BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996, WITH QWEST CORPORATION REGARDING RATES, TERMS, AND CONDITIONS FOR INTERCONNECTION	**Docket No. UT-023042**

QWEST CORPORATION'S POST-HEARING BRIEF

I. Introduction

Qwest Corporation ("Qwest") submits this post-hearing brief in accordance with the scheduling order in this docket. Because Qwest has already briefed the single issue presented in this arbitration in its briefs relating to its motion to dismiss or for summary judgment, this post-hearing submission focuses primarily on the half-day arbitration hearing held October 29, 2002. To avoid unnecessary repetition of its prior briefs, Qwest respectfully refers the Administrative Law Judge to those briefs and incorporates them by reference.[1]

II. Discussion

A. Level 3 Is Improperly Requesting The ALJ To Ignore Binding, Dispositive Commission Rulings On The Issue Of Relative Use.

In the arbitration hearing, Level 3's witness, William Hunt, conceded several points that have a direct and important bearing on this case. First, he acknowledged that Level 3's position relating to

[1] *See* Qwest's Motion to Dismiss or, in the Alternative, for Summary Determination ("Qwest Motion"), filed October 9, 2002; Qwest's Reply in Support of its Motion to Dismiss or, in the Alternative, for Summary Determination ("Qwest Reply"), filed October 16, 2002.

Internet traffic and relative use has been rejected twice by this Commission within the past several months.[2] As Mr. Hunt agreed, Level 3 is asking the ALJ to depart from the Commission's unequivocal rulings in the cost docket establishing that Internet traffic must be excluded from the relative use calculations that carriers use to allocate financial responsibility for interconnection trunks.[3]

Needless to say, the Commission's administrative law judges are required to apply the law that the Commission establishes through its rules and orders. Here, the Commission ruled that Internet traffic must be excluded from relative use in the cost docket after considering detailed evidence and briefing on the issue.[4] The Commission issued this ruling not in the context of an isolated dispute

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[2] Hearing Transcript ("Tr.") at 60-61. *See* Thirty-Second Supplemental Order; Part B Order; Line Splitting; Line Sharing Over Fiber Loops; OSS; Loop Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring Rates for UNEs, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 113 (June 21, 2002) ("*Thirty-Second Supplemental Order*"); Thirty-Eighth Supplemental Order; Final Reconsideration Order, Part B, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, at ¶ 64 (Sept. 23, 2002).

[3] *Id*. at 60-61.

[4] In addition to addressing this issue in Docket No. UT-003013, the Commission has also addressed whether Internet-bound traffic falls within the scope of parties' reciprocal compensation obligations for transport and termination of telecommunications traffic in Docket Nos. UT-003022 and UT-003040. In those dockets, the Commission's *Twenty-Fifth Supplemental Order* recognized that the FCC determined that Internet-bound traffic is not "telecommunications" and that such traffic does not fall within the purview of Section 251(b)(5). *See* 25th Supplemental Order; Order Granting In Part And Denying In Part Petitions For Reconsideration Of Workshop One Final Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040, at ¶ 9 (WUTC Feb. 8, 2002). Furthermore, the language Qwest proposes for the parties' interconnection agreement is identical in all material respects to the language in Qwest's Washington SGAT. In its *Thirty-Ninth Supplemental Order* in Docket Nos. UT-003022 and UT-003040, the Commission approved Qwest's SGAT and found that it complies with Qwest's obligations under Sections 252 and 271 of the Act. *See* 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022/UT-003040 ¶ 391 (WUTC July 3, 2002) ("*39th Supplemental Order*") ("The Commission

between two carriers but, rather, in a generic docket with broad participation among incumbent local exchange carriers ("ILEC s") and competitive local exchange carriers ("CLECs") doing business in Washington. It would plainly be improper to reject that ruling here and to adopt a different rule for Level 3 that would not apply to any other carrier. By asking the ALJ to ignore the Commission's prior rulings, Level 3 is requesting relief that cannot and should not be granted.

B. Because Level 3 Does Not Originate Any Traffic, Its Proposal Would Deny Qwest Any Cost Recovery For Interconnection Trunks.

