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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3	Docket No. 05-2266-01 **OPPOSITION OF QWEST TO MOTION FOR RECONSIDERATION**

Qwest Corporation ("Qwest"), pursuant to Utah Code Ann. § 63-46b-12 and Utah Admin. Code R746-100-11.F, hereby responds in opposition to the Motion for Reconsideration and Rehearing ("Motion") filed September 19, 2005, by Level 3 Communications, LLC ("Level 3"), seeking reconsideration and rehearing of the Commission's Report and Order ("Order") issued in this matter on August 18, 2005.[1]

[1] On October 4, 2005, the parties submitted an Unopposed Motion for Limited Reconsideration, in which they moved the Commission to grant limited reconsideration for the

I. INTRODUCTION

Level 3 commenced this matter by filing its Petition for Enforcement of the Interconnection Agreement Between Qwest and Level 3 and Motion for Expedited Relief ("Petition") on June 23, 2003. The Petition sought a Commission order finding that Level 3 is current in all payments owed to Qwest for the period July 2002 through February 2004 ("Dispute Period") and enjoining Qwest from terminating service to Level 3. The parties agreed that the matter would be considered under Utah Code Ann. § 54-8b-17 on an expedited basis on an agreed schedule. On July 6, Qwest responded to the Petition, opposing the relief sought by Level 3 and counterclaiming for enforcement of the interconnection agreement ("ICA") between the parties. On July 14, Level 3 replied to Qwest's counterclaim, requesting that the Commission deny the relief sought by Qwest and questioning the amount claimed by Qwest as due under the ICA.

The dispute between the parties is whether Level 3 is obligated to pay $563,616.99 for the Direct Trunked Transport and associated entrance facilities ("DTT facilities") it ordered from Qwest under the terms of the ICA during the Dispute Period. Level 3 contends that it is not obligated to pay anything for use of the DTT facilities based on its contention that traffic bound for an Internet Service Provider ("ISP") should be included in calculating the relative use factor ("RUF") used in determining how charges for DTT are divided between the parties. Qwest contends that traffic bound for an ISP ("Internet-bound traffic") is to be excluded from the calculation of RUF. There is

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purpose of allowing Level 3 and Qwest to engage in settlement negotiations without concern for the statutory deadlines for rehearing identified in Utah Code Ann. § 54-7-15 and without prejudicing Level 3's right to appeal. It was understood by the parties that in the event their settlement negotiations were unsuccessful, Qwest would respond to the Motion, and the Commission would then address the Motion in normal course. The parties determined that it would be unfruitful to pursue further settlement discussions in early November.

no dispute between the parties that all traffic on the DTT facilities is one way—Level 3 does not deliver any traffic to Qwest to be terminated to Qwest customers utilizing the DTT facilities.

Following the filing of position statements by the parties and hearing, the Commission entered the Order on August 18, 2005. In the Order, the Commission concluded that interpreting the ICA in the manner urged by Level 3 would be contrary to section 252(d)(1) of the Telecommunications Act of 1996.[2] Accordingly, the Commission determined that the ICA should be interpreted in the manner advocated by Qwest and that Internet-bound traffic should be excluded from the RUF.

In the Motion, Level 3 seeks reconsideration and rehearing of the Order on four grounds. The first three grounds raise legal issues related to interpretation of the ICA. These were the issues argued previously by Level 3 in the Petition and its Position Statement and rejected by the Commission in the Order. While Level 3 has adorned these arguments for purposes of its Motion, the arguments remain incorrect and do not justify reconsideration of the Order. The points Level 3 either misses or chooses to ignore are that the ICA was capable of different interpretations, the Commission had never previously interpreted the provisions of the ICA at issue, Qwest has always interpreted the provisions in the manner accepted by the Commission, and the interpretation urged by Level 3 would render the provisions illegal in violation of the Act. The fourth ground is that the Order amounts to a rulemaking without compliance with the requirements of rulemaking. This argument is incorrect and likewise does not justify reconsideration of the Order. Accordingly, the Commission should deny the Motion.

