0409

the originating carrier's responsibility…" and the originating carrier "recovers the costs of these facilities through the rates it charges its own customers for making calls."[14] Further, the FCC clarified beyond doubt the relationship between Rules 51.703(b) and 51.709(b): "Section 51.709(b) applies the general principle of section 51.703(b)…to the specific case of dedicated facilities."[15] Thus, "the [Local Competition] Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates."[16] Contrary to Qwest's argument, this statement shows that *TSR Wireless* is relevant to this dispute because it addressed application of FCC Rule 51.709(b) for two-way dedicated facilities.

Because dedicated facilities are used both to originate traffic (which is not compensable under Section 251(b)(5)) and terminate traffic (which may be compensable under Section 251(b)(5)), the FCC devised a system to take that distinction into account. Reciprocal compensation obligations for dedicated transport facilities are owed only for that portion of traffic that is headed toward the providing carrier:

> The rate of a carrier providing transmission facilities to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[17]

As the Minnesota Arbitrator found:

> [w]hen the interconnecting carrier [Level 3] sends no traffic back to Qwest, there is no FCC regulation that would obligate the interconnecting carrier to pay anything for the interconnection facilities. Rather, that cost would be considered, under § 51.703(b), to be the originating carrier's responsibility.[18]

The Arizona commission also recognized the crucial distinction between originating interconnection obligations and terminating compensation obligations and found that ISP-bound

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14 *Id.* at ¶ 34.
15 *Id.* at ¶ 26.
16 *Id.* at ¶ 25.
17 47 C.F.R. § 51.709(b).
18 *Minnesota RD* at 6.

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(303) 415-0409

traffic between Level 3 and Qwest should be included in the relative use calculation.[19] Both correctly rejected Qwest's attempt to blur the important distinction between, on the one hand, reciprocal compensation obligations for terminating another party's traffic and, on the other hand, interconnection obligations for delivering a party's own traffic to the POI—both of which are recognized and incorporated in the FCC regulations concerning the relative use principle.

In applying FCC Rule 51.709(b), the *Federal Arbitration Order* addressed the difference between a carrier's originating interconnection obligations and its terminating compensation obligations for two-way trunks. That *Order* found that requiring a CLEC to bear all of the recurring costs, and even one-half of the non-recurring costs, for two-way trunks on the ILEC's side of the POI used to carry the ILEC's originating traffic, in addition to 100% of such costs on the CLEC's side of the POI, improperly allocates costs between interconnecting carriers in violation of FCC rules.[20] This illegal cost allocation is precisely the result that Qwest seeks to achieve in this arbitration.

The important distinction between interconnection responsibilities and terminating compensation rights is also recognized in the FCC's Section 271 orders that separately evaluate an RBOC's compliance with interconnection obligations (under checklist item one) and its compliance with reciprocal compensation obligations (under checklist item 13).[21] While the FCC has affirmed that RBOC's need not *pay* reciprocal compensation for ISP-bound traffic to satisfy the reciprocal compensation checklist item, its Section 271 orders do not recognize a similar ISP-bound exemption from an RBOC's interconnection obligations. Moreover, if as Qwest argues, FCC rules implementing Section 251(b)(5) exclude ISP-bound traffic from

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[19] Opinion and Order, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rules, Terms and Conditions for Interconnection*, Dkt. Nos. T-03654A-00-0882 and T-01051-B-00-0882, Decision No. 63550, 10 (Ariz. Corp. Com., April 10, 2001).

[20] *Federal Arbitration Order* at ¶¶ 148-49.

[21] *See e.g. Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, 17 FCC Rcd 12,275 (2002) ("*New Jersey 271 Order*").

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reciprocal compensation payments, then Qwest may not rely on these same rules to require Level 3 to pay Qwest for carrying ISP-bound traffic either.