Mr. Hunt also conceded that Level 3 does not serve any local exchange customers in Washington – residential or business – and therefore does not originate any traffic in this state.[5] Instead of providing service to customers who originate traffic, Level 3 exclusively serves Internet service providers ("ISPs") that are in the business of receiving only one-way Internet traffic.[6] As Mr. Hunt admitted, the absence of originating traffic on Level 3's network means that under its proposal, Level 3 would pay nothing for interconnection trunks; Qwest would bear 100% of these costs.[7] For several reasons, this result is impermissible.

Allowing Level 3 to obtain interconnection facilities from Qwest for free would violate the requirement in section 252(d)(1) of the Telecommunications Act of 1996 ("the Act") that ILECs be compensated for providing interconnection at rates that are "just and reasonable" and based on cost. While Congress required ILECs to take the extraordinary step of opening their networks to use by their competitors, it also recognized and commanded that ILECs must be compensated for doing so. In *Iowa Utilities Board v. FCC*, the United States Court of Appeals for the Eighth Circuit succinctly described the effect of this requirement: "Under the Act, an incumbent LEC *will* recoup the costs

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approves Qwest's SGAT and all Exhibits, as filed on June 25, 2002, and allows the SGAT to become effective on July 10, 2002").

[5] Tr. at 46.

[6] *Id*.

[7] *Id*. at 20-22.

involved in providing interconnection and unbundled access from the competing carriers making these requests."[8] Notwithstanding its proposal in this case, even Level 3 recognizes that Qwest has a right to be compensated for the interconnection facilities it provides to CLECs.[9]

This case sharply demonstrates the obvious unfairness that would result from denying ILECs compensation for the costs they incur to provide CLECs with interconnection facilities. Level 3's business plan of serving ISPs in Washington depends on gaining access to the Internet traffic on Qwest's network. Without that traffic, Level 3 has nothing to offer ISPs. Thus, Level 3 orders interconnection trunks from Qwest so that it can attract the business of ISPs and earn a profit. It is this business plan and conduct of Level 3 that causes Qwest to incur the often substantial cost of providing interconnection trunks.[10] And yet, under its proposal, Level 3 would pay nothing for these costs it imposes on Qwest.[11]

Adding to the unfairness of its proposal is the fact that Level 3 avoids significant costs by ordering and leasing interconnection trunks from Qwest. Under its interconnection agreement with Qwest, Level 3 has the option of interconnecting with Qwest by building its own facilities and meeting Qwest's network at a negotiated "mid-span meet point."[12] However, the costs to Level 3 of building its own facilities under these "mid-span meet" arrangements can be substantial and can require large amounts of up-front capital. The option of interconnecting with Qwest by leasing interconnection trunks -- entrance facilities and direct trunk transport -- allows Level 3 to avoid these costs and these capital

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[8] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (emphasis added).

[9] Tr. at 50-51.

[10] Tr. at 47-48.

[11] *See* Ex. 12 (Brotherson Rebuttal testimony) at 4.

[12] Exhibit B to Level 3's Petition for Arbitration, § 7.1.2.3.

outlays.[13] Mr. Hunt acknowledged this fact, while also expressly admitting that when Level 3 leases from Qwest instead of building facilities, it must pay Qwest:

> Q. But by leasing trunks from Qwest, Level 3 can avoid the costs of building its own facilities; isn't that right?
>
> A. That would be correct, yes.
>
> Q. And would you agree that when Level 3 leases facilities from Qwest instead of building its own facilities that it is required to pay Qwest for leasing those facilities?
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> A. That would be correct, yeah.[14]

Under its proposal, though, Level 3 would have it both ways – it would avoid the costs of building its own facilities and would pay nothing for the facilities it orders from Qwest. In other words, Level 3 would shift all of these facilities costs onto Qwest.

This is precisely the type of result the FCC had in mind when it ordered an end to intercarrier payments of reciprocal compensation for Internet traffic in the *ISP Remand Order*.[15] As Qwest discussed in its motion to dismiss, this ruling by the FCC was intended to eliminate the payment of improper subsidies by ILECs to CLECs specializing in serving ISPs and to reduce the economic incentive of CLECs to focus on ISPs to the exclusion of other customers.[16] Here, allowing Level 3 to obtain facilities from Qwest for free and to avoid building its own facilities will result in a subsidy from

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[13] Tr. at 50.