[2] P.L. 104-104; 110 Stat. 56 (1996) ("Act"). References to sections in the Act will be to their section numbers as codified in Title 47 of the United States Code.

II. FACTS

This matter arises out of Level 3's ordering of DTT facilities from Qwest pursuant to the terms and conditions found in the parties' ICA dated September 7, 2000, as amended.[3] Level 3 ordered the DTT facilities for the purpose of interconnecting with Qwest in Utah. Level 3 was, at all times relevant to this dispute, a competitive local exchange carrier ("CLEC") providing service exclusively to ISPs.[4]

To provide its service to its ISP customers, Level 3 established a single POI[5] with Qwest in Salt Lake City that gave it the ability to serve the entire state of Utah.[6] To provide its service to ISPs, Level 3, in its capacity as a CLEC, knowingly obtained local telephone numbers through the North American Numbering Plan Administrator ("NANPA") in various parts of Utah and provided them to its ISP customers.[7] The ISPs, in turn, provided these numbers to their dial-up customers as the customers' means of accessing the Internet. The ISP's dial-up customers were also Qwest local exchange service customers. This arrangement allowed the ISP customers who wanted to connect

[3] The ICA was signed by the parties on September 7, 2000 and was approved by the Commission on January 10, 2001 in Docket No. 00-049-88. It was amended by the parties several times. Those amendments included a Single Point of Presence ("SPOP") amendment approved August 21, 2002, which allowed Level 3 to connect to Qwest at a single point of interconnection ("POI") in Salt Lake City, thus requiring Qwest to transport traffic from Level 3 customers in outlying areas to Level 3's POI in Salt Lake City, and an ISP amendment approved January 8, 2003, which was intended to deal with reciprocal compensation for ISP traffic after the Federal Communications Commission ("FCC") order on that issue.

[4] Report and Order, *In the Matter 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. 02-2266-02 (Utah PSC February 20, 2004) ("*Arbitration Order*") at 1. Please note that page references to the *Arbitration Order* are to the page numbers on the version of the order attached to Level 3's Petition.

[5] CLECs are entitled to interconnect as a single POI in each LATA. Because Utah is a single LATA state, Level 3's POI in Salt Lake City gives it access to the entire state through that POI.

[6] *Arbitration Order*, at 1.

[7] *Id.*

their computers to the Internet to dial a *local telephone number* in order to connect to their ISP. Although the number the ISP customer dialed to gain access to the Internet appeared to be the number of an ISP whose equipment was located in the same local calling area ("LCA") as the calling party, this was not the case. These "locally dialed" calls were actually transported over the DTT facilities by Qwest to Level 3's POI in Salt Lake City, thus creating a call that no longer originated and terminated in the same LCA (*i.e.*, an interexchange call); Level 3 then delivered that traffic to its ISP customers, which then provided the end user with access to the Internet. Thus, for example, a Qwest/ISP customer physically located in Cedar City would, through his or her computer modem, dial a local Cedar City telephone number to be connected to an ISP served by Level 3. That "apparently local" Cedar City call was not local at all since it was transported to Salt Lake City via these DTT facilities and delivered to Level 3's physical POI where it, and all other Level 3 traffic, was then transmitted to the appropriate ISP and connected to the Internet. None of the ISP's equipment used to provide Internet access for its customers (*e.g.*, modems, routers, and servers) was located in Cedar City, nor even necessarily in Utah.

In order for this arrangement to work, Level 3 ordered facilities from Qwest pursuant to the terms and conditions of the parties' ICA, as amended. Under the ICA, the parties could elect to provision their own one-way trunks to the other party's end office, or they could elect to establish two-way direct trunk groups.[8] If one-way trunks were

[8] The applicable sections of the ICA stated:

> 5.1.2 Transport
>
> 5.1.2.1 If the Parties elect to each provision their own one-way trunks to the other Party's end office for the termination of local

provisioned, the party provisioning those trunks was responsible for the cost of those facilities, but if two-way trunks were established pursuant to section 5.1.2.4 of the ICA, the cost of those facilities was to be adjusted by reducing the rate paid to the provider of those facilities to reflect the provider's relative use of those facilities.[9] Section 5.1.2.4 stated:

> 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.

