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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER** Docket No. 05-2266-01

Level 3 Communications, LLC ("Level 3") by and through its undersigned counsel and pursuant to Utah Administrative Code R746-100-4, hereby submits its Reply Memorandum in Support of Motion for Entry of Order.

ARGUMENT

In Qwest's Opposition to Level 3's Motion for Entry of Order ("Opposition Memorandum"), instead of agreeing to work through the relatively straightforward process of determining the correct refund amount owed to Level 3, Qwest asks the Commission to reopen the record so that the entire Old Agreement and other extrinsic evidence can be reviewed.

Opposition Memorandum at 6-8. From its Brief of Appellee submitted to the Utah Court of Appeals, it is evident that Qwest hopes that, by doing so on remand, it can improve upon the initial presentation of its argument below by arguing that the Old Agreement pertained only to "local traffic." Brief of Appellee Qwest Corporation at 24, Aug. 30, 2006 ("Brief of Appellee"). Notwithstanding the impropriety and the burden of such a request at this juncture of the case, for Qwest to prevail with its new theory, the Commission would have to find that Section 5.1.2.4 (the RUF clause) should not have applied to the DTT facilities in question at all. That is because Qwest now claims that the ISP-bound traffic cannot be considered "local" and is not even subject to Sections 5.1.2.4. Opposition Memorandum at 7; Brief of Appellee at 26-27. Qwest's argument is without merit for several reasons.[1]

The Utah Court of Appeals ruled that the Commission erred in considering extrinsic evidence to interpret the RUF clause, which the parties have already agreed controls the outcome of this dispute. Although Qwest attempts to put several different faces on its argument, at bottom, it is ignoring the Court of Appeals' opinion by now asking the Commission to do precisely what the Court held to be error—to look beyond the language of the RUF clause itself.

In addition, Qwest's argument that the DTT facilities are not subject to the RUF clause should be rejected because the parties have agreed to the contrary in prior adjudicative proceedings. Both in the Arbitration Docket involving Section 5.1.2.4 of the New Agreement, and in the present case involving Section 5.1.2.4 of the Old Agreement, the Commission accepted and relied upon the Parties' stipulation to the undisputed fact that ISP-bound traffic would be exchanged pursuant to the RUF clauses in both the New and Old Interconnection

[1] Contrary to Qwest's implication and extensive argument, and as explained below, Level 3 has never asserted that the record cannot be reopened on remand. In fact, Level 3 assumed that the Commission would consider *relevant* new evidence such as the Affidavit of Rhonda Tounget in bringing this matter to completion.

Agreements ("ICA"). It is, therefore, *res judicata* that Section 5.1.2.4 is the applicable provision for assigning cost responsibilities for the DTT facilities at issue in this case, and the doctrine of collateral estoppel bars Qwest from now re-litigating the issue.

Qwest also contends that the Commission must consider extrinsic evidence, including the entire Old Agreement and the intentions of Qwest and AT&T, suggesting that to do otherwise would amount to "usurpation" of the Commission's "legislative function." These arguments are completely without merit and contrary to well-established legal principles. The only matter left for the Commission to decide in this docket, is the appropriate amount of the refund from Qwest to Level 3.

1. The Commission May Not Consider Extrinsic Evidence for the Purpose of Re-Interpreting the RUF Clause.

When it reviewed the Commission's decision in this case, the Court of Appeals had before it everything that the parties had submitted to the Commission. Qwest's attempt to submit the entire Old Agreement to the Court of Appeals was rejected because it had not been submitted into the record below. Upon remanding the case, the Court did not direct the Commission to consider the entire contract. Instead, it found that the issue could be decided by looking at the RUF clause alone. Opinion, Level 3 Communications, LLC v. Public Service Comm'n, 2007 UT App. 127 (Apr. 19, 2007) at ¶ 14-15 ("Opinion"). Observing that the question of whether an ambiguity exists is a matter of law, id. ¶ 9, and noting that the Commission "is in no better position than is this court to interpret the contractual language at issue," id. ¶ 11, the Court ruled: "Thus, looking at the plain language of the relative use clause, we see no 'uncertain meanings of terms, missing terms, or other facial deficiencies' . . . that would render Qwest's interpretation reasonably supported by that plain language." Id. ¶ 17.