[14] Tr. at 50.

[15] *See* Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, 2001 FCC LEXIS 2340 (rel. Apr. 27, 2001), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*").

Qwest to Level 3 and will further distort Level 3's economic incentive to serve just ISPs and no other customers. It was precisely to avoid these effects that both the Colorado and Oregon commissions ruled against Level 3 in prior Qwest Level 3 arbitrations.[17]

Finally, Level 3's proposal that would require Qwest to pay all the costs of interconnection trunks ignores the fact that Level 3 can recover the costs of these facilities from its ISP customers. According to Mr. Hunt, Level 3 recovers all of its network-related costs through the rates it charges ISPs; indeed, it is possible that Level 3 is already recovering the costs of interconnection facilities from these customers.[18] Recovering these costs from ISPs instead of Qwest is consistent with the principles the FCC established in the *ISP Remand Order*. As the FCC stated in ordering an end to reciprocal compensation for Internet traffic:

> Finally, and most important, the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments

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[16] Qwest Motion at 9-10.

[17] *See In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation,* Dkt. NO. 00B-601T, Decision No. C01-312, at 36 (Colo. PUC March 30, 2001); *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Commission Decision, ARB 332, Order No. 01-809, Arbitrator's Decision at 9 (Oregon PUC Sept. 13, 2001).

Level 3 relies upon a decision from a previous arbitration with Qwest in Arizona in support of its arguments. Level 3 Opposition at 17. This decision is not persuasive authority. First, the Arizona Commission rendered its decision before the FCC issued its *ISP Remand Order* and, therefore, the decision Level 3 cites did not consider that order. Second, since the Level 3 arbitration, the Arizona Commission recognized in the Section 271 docket that the FCC defined ISP-bound traffic as interstate access traffic outside the bounds of Section 251(b)(5). Decision No. 63977, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Opinion and Order ¶¶ 29-34 (Aug. 30, 2001). Accordingly, the Arizona Commission ordered Qwest to propose language for its Arizona SGAT consistent with the *ISP Remand Order*. *Id.* ¶¶ 30-31, 34. Qwest has done so, and its current Arizona SGAT, like those in all other states, excludes ISP-bound traffic from the provisions relating to relative use for direct trunk transport and entrance facilities. The Arizona Commission has required no change to this language.

[18] Tr. at 54.

> fail altogether to account for a carrier's opportunity to recover costs from its ISP customers.[19]

Based on this concern, the FCC criticized CLEC proposals relating to compensation for Internet traffic because they "do not address carriers' ability to shift costs from their own customers onto other carriers and their customers."[20]

This concern expressed by the FCC applies with equal force to this case. Nothing prevents Level 3 from turning to its ISP customers to recover the costs of the interconnection facilities it orders from Qwest. Indeed, as acknowledged by Mr. Hunt, Level 3 recovers all of its network costs in the rates it charges its ISP customers and may already be recovering the costs of interconnection facilities. Just as with the CLECs' proposals in the *ISP Remand Order*, Level 3's proposal here is flawed because it does not account for Level 3's ability to recover costs from its ISP customers and would deliberately result in a shift of costs from Level 3 and its customers onto Qwest.

C. Level 3 Incorrectly Contends That The FCC's Rules Relating To Reciprocal Compensation Apply To Internet Traffic.

In his direct testimony, Mr. Hunt states that "reciprocal compensation is not at issue," and he argues that FCC rules relating to reciprocal compensation do not apply to this dispute.[21] At the hearing, however, Mr. Hunt did a 180-degree reversal, contending that this issue is specifically governed by the FCC's reciprocal compensation rules. In particular, he now contends that Rule

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[19] *ISP Remand Order* at ¶ 76.

[20] *Id.*

[21] Level 3 Ex. 1 (Hunt Direct) at 12.