Qwest provides the two-way DTT facilities at issue in this docket pursuant to orders from Level 3.

> traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply.
>
> 5.1.2.2 If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party's tandem or end office switches. The applicable rates are described in Appendix A.
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> 5.1.2.3 Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the Point of Interconnection and the terminating end office or tandem switch.
>
> 5.1.2.4 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.

[9] *Id*. ¶¶ 5.1.2.1 and 5.1.2.4

Pursuant to section 1.3.1 of the SPOP Amendment to the ICA, however, Qwest required Level 3 to order one or more direct trunk groups when its traffic volumes reached 512 CCS (a DS1 level of traffic).[10] Level 3 ordered these direct trunk groups from Qwest, which were used for transporting Internet-bound traffic back to Salt Lake City to Level 3's POI. As a result, Qwest began billing Level 3 on a monthly basis for the cost of these DTT facilities at the rates established by the Commission and incorporated into the ICA. When Level 3 refused to pay, a dispute arose between the parties as to who was financially responsible for these facilities.

Although the terms of the ICA required Level 3 to order the DTT facilities, Level 3 claimed that Qwest was responsible for the entire cost of these facilities because (1) they were on Qwest's side of the POI, (2) Qwest's end-user customers originated all of these Internet-bound calls, and (3) section 5.1.2.4 of the ICA did not specifically exclude Internet-bound traffic from the compensation formula for shared two-way direct trunk groups.

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[10] Section 1.3.1 of the SPOP Amendment to the ICA provides as follows:

> The Parties shall terminate Exchange Access Service (EAS/Local) traffic on tandem or end office switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch. CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide Interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to CLEC as Interconnection at the access tandem. If CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal, Qwest may require it only: (a) upon demonstrating that a failure to do so will have a material adverse affect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact on the operation of CLEC, as compared with Interconnection at such access tandem.

At this same time, the parties were engaged in negotiations for a new ICA to govern their relationship in Utah ("New ICA"). Through those negotiations, the parties were able to reach agreement on every term in the New ICA but one. Like the dispute here, that term involved whether Internet-bound traffic would be excluded from the RUF which the parties agreed to apply to the cost for DTT facilities (the very same DTT facilities that are at issue here). The parties were unable to reach agreement on this issue in the New ICA. Level 3's business plan had not changed and all of the traffic carried on these facilities was bound for the Internet. Thus, if Internet-bound traffic were excluded from RUF, Level 3 would be required to pay the costs for these facilities; if, on the other hand, traffic bound for the Internet were to be included in the RUF calculation, Qwest would be financially responsible for the entire cost of the facilities ordered by Level 3 and used for its benefit. Because they were unable to reach agreement on this issue, the parties submitted their dispute to the Commission for arbitration in accordance with section 252 of the Act in Docket No. 02-2266-02.

After an evidentiary hearing and briefing, the Commission issued the *Arbitration Order* on February 20, 2004, wherein the Commission determined that Internet-bound traffic should be excluded from the RUF in the New ICA and that Level 3 was therefore responsible for the cost of the DTT facilities. In making this decision, the Commission relied on the Act, various FCC orders, and policy considerations to find that Level 3 was financially responsible for the DTT facilities. Although the Commission cited several grounds for its decision, the primary basis was its conclusion (based on governing federal

appellate court authority) that to require Qwest to bear the cost of the DTT facilities would violate section 252(d)(1) of the Act.[11]

Since the *Arbitration Order* was issued and the New ICA became effective, Level 3 has paid the costs of these DTT facilities in Utah. However, Level 3 refuses to pay for these same facilities for the Dispute Period that preceded the *Arbitration Order*. This period of time runs from July 2002 to February 2004, and the amount in dispute for that time is $563,616.99.[12]

III. ARGUMENT

Level 3's Motion claims that the Order is in error in four ways. Level 3 claims that (1) the relative use provision was previously determined by the Commission to be just and reasonable; (2) the Commission failed to give effect to the intention of the parties in interpreting the provision; (3) the Commission failed to give effect to the parties' agreement on how to address a change in law; and (4) the Order amounts to a rulemaking and results in discriminatory treatment of Level 3 without complying with rulemaking requirements. The first three contentions are related to interpretation of the ICA are largely elaborations of points argued by Level 3 in its Petition and in its Position Statement filed July 15, 2005. Each starts from the incorrect premise that the language of section 5.1.2.4 of the ICA is straightforward and unambiguous and capable of only one interpretation. The last contention is new but is also incorrect.