The Court concluded that "Qwest is clearly assigned responsibility for all of its originating minutes of use, without exception." Id. ¶ 16. It did not allow any room on remand for the Commission to consider extrinsic evidence to "re-interpret" the RUF clause as Qwest would prefer. The Court stated: "The relative use clause of the Old Agreement is unambiguous regarding which party is responsible for the cost of the DTT facilities. The Commission therefore *erred in looking to extrinsic evidence to apportion cost between the parties*." Id. ¶ 18 (emphasis added).

Having so ruled, it would be directly contrary to the Court's opinion for the Commission to receive extrinsic evidence on remand for the purpose of somehow "re-interpreting" the RUF clause. The Commission cannot escape the specific ruling of the Court of Appeals that Qwest is assigned responsibility for all of the costs of the DTT facilities under the Old Agreement.

2. Qwest is Barred from Asserting that the RUF Clause Does Not Apply to the Traffic at Issue in This Case Because the Question was Finally Resolved in the Arbitration Docket.

Res judicata refers to the "binding effect of a previous adjudication on a current adjudication." Culbertson v. Bd. of County Comm'rs, 44 P.3d 642, 648 (Utah 2001). "Res judicata has two branches: claim preclusion and issue preclusion." Murdock v. Springville Mun. Corp. (In re Gen. Determination of the Rights to the Use of All the Water), 982 P.2d 65, 70 (Utah 1999). "[C]laim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." Culbertson, 44. P.3d at 642. Issue preclusion, also referred to as collateral estoppel, bars "parties or their privies from re-litigating issues which were once adjudicated on the merits and have resulted in a final judgment." Murdock, 989 P.2d at 65. The Utah Supreme Court has set out four requirements for demonstrating issue preclusion:

> [1] [T]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior

> adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits.

BYU v. Tremco Consultants, Inc., 110 P.3d 678, 686 (Utah 2005) (citing Murdock, 982 P.2d 65). All of these requirements have been met in the present case.

The issue of whether ISP-bound traffic is subject to the ICA generally and to the RUF clause in particular was the essence of the litigation before the Commission in the prior proceeding in which the parties arbitrated the RUF clause of the New Agreement. Report and Order, Docket No. 02-2266-02, (Feb. 20, 2004) ("2004 Order" or "Arbitration Order") at 1. In the Arbitration Docket, the parties brought Section 5.1.2.4 of the New Agreement before the Commission to determine whether it should include language excepting ISP-bound traffic from the RUF calculation. Id. at 1. Qwest contended that the RUF clause should include an express exclusion for ISP-bound traffic; Level 3 contended it should not.

In its Arbitration Order, the Commission found that the facts were undisputed. It stated:

> The facts are undisputed. . . . The interconnection agreement provision at issue in this matter deals with the financial responsibility of each party for direct trunk transport facilities ("DTTs") and related entrance facilities used to transport and exchange traffic between the companies. Level 3 and Qwest have agreed that when traffic reaches a certain level, DTTs will be used to carry the traffic. They have further agreed that the cost of those facilities will be based on the "relative use" of the facilities. The parties disagree, however, on whether ISP-bound traffic should be excluded from the relative use calculations.

Id. (emphasis added). Both parties, therefore, agreed with the undisputed fact that financial responsibility for the DTT facilities was to be determined by the relative use of the facilities. Having accepted that premise as an undisputed fact, the Commission noted that the single issue in the Arbitration Docket was whether there should be an exception for ISP-bound traffic for the

purpose of the calculation. The Commission's ruling on that single issue, based on the undisputed facts, determined cost responsibility for the DTTs that carry Qwest originated ISP-bound traffic to Level 3. Id. Neither party appealed the Commission's decision.

In the present docket, the Commission expressly found that the resolution of the matter turned on the same section (i.e., the RUF clause) found in both contracts. Referring to the Arbitration Docket, the Commission observed that "the sole provision at issue in [the Arbitration Docket] was Section 5.1.2.4 of Attachment 1, *the same provision*" that the Commission was asked to interpret in the present docket. Report and Order at 4. The Commission further observed in the present docket, that just as in the Arbitration Docket:

> *Level 3 and Qwest have agreed* that when traffic reached a certain level, DTTs would be used to carry the traffic. *They further agreed* that the cost of those facilities would be based on the "relative use" of the facilities, with Level 3 being billed for all of the cost of the interconnection facilities at issue but Qwest issuing Level 3 a credit for its portion of the relative use of the facilities.

