Gregory L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Telephone: (720) 888-2512
Facsimile: (720) 888-5134

William J. Evans (5276)
Vicki M. Baldwin (8532)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for Level 3 Communications, LLC

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	**MOTION FOR RECONSIDERATION AND REHEARING** Docket No. 05-2266-01

Level 3 Communications, LLC ("Level 3"), through its counsel, and pursuant to the provisions at Utah Code Annotated § 63-46b-12 and 54-7-15, hereby requests reconsideration and rehearing of the Order of Administrative Law Judge Steven F. Goodwill, as approved and confirmed by the Utah Public Service Commission ("Commission") on August 18, 2005, and in support of its motion, hereby submits the following:

For the purposes of this Motion for Reconsideration ("Motion"), Level 3 does not dispute the Procedural History or Background recited in the Order. The Commission's Findings and Conclusions of Law, however, contain errors that have led the Commission to reach the wrong result.

When the parties brought the present dispute to the Commission, Level 3 requested that the Commission enforce the straightforward, unambiguous language of the operative interconnection contract between Level 3 and Qwest Corporation ("Qwest") ("Old Agreement") to prevent Qwest from collecting on charges that were never contemplated by the parties when

the Old Agreement was executed. Qwest requested that the Commission "interpret" the clause in a way which Qwest argued was the only just and reasonable way: to, regardless of the explicit language in the contract, exclude ISP-bound traffic from the relative use calculation to which the parties had otherwise agreed. Report and Order, Discussion, B. Qwest's Position (Aug. 18, 2005). Qwest's position is contrary to well-established contract law, in Utah and the rest of the country, as is the Commission's decision accepting Qwest's position.

A. The Relative Use Provision in the Old Agreement Was Determined by the Commission to be Just and Reasonable.

On January 10, 2001, the Commission approved the agreement between Level 3 and Qwest, which is referred to in these proceedings as the Old Agreement. In approving the Old Agreement, the Commission specifically found that it "does not discriminate against any telecommunication carrier not a party to it" and that it "*comports with the [Telecommunications Act of 1996's (the "Act")] § 251*". Report and Order, Docket No. 00-049-88, Findings of Fact (January 10, 2001) (emphasis added) ("Original Order").

The Old Agreement contained the following language:

> If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's *relative use (i.e. originating minutes of use)* of the facility in the busy hour.

Old Agreement, Attachment 1 § 5.1.2.4 (emphasis added).[1]

[1] As noted in Level 3's Position Statement, the Old Agreement provided that the terms of the Old Agreement were to apply until the New Agreement was approved by the Commission.

> This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party

Section 251 of the Act states, in part, that an incumbent local exchange carrier must interconnect with the competitive carrier's network "on rates, terms and conditions that are just, reasonable, and non discriminatory." 47 U.S.C. § 251(c)(2)(d). Thus, in finding that the Old Agreement complied with Section 251 of the Act, the Commission necessarily found that Section 5.1.2.4, the Relative Use clause of the Old Agreement, was just and reasonable.

The Original Order whereby the Commission approved the Old Agreement also ordered that the Old Agreement met the requirements of Section 252(e)(1) of the Act. Report and Order, Docket No. 00-049-88, Conclusions of Law (January 10, 2001). That section of the Act provides that a state commission may only reject an interconnection agreement adopted by negotiation or arbitration[2] when it finds, among other things, that:

> the agreement does not meet the requirements of section 251 of this title, … or the standards set forth in subsection (d) of this section.

47 U.S.C. § 252(e)(2). Subsection (d) of Section 252 requires state commissions to set "just and reasonable" rates for interconnection, network elements and the reciprocal exchange of traffic. 47 U.S.C, § 252(d). Necessarily implicit in the Commission's Original Order, therefore, was a determination that the relative use clause, as stated, was just and reasonable.

> may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

Old Agreement, Part A, Section 20.1 (emphasis added).

[2] The Old Agreement was an "opt in" by Level 3 of the AT&T/US West Agreement that had been the subject of arbitration before this Commission. (See *In re Petition of Level 3 Comm'cns, LLC for Enforcement of the Interconnection Agreement between Qwest and Level 3*, TR at 40 (July 26, 2005)) (Counsel for Qwest: "I assure you that the AT&T agreements, I believe, have been arbitrated in every case.")