[11] *Arbitration Order*, at 3-4.

[12] Level 3 questioned this amount for the first time in its Position Statement filed on July 15, 2005. Accordingly, the Commission did not resolve the amount due in the Order.

A. SECTION 5.1.2.4, WHICH WAS SILENT ON THE ISSUE, HAS ALWAYS BEEN INTERPRETED DIFFERENTLY BY THE PARTIES. THE COMMISSION INTERPRETED THE ICA APPROPRIATELY.

In Level 3's world view, the language of section 5.1.2.4 of the ICA is capable of only one interpretation (Level 3's interpretation) and that interpretation reflects the intention of the parties. In making this argument, Level 3 conveniently ignores the fact that the ICA is actually silent on the inclusion or exclusion of Internet-bound traffic in the RUF calculation and Qwest has always interpreted the provision differently than Level 3. As noted above, as soon as Level 3 began ordering DTT facilities under the ICA, Qwest began billing Level 3 for those facilities based on its understanding that the originating minutes to be used in the RUF provided in section 5.1.2.4 did not include Internet-bound traffic.

Level 3 argues that the language of section 5.1.2.4 does not specifically state that Internet-bound traffic is excluded from the calculation of RUF.[13] This is true. However, it is likewise true that the language of section 5.1.2.4 does not specifically state that Internet-bound traffic is included in the calculation of RUF. In other words, the issue is not resolved by the express terms of the agreement. When a contract is silent on a disputed term it is perfectly appropriate for the reviewing tribunal to imply the necessary term by law, as long as the implied-in-law term is reasonable.[14] That is precisely what the Commission has done in this case. Further, because Qwest has never regarded Internet-bound traffic as local traffic, it has never believed such traffic would be included in the RUF used for determining financial responsibility for the costs of DTT facilities.

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[13] *See, e.g.*, Motion at 4; Level 3 Position Statement at ¶ 17.

[14] *See, e.g., Allstate Enterprises, Inc. v. Heriford*, 772 P.2d 466, 468 (Utah Ct. App. 1989).

Qwest has demonstrated from the outset that it did not intend Internet-bound traffic to be included in the RUF calculation. Level 3's assertions about the parties' intent ring hollow in light of this fact.

Level 3 also argues that because the language approved in the New ICA does explicitly provide for exclusion of Internet-bound traffic from the RUF, the absence of such language in the old ICA must mean the contrary—that the old ICA included Internet-bound traffic in the RUF. Even putting aside that this argument contradicts Level 3's repeated statement that the parties' intent in the old ICA can only be judged as of "the time they entered the Old Agreement, based on facts known at the time . . . ,"[15] the fact is that when Qwest became aware of the dispute between the parties in interpretation of section 5.1.2.4 of the ICA, it simply wished to clarify the provision in the New ICA. Therefore, it proposed language that specifically excluded Internet-bound traffic from the RUF. Level 3's argument that this clarification proves a contrary interpretation for the previous language has no merit. The fact that Qwest sought to bolster its interpretation by expressly excluding Internet-bound traffic from the RUF in the New ICA does not indicate that under the old ICA such traffic was included in the RUF—it merely demonstrates Qwest's rational preference to avoid further disputes with Level 3 on this issue under the New ICA.

Level 3's assumptions were essentially already considered and rejected by the Commission in the Order. The Commission said:

> We do not agree with Level 3's characterization that it would be improper for this Commission to "add language" to the [ICA] by excluding ISP-bound traffic from the RUF calculation. This Commission is routinely asked to interpret disputed terms

[15] *See* Motion at 7.