Report and Order at 4-5. Having thus found that the parties agreed that Section 5.1.2.4 applied to the traffic exchanged on the DTT facilities, the Commission articulated the sole issue before it in the present case: "[W]hether ISP-bound traffic should be excluded from the relative use calculations." Id. at 5.

The issue in the two dockets is identical. In the Arbitration Docket, the Commission held that the interpretation of the RUF clause alone was determinative of the dispute. It stated: "Since at the current time all traffic to Level 3 is ISP traffic, *a decision on the issue of how the relative use of the facilities should be calculated will determine who pays* all of the costs of the interconnection facilities." Arbitration Order at 1. Leaving no room for doubt about the effect of the RUF clause, the Commission stated simply and clearly how the inclusion or exclusion of ISP-bound traffic into the relative use calculation would resolve the matter before it:

> If ISP traffic is included in the calculation of relative use, Qwest will pay 100% of the costs because its customers originated [?] all of the traffic to the ISP's served by Level 3. If ISP traffic is not included in relative use, Level 3 will pay all of the costs of these interconnection facilities.

Id. at 1-2. The entire disposition of the Arbitration case, therefore, turned on whether or not the RUF clause should include language excluding ISP-bound traffic from the calculation.

Qwest has admitted that the issue in the present case regarding the Old Agreement is the same. In its response to Level 3's Petition in this docket, Qwest stated:

> Qwest also admits that the parties' negotiated a new ICA and that there was a single issue in dispute between the parties (*the same issue that is in dispute here*) that was resolved in Qwest's favor during the arbitration over this term in the new ICA.

Qwest's Response to Level 3's Petition for Enforcement of Interconnection Agreement and Motion for Expedited Relief at 4-5, ¶ 4 (July 6, 2005) (emphasis added). Furthermore, Qwest has argued throughout this proceeding that the Commission's Order in the Arbitration Docket "applied equally to the DTT facilities purchased during the dispute period as well." Id. at 2; see also id. at 6, ¶ 10 ("[T]he Commission's [Arbitration] Order applies equally to the disputed period as well.").

There was (and still is) no question in the present docket that the interpretation of the RUF clause alone determines the allocation of the shared cost responsibility for the DTT facilities. Neither party argued that the RUF clause was somehow not applicable to apportioning the shared costs. Neither party suggested that the Commission needed to consider the "broader context" of the whole agreement to interpret the RUF clause. Neither suggested that the Commission should investigate the negotiations between Qwest and AT&T in order to interpret the RUF clause. Neither disputed that Qwest provided the DTT facilities to Level 3 and billed

the facilities under Section 5.1.2.4. Qwest never contended that the shared cost of the DTT facilities should be determined by any means other than the RUF clause.

Qwest now requests that the Commission ignore the undisputed facts, the previously agreed positions of the parties, the outcome in the Arbitration Docket, as well as the opinion of the Court of Appeals, and essentially start over in this case. It contends that the Commission must allow virtually unlimited additional evidence on the question of "whether section 5.1.2.4 is *even applicable* to that traffic [carried on the DTT facilities]." Opposition at 7 (emphasis added). Qwest is mistaken about the scope of this remand.

The outcome of this case depends only on whether the plain language of the RUF clause can be read to exclude ISP-bound traffic from the relative use calculation. In the Arbitration Docket, the Commission imposed the exclusion by selecting Qwest's version of the RUF clause for purposes of the New Agreement. In the present case however, the Court of Appeals held that an exclusion does not exist in the RUF clause of the Old Agreement and that it would be improper to create one. There is nothing left to decide in this case except the quantum of damages Qwest must refund to Level 3. Thus, Qwest is collaterally estopped from re-litigating the issue of whether the RUF clause alone determines cost sharing responsibility for the DTT facilities

3. The Commission Should Reject Qwest's Argument that Section 252 Should Be Considered on Remand.

Qwest's Opposition suggests that the Commission should reopen the record, receive evidence about whether Qwest and AT&T negotiated or arbitrated the RUF clause in the ICA, and then apply Section 252 of the federal Act to determine whether a "just and reasonable" requirement should be imposed on the RUF clause. Opposition at 6-7. Qwest unsuccessfully made a similar argument in federal court, and at the Utah Court of Appeals, claiming that the

RUF clause must be interpreted to require "just and reasonable" compensation for Qwest under Section 251 (c) of the Act. Opposition to Motion to Remand, Case No. 2:06cv00132 DAK, (Apr. 3, 2006) at 3-4; Brief of Appellee at 35. Neither the federal court nor Court of Appeals agreed, each separately holding that the interpretation of the RUF clause is a matter of pure state contract law.