B. Contrary to Established Utah Contract Law, the Commission Failed to Give Effect to the Intention of the Parties.

Instead of enforcing the unambiguous language of the Old Agreement, which the Commission found to be just and reasonable, or applying acceptable principles of contract interpretation to determine the meaning of the relative use clause of the Old Agreement, the Commission ignored its explicit finding that the 2004 Arbitration Order should be applied *prospectively only*[3] and instead applied retroactively the rationale of its 2004 Arbitration Order along with a new and selective interpretation of the FCC *ISP Remand Order*. See Report and Order, Findings and Conclusions of Law. It is also critically important to note that prior to the Arbitration Order and the implementation of the new Agreement, Qwest and Level 3 negotiated, agreed to and filed an amendment to reflect the affect of the FCC *ISP Remand Order* on the Old Agreement ("ISP Remand Amendment"). The Relative Use clause is unambiguous. It does not include any exception for ISP-bound traffic, and cannot reasonably be read to impose one. See Level 3 Position Statement at ¶ 17.

While it is true that the Commission may interpret contracts between parties, as demonstrated in Yeargin, Inc. v. Utah State Tax Comm'n, 20 P.3d 287, 297 (Utah 2001) and Cache County v. Property Tax Div. of Utah State Tax Comm'n, 922 P.2d 758, 766–67 (Utah 1996), the Commission must abide by the principles of contract interpretation in doing so. Principles of contract interpretation require that the meaning of contractual terms must be determined by the ***intent of the parties at the time they entered into the agreement***. Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 172 (Utah Ct. App. 2005) (citing Central Fla. Invs., Inc. v. Parkwest Assocs., 40 P.3d 599 (Utah 2002)). Only if the plain language of the contract itself is ambiguous, may the language be interpreted to determine the intent of the parties. Id. "The

[3] See 2004 Arbitration Order, Discussion, Subissues.

plain meaning rule preserves the intent of the parties and protects the contract against judicial revision." Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990). Only if interpretation is required because of an ambiguity may extrinsic evidence be considered, but then only to ascertain the intent of the parties at the time they entered into the agreement. Id. However, "'[t]he ***only evidence relevant*** to that inquiry is evidence of the ***facts known to the parties at the time they entered the [agreement]***.'" Peterson v. The Sunrider Corp., 48 P.3d 918, 925 (Utah 2002) (quoting Yeargin, 20 P.3d 287) (emphasis added). Not only must the Commission determine the intent of the parties at the time they contracted, it must apply the law that was in effect at the time the contract was signed. Cache County, 922 P.2d at 765–67; Washington Nat'l Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 669 (Utah Ct. App. 1990).

The parties to the Old Agreement could have included language allowing an exception for ISP-bound traffic, but they did not. Qwest knew full well from doing business and exchanging traffic with Level 3 in other states that Level 3 served only ISPs at that time, and Qwest could have sought to have ISP-bound traffic excluded from relative use calculations during any one of the three times the commission was considering the Old Agreement. However, while Qwest likely drafted and arbitrated the agreement that Level 3 agreed to, it did not seek to exclude ISP-bound traffic from the relative use calculation and it did not seek to change the language of the contract through the change-in-law clause of the Old Agreement after the FCC's *ISP Remand Order*. Rather, Qwest acted unilaterally and billed Level 3 for fees not contained in the contract, threatening to shut down Level 3's services if it did not pay the unjustified amounts. The contract must control and this kind of unilateral behavior must be

prevented or it will result in the inability of parties to rely on fairly negotiated and approved contracts.

Even though Level 3 believes that the law in Utah governing direct trunk transport ("DTT") billing was in Level 3's favor at the time Level 3 and Qwest entered into the Old Agreement, the parties were free to negotiate and determine their rights by contract before presenting the Old Agreement to the Commission for its determination that the contract was "just and reasonable." As this Commission itself noted in the 2004 Arbitration Order, this exact issue had been addressed with conflicting results in various states, and the issue was unsettled in Utah. 2004 Arbitration Order, Discussion. The parties, therefore, would have no reason to believe that anything other than the plain language of the contract would govern their conduct. Any other interpretation would have to have been specifically delineated by language in the agreement. The Commission is not free to "re-interpret" what it had already found to be a "just and reasonable" provision in light of the law as it existed at that time.