> between parties in order to produce a just a reasonable result in accordance with applicable law and regulation. This case is no different.[16]

As noted above, such action by the Commission was completely appropriate. The Commission's interpretation was reasonable, was consistent with the requirements of the Act, and avoided the patent unfairness of Level 3's attempted regulatory arbitrage by which it sought to have Qwest pay for the facilities Level 3 ordered and used for its own benefit. As the Colorado commission found, when a customer dials a the "local" ISP access number, it is acting primarily "as the customer of the ISP, not as the customer of the ILEC."[17] It is Level 3 and its ISP customers who have created the services that have caused this traffic to be generated. They are the cost causers and the parties benefiting from the DTT facilities. They should, therefore, bear the costs. The Commission's interpretation of section 5.1.2.4 is consistent with the Colorado decision.

B. THE COMMISSION HAS NEVER PREVIOUSLY SPECIFICALLY INTERPRETED THE RELATIVE USE PROVISION.

Level 3 argues in the Motion that by approving the ICA, the Commission necessarily approved its interpretation of the ICA and found that it was just and reasonable in compliance with the Act.[18] This argument is based on false premises and, therefore, fails.

The Commission issued its Report and Order on January 10, 2001 in Docket No. 00-049-88 approving the ICA. The order notes that the ICA was submitted by the

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[16] Order at 8-9.

[17] *See* Order, *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Docket No. 00B-601T, at 36 (Colo. PUC 2001).

[18] *See* Motion at 2-3.

parties for approval under section 252(e)(1). Therefore, since the docket was not an arbitration proceeding, the ICA was a negotiated agreement.[19] The order makes no mention of any specific provision of the ICA and, therefore, makes no finding regarding the interpretation of section 5.1.2.4. However, based on the Commission's conclusion in the Order that the interpretation of section 5.1.2.4 urged by Level 3 would violate section 252(d)(1) of the Act, it is more logical to assume that in approving the ICA, if the Commission interpreted section 5.1.2.4 at all, it interpreted it as excluding Internet-bound traffic from the RUF calculation.[20] Otherwise, it would have rejected the ICA because it did not comply with the Act.

In reality, it is clear that the Commission did not interpret section 5.1.2.4 at all given that the parties had submitted a negotiated ICA for approval. In any event, in approving the ICA the Commission certainly never interpreted section 5.1.2.4 as requiring inclusion of Internet-bound traffic in the RUF.

C. THE COMMISSION HAS NOT FAILED TO GIVE EFFECT TO THE INTENTION OF THE PARTIES TO THE ICA OR RULED INCONSISTENTLY WITH THE *ARBITRATION ORDER*.

Level 3 argues that the Order is in error because the Commission failed to interpret the ICA in accordance with the intent of the parties at the time they entered into the ICA, that the interpretation violates the conclusion in the *Arbitration Order* that the new provision on RUF should be applied prospectively only, and that the parties failed to

[19] Section 252(e)(1) provides for submission of negotiated or arbitrated ICAs for approval.

[20] *See, e.g.*, Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

amend section 5.1.2.4 after the FCC's *ISP Remand Order*.[21] The first of these arguments, which Qwest addressed in section III.A. above, is based on the false premise that the parties intended to include Internet-bound traffic in RUF when they entered into the ICA. The second argument, which Qwest addresses below, misapplies the *Arbitration Order*. The third argument, likewise addressed below, is also based on a false premise.

1. The Commission's Interpretation of the ICA Is Not Inconsistent with the *Arbitration Order*.

Level 3 argues in passing that the *Arbitration Order* precludes Qwest from recovering charges for DTT facilities prior to the New ICA because the *Arbitration Order* states that it would not have retroactive application.[22] Qwest already disposed of this argument in its Position Statement. As stated there, a rational analysis of the language of the *Arbitration Order* refutes Level 3's contention. The Commission was clear that the issue of retroactive application of the language presented by the parties in the arbitration related solely to the first quarter of the New ICA and had absolutely no bearing on the Dispute Period:

> There are two related sub-issues raised by Level 3 *in this arbitration*. The first is the relative use factor to be used for the *initial quarterly billing period*. The contract provides for a relative use factor of 50% to be used until a new factor is agreed upon by the parties. Qwest proposes that when a new factor is established that bills should be retroactively adjusted *for the initial billing quarter*. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that the contract language be modified so that no true up will

[21] Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001).