Assuming for the sake of argument that facts which are not supported by the record[2] were as Qwest contends, that the clause was arbitrated rather than negotiated, that would only affect the standard by which the Old Agreement would have been *approved*. It would not change the fact that *interpretation and enforcement* of the RUF clause is governed by state contract law, not by federal law of any kind. Opinion ¶ 11; Federal Court's Remand Order at 2; see also Level 3's Brief in Support of its Petition for Review at 27-31 (discussing correct application of federal law to negotiated and arbitrated agreements). For this reason, it is entirely irrelevant whether the RUF clause in the Commission-approved Old Agreement was negotiated or arbitrated before Level 3 adopted it.

Having failed to prevail in this same argument twice before, Qwest persists in trying to distract the Commission, hoping that it will again confuse the federal standard applicable to approving ICAs with the Utah state contract law applicable to interpreting and enforcing them. The Commission should not be misled. The Court of Appeals has already interpreted the RUF as a matter Utah contract law. There is no reason for any further discussion of Section 252 in this case.

[2] The record shows that Qwest stated to the Commission that the RUF was negotiated. R. 71, at 13.

4. Level 3 Acknowledges that the Commission May Take Additional Evidence on Remand.

In the absence of specific instructions from the Court on remand, the Commission has discretion whether to make a decision based on the current state of the record or, *if justice so requires*, to allow additional evidence to facilitate an appropriate decision. Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs., 881 P.2d 929, 931 (Utah Ct. App. 1994) ([T]he decision whether to take additional evidence on remand is within the sound discretion of the trial court."). The Commission is not required to allow additional evidence unnecessarily. Id. ("Had we felt the trial court needed to take additional evidence, we would have remanded with instructions so specifying, as Utah courts have not hesitated to do in the past.").[3] There is no need to admit new or supplemental evidence where it would be unnecessary to make adequate findings on the issue remanded. Id. (citing Stevens v. Collard, 837 P. 2d 593, 598 n.9 (Utah Ct. App. 1992) ("It is the trial court's obligation on remand to make adequate findings addressing the issue. . . . Accordingly, we leave to the trial court's sound discretion the decision whether additional evidence is necessary before a determination and findings can be made.")).

A good portion of Qwest's Opposition is spent addressing its misperception about Level 3's position regarding the Commission's discretion to accept new evidence on remand. Level 3 does not contend that the Commission may not take additional evidence on remand. To the contrary, Level 3 submitted an affidavit in support of its Motion, implicitly asking the Commission to accept new evidence necessary for the Commission to enter an order consistent with the Court of Appeals' Opinion. However, the Commission is certainly not *required* to take additional evidence, as Qwest argues in its Opposition. Opposition at 7 ("[T]he Commission

[3] If the Court of Appeals felt the Commission needed to consider the entire ICA or whether the RUF clause had been negotiated or arbitrated, it would have remanded with instructions so specifying.

can, *and indeed must*, give Qwest . . . a full and fair opportunity to present evidence on a number of relevant matters . . . .") (emphasis added). Neither is it the case, as Qwest asserts, that the Court's Opinion places the Commission and parties in a position where all proceedings and orders upon which the Commission's decision was based are vacated.[4]

Qwest's misguided request to re-litigate this case stems from its own failure in both the Arbitration Docket and in the present docket to raise the arguments it now asserts for the first time on remand. Complaining of a "lack of evidence," a situation created by its own failure to submit evidence (if it believed that such evidence was relevant), Qwest demands that the Commission must give it a "full and fair opportunity to present evidence on a number of matters." Opposition at 7. What Qwest really wants, is a second bite at the apple. As described above in detail, there is nothing further that the Commission needs to consider to find that Level 3 is entitled to a refund of payments made for the DTTs at issue here. An expedient determination that Qwest must refund the payments (with interest) both avoids the needless extension of this dispute and is consistent with the Court of Appeals' determination about the unambiguous requirements of the RUF clause.