As noted above, after the FCC's *ISP Remand Order*, the parties amended the Old Agreement in accordance with the change-in-law provision of the Old Agreement, but still, they did not include any exception to the relative use calculation for ISP-bound traffic, though they certainly could have if that had been their intent, and presumably, it would have been an appropriate time to do so. Instead, the parties chose to continue to abide by the relative use language of the Old Agreement, which the Commission had previously determined was just and reasonable and in compliance with Sections 251 and 252 of the Act.

While the Commission stated that it did not view the 2004 Order as precedent in this case, it stated:

> The rationale behind the 2004 Order is equally applicable to the parties' current dispute both because the issue now before us is

> identical to the issue in Docket No. 02-2266-02 and because the release of the *ISP Remand Order* predates the start of the Dispute Period by more than a year.

Report and Order, Docket No. 05-2266-01, Findings and Conclusions of Law. This quoted section apparently states two reasons, for the Commission's decision: (1) the rationale of the 2004 Order is applicable; and (2) the *ISP Remand Order* predates the Dispute Period. However, neither reason allows the Commission to impose an interpretation other than what was intended by the parties ***at the time they entered the Old Agreement, based on facts known to the parties at the time they entered the Old Agreement, and under existing law at the time they entered the Old Agreement***. Peterson, 48 P.3d at 925; Cache County, 922 P.2d at 765–67.

The rationale in the 2004 Order was that the FCC had determined in the *ISP Remand Order* that payment of reciprocal compensation for internet traffic could cause uneconomic subsidies and create incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. 2004 Order, Discussion, Obligations under the Telecommunications Act. The Commission's 2004 Order decision was made in the context of the parties arbitrating the relative use clause in the New Agreement in light of the FCC *ISP Remand Order*, with the Commission adopting the FCC's reciprocal compensation rationale for relative use payments. However, this rationale cannot be retroactively imposed as the factual basis for the parties' intent regarding relative use payments at the time they entered the Old Agreement.

C. The Commission Failed to Give Effect to the Parties Agreement on How to Address a Change in the Law.

Level 3 is not requesting in this Docket that the Commission find that its rationale for the 2004 Arbitration Order is not applicable on a going forward basis in light of the FCC's *ISP Remand Order*.[4] Rather, Level 3 submits that the fundamentals of contract law dictate that if

[4] In fact, since the Commission's 2004 Order, there has been no dispute about charges for the ISP-bound traffic.

Qwest never availed themselves of the contractual provision that established the process for amending the Old Agreement for a change in the law, the Commission has no authority to ignore the terms of the Old Agreement and amend it.

The Old Agreement provided a procedure that the parties were to follow in the event of a change in the law. In fact, Qwest and Level 3 agreed to an ISP Remand Amendment to the Old Agreement. See Level 3 Position Statement at ¶ 17. Because the *ISP Remand Order* only spoke to intercarrier compensation, that amendment only established new terminating intercarrier compensation rates. Id. If the parties had understood the *ISP Remand Order* to also affect the Relative Use clause of the Old Agreement, the parties could have included language at that time that would have excluded ISP-bound traffic from relative use calculations. They chose not to and Section 5.1.2.4 of the Old Agreement was never amended.

The same is true with respect to the SPOP Amendment that the parties executed in June 2002. There is no language in the SPOP Amendment that changes the "relative use" treatment that is set forth in Section 5.1.2.4 concerning the exchange of ISP-bound traffic or the fact that all such traffic was Qwest originated during the Dispute Period. Instead, the SPOP Amendment confirms the well-established rule that competitive providers are allowed to interconnect at one point of interconnection in each LATA. The parties thus dealt with the change-of-law clause on more than one occasion yet the Old Agreement consistently dictated relative use treatment in accordance with the Commission's finding that it was just and reasonable.