As the FCC has found, requiring Qwest to bear the costs of delivering its traffic to the POI is not a "taking" of its property without just compensation because "the originating carrier recovers the cost of these facilities through the rates it charges its own customers for making calls."[22] Qwest is providing interconnection facilities to carry to the POI traffic that its customers originate for its own benefit (or at least its own customers' benefit). Tr. at 41. Qwest receives revenue from its customers from providing them services that let them place both voice and dial-up ISP-bound calls. Tr. at 98; Level 3 Cr. Exh. 13-15. The Act and FCC rules simply do not permit Qwest to impose on Level 3 the costs of originating calls placed by Qwest's customers.

C. THE *ISP ORDER ON REMAND* DOES NOT ALTER QWEST'S INTERCONNECTION OBLIGATIONS

Qwest contends that the *ISP Order on Remand* requires a departure, in the case of ISP-bound traffic, from the FCC's rules regarding cost allocation for interconnection obligations. The linchpin of Qwest's argument in this case is the proposition that the FCC characterized ISP-bound traffic as "interstate." Based upon this characterization, Qwest concludes that traffic originated by Qwest customers bound for Level 3's ISP customers should be excluded when determining the relative use of facilities used to carry this Qwest-originated traffic to the POI. In so arguing, Qwest urges an expansion of the FCC's order that the FCC explicitly prohibited.

In adopting its interim compensation regime for transport and termination of ISP-bound traffic, the FCC explicitly stated:

> This interim regime affects **only** the **intercarrier compensation** (*i.e.,* the rates) applicable to the delivery of ISP-bound traffic. It does not alter carrier' other obligations under Part 51 rules, 47 C.F.R. Part 51, or existing interconnection

[22] *TSR Wireless* at ¶ 34.

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(303) 415-0409

> agreements, **such as obligations to transport traffic to points of interconnection**.[23]

With this footnote, the FCC conclusively countered any suggestion that interconnection obligations with respect to ISP-bound traffic would be affected in any respect by its order. There is no reasonable interpretation of this language that could support Qwest's position.[24] As the *Minnesota Recommended Decision* found, "[n]othing in the text of the *ISP Remand Order* suggests that it applies to any functions other than transport and termination on the *terminating* side of the point of interconnection."[25] Because the issue in this proceeding is not a matter of intercarrier compensation for terminating traffic, the primary authority relied upon by Qwest is irrelevant.

And even if the *ISP Order on Remand's* classification of ISP-bound traffic for purposes of terminating compensation is relevant, it still does not support Qwest's position. In the *ISP Order on Remand*, the FCC also stated that "we . . .are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic."[26] Contrary to this directive, Qwest's position does just that. For ISP-bound traffic carried over dedicated facilities, Qwest ignores FCC Rule 51.703(b) and attempts to shifts to Level 3 100% of the costs of carrying Qwest's originating traffic over Qwest's network to the POI. Tr. at 111. For voice or "interstate" paging traffic, however, Qwest follows FCC Rule 51.703(b) and bears 100% of the costs of transporting traffic originating on its network to the POI, even if all traffic is "interstate" and flows only one way (as it does with paging). Tr. at 112; *TSR Wireless* at ¶¶ 19-21. The Commission therefore cannot adopt Qwest's

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[23] *ISP Order on Remand* at ¶ 78, fn. 149 (emphasis added).

[24] It is for this reason that Qwest's Hobbs Act argument has no merit. Qwest has insisted that Level 3 is collaterally attacking the FCC precedent mandating that ISP-bound traffic be considered interstate for the purposes of Rule 51.703(b). This argument is based upon Qwest's mistaken position that the FCC has found that ISP-bound traffic is interstate for all regulatory purposes. As discussed above, the FCC has not found ISP-bound traffic to be interstate for all regulatory purposes. Therefore, Qwest's Hobbs Act argument, along with its other arguments, fails.

[25] *Minnesota RD* at 7 (emphasis added).

[26] *ISP Order on Remand* at ¶ 90.

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BOULDER, CO 80302
(303) 415-0409

position when doing so would take precisely the action that the FCC, in the *ISP Order on Remand*, expressly stated it was unwilling to take.