51.703(b) implicitly requires the inclusion of Internet traffic in relative use.[22] Mr. Hunt and Level 3 had it right the first time -- the FCC's reciprocal compensation rules do not apply to Internet traffic and, therefore, Rule 703(b) cannot apply to this dispute.

As Qwest explained in its reply in support of its motion to dismiss, in the *ISP Remand Order* and multiple other orders, the FCC ruled specifically that Internet traffic is not subject to the reciprocal compensation obligations of section 251(b)(5) of the Act.[23] Accordingly, Rule 703(b) -- a reciprocal compensation rule promulgated by the FCC pursuant to section 251(b)(5) -- cannot apply. Nor can the FCC's ruling in *TSR Wireless v. US WEST Communications, Inc.* apply, since it did not involve Internet traffic and was specifically premised on Rule 51.703(b).[24]

Moreover, Level 3's reliance on Rule 51.703(b) and *TSR Wireless* for the proposition that it cannot be responsible for costs on Qwest's side of the point of interconnection ("POI") is undermined by the agreed terms of the Qwest/Level 3 interconnection agreement. Under these terms, Level 3 has agreed that the parties' financial responsibility for entrance facilities and direct trunk transport will be determined based on relative use, regardless of whether these facilities extend beyond either party's POI.[25] That fact is undisputed.

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[22] Tr. at 54-55. Rule 51.703(b) provides: "A LEC may not access charges on any other telecommunications carrier for telecommunications carrier for telecommunications traffic that originates on the LEC's network."

[23] Qwest Reply at 8-9. For this reason, Internet traffic is excluded from the traffic covered by Rule 709(b) -- the FCC's reciprocal compensation rule that defines traffic to be included in relative use calculations.

[24] Qwest fully distinguished *TSR Wireless* in the briefing in support of its motion to dismiss. *See* Qwest Reply Br. at 11-13.

[25] Qwest Reply Br. at 10. Mr. Hunt acknowledged this agreement during the hearing. Tr. at 58-59. Level 3 likely will cite the decision of a Minnesota administrative law judge issued last week in an arbitration in that state

For these reasons, there is no merit to Level 3's contention that it cannot be responsible for costs on Qwest's side of the POI.[26]

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between Qwest and Level 3. *See In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, Minnesota Docket No. P4733, 421/IC-02-1372, Arbitrator's Recommended Decision (Nov. 1, 2002). However, that recommended decision, which is not a final order and which Qwest is challenging through the Minnesota Commission's exceptions process, is wrong for multiple reasons. First, it is based on the incorrect premise that FCC Rule 51.703(b) prohibits Qwest from charging Level 3 for facilities on Qwest's side of the POI that carry Internet traffic. As discussed above, the FCC has made it abundantly clear that reciprocal compensation obligations – and Rule 703(b) is such an obligation – do not apply to Internet traffic. Nevertheless, the ALJ invoked Rule 703(b) based on her reading of *TSR Wireless*, which was decided before the *ISP Remand Order* and before the multiple orders in which the FCC has said that reciprocal compensation does not apply to Internet traffic. Second, by imposing all the costs of Level 3's interconnection facilities on Qwest, the decision violates Qwest's right to be compensated for these facilities and produces the improper economic effects and incentives that the FCC identified in the *ISP Remand Order*. Third, in violation of the *ISP Remand Order*, the decision ignores altogether Level 3's ability to recover the costs of these facilities from its own ISP customers.

[26] During the hearing, Level 3 also suggested through its questioning that Qwest's proposed language relating to relative use does not define how the parties' financial responsibility will be calculated. As Mr. Brotherson described, however, Qwest's proposed provisions relating to relative use -- sections 7.3.1.1.3.1 and 7.3.2.2.1 of the interconnection agreement -- specifically explain how relative use will be determined. Tr. at 108-09. This is the same language that is in Qwest's SGAT and that, as discussed above, the Washington Commission has approved.

III. Conclusion

For the reasons stated here, in Mr. Brotherson's testimony, and in Qwest's briefs in support of its motion to dismiss or for summary determination, the Commission should adopt Qwest's proposed interconnection language relating to relative use.

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