Although the Court of Appeals held that the Commission may not consider extrinsic evidence to re-interpret the RUF clause, the Commission may consider additional evidence on the amount of money in controversy. Opinion ¶ 18. Because the amount in controversy is not of

[4] Qwest cites Phebus, et al. v. Dunford, 198 P.2d 973 (Utah 1948), in support of its position that the Court of Appeals remand somehow wipes the slate clean and directs the Commission to start over and allow any and all new evidence Qwest now wants to introduce. Opposition at 7. This is simply not the case. Qwest's quotation from that case conveniently replaces key language with ellipses. In Phebus, the court had previously set aside *the entire decision of the lower court*. Based on that position, the court, on appeal for the second time, stated that "[a] reversal of a judgment or decision of a lower court ***such as this*** places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed. Id. at 974. That position is not paralleled here. As Qwest repeatedly reminded the Commission in its Opposition, the Court of Appeals' remand was limited in scope and certainly did not set aside everything that has already been done by the Commission. Rather, it simply identified those legal issues in which the Commission erred, and remanded to the Commission for a decision consistent with the legal conclusions of the Court.

record, Level 3 submitted an affidavit stating the amount that should be refunded to Level 3 by Qwest in accordance with the plain terms of the RUF clause. Qwest has neither opposed its admission in evidence nor contradicted any statement in it, including the amount alleged to be owing to Level 3 and the method for calculating applicable interest. Because it stands unchallenged, the Commission may rely on it to issue a final order in this case.

5. The Court did not "Usurp" the Commission's Legislative Function.

In an attempt to bolster its argument that the Commission "may proceed after reversal" without restriction, Qwest essentially accuses the Court of Appeals of "usurping" the Commission's "legislative function." Opposition at 8. Qwest contends that the Court may not assume the duties of the agency, particularly "in matters involving a legislative function relying heavily on agency expertise." Opposition at 8. Qwest's argument should be rejected.

Contrary to Qwest's assertions, not every matter determined by the Commission implicates the Commission's role as a legislative body. The examples provided by Qwest are inapposite because they deal with ratemaking, a largely legislative function exercised by the Commission. Opposition at 8-10. The role of the Commission in the present case, however, is to adjudicate the legal rights and obligations of Qwest and Level 3 based entirely on principles of Utah contract law by interpreting the unambiguous language of the RUF clause. This case has nothing to do with the Commission's "legislative function." See, e.g., Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n, 658 P.2d 601, 621 (Utah 1983) ("In contrast to the lack of finality that exists as to orders fixing public utility rates, the principles of *res judicata* apply to enforce repose when an administrative agency has *acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights* and to apply a remedy.") (emphasis added).

The Court of Appeals already considered the respective roles of the Commission and the Court in interpreting the agreement between the parties. After holding that general Utah contract law applied to this case, the Court stated:

> The Commission *has not been delegated discretion to interpret or apply general contract law*, and the Commission is in no better position than is this court to interpret the contractual language at issue here. Thus, we review [the Commission's decision] for correctness, granting no deference to the Commission's determination

Opinion ¶ 11 (emphasis added). Qwest fails to explain how the distinction between the Commission's legislative and judicial functions is even relevant in light of the Court's ruling.

If Qwest really believed that the Court of Appeals usurped the Commission's legislative function, its remedy would have been to petition the Court of Appeals for rehearing, or petition the Utah Supreme Court for a writ of certiorari. Utah R. App. P. 35, 46. Instead, Qwest is asking the Commission to conclude that somehow based on its legislative authority the Commission should ignore the Court of Appeals' decision. Such disregard for the appellate process and the rule of law does not merit serious consideration.

CONCLUSION

For the foregoing reasons, the Commission should reject Qwest's arguments and issue an Order consistent with the Court of Appeals' findings and direction on remand as set forth in Level 3's Motion and [Proposed] Order.

Respectfully submitted, this _____day of October, 2007.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2007, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER** to be sent in the following manner:

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