Qwest is correct that the FCC *tried* to exclude ISP-bound traffic from the definition of "telecommunications traffic." The FCC ruled in the *ISP Order on Remand* that *all* telecommunications are subject to the requirements of Section 251(b)(5). It then ruled that Section 251(g) excludes certain types of traffic from Section 251(b)(5), including ISP-bound traffic. Consequently, the FCC rewrote the definition of "telecommunications traffic" in connection with reciprocal compensation requirements by doing two things: First, it eliminated the restriction that reciprocal compensation applies only to "local" traffic; Second, it added language taken from Section 251(g) to identify types of traffic that were excluded from reciprocal compensation obligations: "interstate or intrastate exchange access, information access, and exchange services for such access."

However, the D.C. Circuit in *WorldCom* rejected the FCC's second step. It ruled that Section 251(g) does not provide the FCC with the authority to exclude ISP-bound traffic from Section 251(b)(5). Therefore, the court remanded the case for further proceedings, making clear that the classification of ISP-bound traffic is open:

> [W]e do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act . . . or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of "telecommunications" covered by § 251(b)(5)…[27]

Level 3 anticipates that Qwest will contend that there is no meaningful distinction between "interstate access" and "interstate exchange access." Qwest is wrong. "Exchange access" is defined by the Act, while "interstate access" is not. Further, no part of any of the FCC rules at issue here refers to "interstate access." They refer to "exchange access." Traffic to ISPs cannot be "exchange access" because it is not used "for the purpose of the origination or

[27] *WorldCom v. FCC*, 288 F.3d at 434.

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BOULDER, CO 80302
(303) 415-0409

termination of telephone toll services."[28] It is used to provide "information service,"[29] which is defined differently than "telephone toll service."[30] While Qwest may have used the terms "interstate access" and "interstate exchange access" interchangeably for services to interexchange carriers ("IXCs"), the terms are not interchangeable for services to ISPs. Even if ISP-bound traffic were somehow "information access"—another term not defined by the Act—the D.C. Circuit has ruled that the FCC cannot say that "information access" to ISPs is excluded from reciprocal compensation obligations. Moreover, the FCC has repudiated the "local/non-local/interstate" distinction for reciprocal compensation obligations.

Thus, even as limited (to reciprocal compensation) as the FCC sought to render its *ISP Order on Remand,* the FCC's reasoning for excluding ISP-bound traffic from Section 251(b)(5) and the reach of the Order remain in doubt. This was confirmed by the *Federal Arbitration Order*:

> We disagree with Verizon's assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation. In remanding the [*ISP Order on Remand*] to the Commission, the D.C. Circuit recently rejected the Commission's earlier conclusion that section 251(g) supports the exclusion of ISP-bound traffic from section 251(b)(5)'s reciprocal compensation obligations. Accordingly, we decline to adopt Verizon's contract proposals that appear to build on logic that the court has now rejected.[31]

In sum, the *WorldCom* decision means that references to "telecommunications traffic" in the FCC's rules include ISP-bound traffic. As a result, under FCC Rule 51.703(b), Qwest is still required to bring ISP-bound traffic to the POI with Level 3 and may not charge Level 3 for the facilities used to do so.[32]

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[28] 47 U.S.C. § 153(16).

[29] 47 U.S.C § 153(20).

[30] 47 U.S.C. § 153(48).

[31] *Federal Arbitration Order* at ¶ 261 (footnotes omitted).

[32] Contrary to Mr. Brotherson's testimony, Tr. at 96, 114, the FCC's Section 271 orders do not affirm that ISP-bound traffic is "interstate access." Rather, they find that the RBOC's refusal to pay reciprocal compensation for Internet-bound traffic is not a failure to satisfy the reciprocal compensation checklist item. *See e.g. New Jersey 271 Order* at ¶ 160. If the RBOCs may refuse to pay compensation to CLECs for ISP-bound traffic under Section 251(b)(5), it necessary follows that Level 3 may