The Commission stated in its Report and Order in the present case that the *ISP remand Order* "illuminat[es] the proper meaning of Section 5.1.2.4 of Attachment 1 to the Old Agreement." Report and Order, Findings and Conclusions of Law. But, the Commission in fact made no real attempt to ascertain the "proper meaning," or it would have looked to the intent of

the parties as set forth in the plain language of Section 5.1.2.4 of the Old Agreement. The Commission imposed its own amendment to the contract based on its own reading of the *ISP Remand Order* in the 2004 docket. The Commission stated:

> No one disputes that including ISP-bound traffic in the RUF calculation of the Old Agreement would result in Qwest bearing all of the costs of the DTT Facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest.

Report and Order, Findings and Conclusions of Law. Yet the Commission did conclude precisely that in its initial Original Order in Docket No. 00-049-88 approving the Old Agreement. Thus, while the Commission characterizes its current decision as ascertaining the proper meaning of Section 5.1.2.4, in fact the Commission has imposed a new obligation on the contract that never existed before, based on the rationale used in the 2004 Arbitration Order interpreting the *ISP Remand Order*, neither of which existed as "facts known to the parties at the time they entered the [Old Agreement]." Peterson, 48 P.3d at 925.

D. The Commission's Action Is in the Nature of a Rulemaking and Results in Discriminatory Treatment of Level 3.

The Commission's interpretation amounts to a rulemaking and the state has thus imposed upon Level 3 a rule without Level 3 having the benefit of engaging in the required rulemaking proceedings of the Utah Administrative Rulemaking Act ("ARA"). Pursuant to the ARA a rulemaking is *required by law* "when agency action: (a) authorizes, requires, or prohibits an action; (b) provides or prohibits a material benefit; (c) applies to a class of persons . . .; and (d) is explicitly or implicitly authorized by statute." Utah Code Ann. § 63-46a-3(2). "Rulemaking is also required when an agency issues a written interpretation of a state or federal legal mandate." Id. § 63-461-3(3). A rule should generally be given prospective, not retroactive, application. See, generally, id. § 63-46a-4; 73 C.J.S. Pub. Admin. Law & Proc. § 179. See also Williams v.

Public Serv. Comm'n of Utah, 720 P.2d 773, (Utah 1986) (noting that rulemaking is proper when an agency overrules its own decisions on which private parties have acted in reliance).

Applying the requirements for rulemaking set forth in the ARA to the instant case: (a) the Commission's decision authorizes or requires an action because it requires Level 3 to pay Qwest based on a formula excluding ISP-bound traffic from the relative use calculation for the Dispute Period even though no such condition was provided in the controlling agreement; (b) the Commission's decision provides a material benefit in that the Commission's decision authorizes Qwest to collect from Level 3 the approximately $560,000 Qwest claims Level 3 owes to Qwest; see Tr. at p. 21, lines 9-13; (c) the conclusion of the Commission in this case applies to a class of persons as it is likely that the Commission would apply this new policy to any parties in similar positions with respect to payment obligations for DTT facilities; and (d) the Commission's decision is explicitly authorized by statute because the Commission based its decision on the Act.

More importantly, rulemaking is required because the Commission's decision is a written interpretation of a federal mandate in that the Commission ruled that it has determined a change in policy of what is just and reasonable under the Act in light of the FCC *ISP Remand Order*. Report and Order, Findings and Conclusions of Law (Aug. 18, 2005). Despite the fact that Level 3 relied on the Commission's ruling in its Original Order that the language of the Old Agreement, including Section 5.1.2.4 of Attachment 1, was just and reasonable as written, the Commission arbitrarily overruled this precedent and imposed a new interpretation of what is just and reasonable under the Act. Thus, pursuant to the ARA this action by the Commission would require a rulemaking, and even then, the results would not apply retroactively to the Old Agreement. The Commission's Order in this case is discriminatory in that it has been applied

retroactively to Level 3, and to no other carrier. Accordingly, the Commission's decision cannot stand.

WHEREFORE, based on the foregoing, Level 3 respectfully requests that the Commission (1) reverse the Report and Order issued August 18, 2005, in this matter; (2) determine that the Old Agreement does not require that ISP-bound traffic be excluded from the relative use charge; and (3) order that Level 3 is not obligated to pay the amounts billed by Qwest.

DATED this _____ day of September, 2005.

William J. Evans (5276)
Vicki M. Baldwin (8532)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for Level 3 Communications, LLC

and

Gregory L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2512 (Tel)
(720) 888-5134 (Fax)
Attorneys for Level 3 Communications, LLC