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If the *ISP Order on Remand* could be read to leave any doubt as to the continued applicability of Rule 51.703(b) to ISP traffic, recent decisions leave no such doubt. As the New York Public Service Commission found, whether or not the requesting carrier provides service to ISPs or traditional local voice services has no impact whatsoever on its rights to interconnection under federal law and the ILEC's obligation to deliver its originating traffic to the POI at no cost to the CLEC.[33] Similarly, the *Federal Arbitration Order* rejected Verizon's attempts to "relieve Verizon of its obligation to deliver its originating traffic to the network of a co-carrier, and shift[] to the co-carrier Verizon's cost of facilities used to deliver its originating calls."[34] It also found that where an ILEC and CLEC jointly provide exchange access, the ILEC should assess any charges for its exchange access services on the relevant IXC, not the CLEC.[35] The FCC approached the carriers' interconnection responsibilities generally, and said nothing about excepting ISP-bound traffic from its rulings.

D. QWEST'S ARGUMENT IGNORES THE PLAIN LANGUAGE OF THE FCC RULES

In order to support its position, Qwest must also rewrite FCC Rules 51.709(b) and 51.701(b). FCC Rule 51.709(b) provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of **traffic** between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send **traffic** that will terminate on the providing carrier's network. (Emphasis added.)

In his testimony, Mr. Brotherson inexplicably modified the plain language of the rule by replacing the word "traffic" with the phrase "telecommunications traffic." LBB-T1 at 10. Although the FCC used the phrase "telecommunications traffic" in Rule 51.709(a), it did not use

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similarly refuse to pay Qwest compensation for ISP-bound traffic under Rule 51.709(b) (one of the rules that implements Section 251(b)(5)).

[33] *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006, Order Resolving Arbitration Issues, 5-10 (N.Y. P.S.C. May 24, 2002). (Attached as **EXHIBIT 2**.)

[34] *Federal Arbitration Order* at ¶ 46.

[35] *Federal Arbitration Order* at ¶ 177.

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that phrase in Rule 51.709(b). Tr. 80-81. As the Minnesota arbitrator found,[36] basic principles of statutory construction therefore provide that Qwest may not substitute the phrase "telecommunications traffic" for the word "traffic."[37]

Qwest engages in similar sleight-of-hand in its reading of Rule 51.701(b). Under the plain language of 51.701(b), the only traffic excluded from the definition of "telecommunications traffic" is "interstate or intrastate exchange access, information access, or exchange services for such access." Although claiming in a general fashion that ISP-bound traffic is "interstate," Qwest nowhere demonstrates that this traffic is "exchange access" or "exchange services for such access," and the FCC did not make any such conclusion in the *ISP Order on Remand*.[38] Indeed, it would be improper to treat ISP-bound traffic as exchange access given that the FCC has excluded ISP-bound traffic from payment of access charges.[39]

In the *ISP Order on Remand*, the FCC also deleted the word "local" from its reciprocal compensation rules in 51.701 *et seq*, repudiating what it had previously interpreted as a non-interstate/interstate distinction.[40] Thus, the character of traffic as "local" or "interstate" is no longer relevant to relative use calculations under 51.709(b), even under Qwest's construction of that Rule.[41] As explained above, following *WorldCom*, "telecommunications traffic" necessarily includes ISP-bound traffic. Therefore, even under Qwest's construction of applicable FCC rules, there is no basis to exclude ISP-bound traffic from the relative use calculation.

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[36] *Minnesota RD* at 8 (*citing Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)).

[37] *See also Russello v. United States*, 464 U.S. 16, 23 (1983).

[38] *ISP Order on Remand* at ¶ 42, n.76. As explained above, traffic to ISPs cannot be "exchange access," and "information access" to ISPs is not excluded from reciprocal compensation obligations.

[39] *See MTS and WATS Market Structure*, CC Docket 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988).

[40] *ISP Order on Remand* at ¶ 34.

[41] Nor can Qwest rely on the FCC's conclusion in the *ISP Order on Remand* that ISP-bound traffic is excluded from reciprocal compensation because it is "information access." That particular FCC conclusion was overturned by the D.C. Circuit in *WorldCom*, and thus is no longer good law. *WorldCom v FCC*, 288 F.3d at 434.

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E. EXCLUDING ISP-BOUND TRAFFIC FROM THE RELATIVE USE CALCULATION PERMITS QWEST TO ENGAGE IN IMPROPER ARBITRAGE

The FCC made it clear that the same policy concerns that led it to adopt a new intercarrier compensation regime to address claims of arbitrage do not alter carriers' interconnection obligations. First, as discussed above, the FCC explicitly stated that its ruling regarding reciprocal compensation for transport and termination of ISP-bound traffic does not alter other obligations under FCC rules "such as obligations to transport traffic to points of interconnection."[42]

Furthermore, Qwest's argument about the possibility for arbitrage is illogical. Because LECs were paying reciprocal compensation on a **per-minute** basis, the FCC was concerned that carriers had an incentive to seek out customers with high volumes of incoming traffic (such as ISPs) in order to increase those per-minute revenues.[43] However, the costs of the dedicated interconnection facilities that are at the core of the dispute here are not volume sensitive, either on a per minute or per call basis. WPH-1T at 21. Including ISP-bound traffic in the relative use calculation does not generate more revenue for Level 3—thus there is no "reciprocal compensation windfall." To the contrary, it creates a revenue windfall for Qwest.

Where Qwest delivers a voice call to its POI with Level 3, under Qwest's proposal, Qwest would collect only its end user's local service rate. But when it delivers an ISP-bound call to that same POI, despite the fact that Qwest holds out its local services as providing customers the capability to make both voice and dial-up ISP calls, Qwest would collect both its local service rate from its end user and DTT charges from Level 3. Thus Qwest's relative use calculation generates a revenue windfall for Qwest. Moreover, if, as Qwest alleges, it is permitted to make this distinction because it is providing "interstate access," and assuming that "interstate access" is no different than "interstate exchange access,"[44] the *Federal Arbitration*

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42 *ISP Order on Remand* at ¶ 78, fn. 149.

43 *Id*.

44 As explained above, such an assumption would be incorrect.

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Order makes clear that Qwest must charge the IXC (in this case the ISP) for such services, not Level 3.[45] Yet under its proposal, Qwest would be permitted to impose originating access charges on Level 3 (on a flat rate basis) that Qwest is prohibited from imposing on ISPs. WPH-5T at 11.

Further, Qwest's proposal effectively requires Level 3 to interconnect with Qwest at each end office in violation of FCC rules. As Mr. Brotherson stated, it is Qwest's position that Qwest has no obligation to establish a single POI per LATA for the exchange of ISP-bound traffic. Tr. at 85-8. Thus, Qwest seeks to prevent the economic efficiencies arising from a single POI per LATA by requiring Level 3 to bear additional costs on Qwest's side of the network for interconnection. There is no legal basis for such a position.

CONCLUSION

For the foregoing reasons, Level 3 urges the Commission to adopt the Interconnection Agreement language proposed by Level 3 for the determination of the parties' relative use of facilities on Qwest's side of the POI. ISP-bound traffic should be included in the relative use calculation, the relative use factor should be applied to apportion both recurring and non-recurring charges, and the factor should be applied prospectively only. Qwest's argument that ISP-bound traffic should be ignored for purposes of determining relative use of facilities on Qwest's network, on Qwest's side of the POI, relies on a misreading of applicable federal law and should be rejected. Requiring Qwest to pay for the cost of carrying calls, including ISP-bound calls, originated by Qwest customers is the only result that is supported by the FCC's rules and orders regarding the interconnection obligations of carriers.

[45] *Federal Arbitration Order* at ¶ 177.

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RESPECTFULLY SUBMITTED this 8th day of November, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing LEVEL 3 COMMUNICATIONS, LLC POST-HEARING BRIEF in WUTC Docket No. UT-023042, including diskette of same in Word and Adobe format, was sent via electronic, facsimile and ABC Legal Messenger on this 8th day of November, 2002, addressed to the following:

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