[22] *See* Motion at 4.

> be made and new relative use factors will apply prospectively only.[23]

This language is clear. The issue of retroactivity related solely to the application of the *new* language related to RUF in the New ICA (and then only to the first quarter of its application).

Nothing in the prior arbitration purported to be an adjudication of any claims under the old ICA. The arbitration dealt solely, as it must under section 252 of the Act, with disputed language under the New ICA. Thus, the Commission was not purporting to issue an order that adjudicated claims under the ICA, nor could it legally do so since no such issues were before the Commission.

2. Under Qwest's Understanding of Section 5.1.2.4, There Was No Need to Amend the Provision After the *ISP Remand Order*.

Level 3 argues that when the parties amended the ICA based on the FCC's *ISP Remand Order*, they should have amended section 5.1.2.4 if they intended to exclude Internet-bound traffic from the calculation of RUF. Like almost every other argument made by Level 3, this argument assumes that Qwest understood section 5.1.2.4 the same way Level 3 did and that it was necessary to amend the provision to bring it into conformity with Qwest's intention. As has already been discussed at length above, this assumption is not accurate.

The *ISP Remand Order* did not address the subject of RUF calculations for DTT facilities. Rather, it addressed the treatment of Internet-bound traffic for reciprocal compensation purposes. It settled an issue that had previously been in dispute between incumbents such as Qwest and CLECs serving ISPs such as Level 3—it held that

[23] *Arbitration Order*, at 4 (emphasis added).

Internet-bound traffic was interstate in nature and, therefore, not local traffic subject to reciprocal compensation. However, it also provided transition rules for reciprocal compensation for local traffic that allowed some transitional compensation for Internet-bound traffic. Given the *ISP Remand Order*, it was necessary for parties to amend their ICAs to take into account these transitional rules, which related only to reciprocal compensation.

While it is conceivable that Qwest might have sought an amendment to section 5.1.2.4 based on the rationale of the *ISP Remand Order*, such a request would only have been made had Qwest believed it was necessary and worthwhile. Given Qwest's view that the RUF did not include Internet-bound traffic, it would have made no sense for Qwest to request an amendment to section 5.1.2.4 based on the rationale of the *ISP Remand Order*. In addition, given that the amendment to the ICA based on the *ISP Remand Order* was being made in 2003, Qwest would not have considered it worthwhile to seek an amendment at that time. It already knew that Level 3 disputed Qwest's interpretation of section 5.1.2.4. There would have been little point in seeking a voluntary amendment to resolve a disputed issue.

D. THE ORDER DID NOT IGNORE THE CHANGE OF LAW PROVISION IN THE ICA.

Level 3 argues that the Order is in error because the Commission's decision fails to give effect to the change in law provision in the ICA. The problem with Level 3's argument is that it incorrectly assumes that the Commission's ultimate interpretation of section 5.1.2.4 depends on a change in law.

The Commission made clear in the Order that it was interpreting section 5.1.2.4 of the ICA in the manner it did because interpreting it in the way urged by Level 3 would violate section 252(d)(1) of the Act. It also cited the rationale of the *ISP Remand Order*

as a basis for this conclusion. Contrary to Level 3's argument, neither of these grounds for the Order has anything to do with any change in law. Section 251(d)(1) did not change between the time the parties entered into the ICA and when the Commission issued the Order. It has provided since 1996 that the prices for interconnection must be just and reasonable. There has not been any binding decision or even a non-binding decision of a court interpreting section 251(d)(1) which had any bearing on the Commission's conclusion that interpreting the ICA in the manner urged by Level 3 would violate that section of the Act.

As previously discussed, the *ISP Remand Order* did not change the law on calculation of RUF for purposes allocating costs of DTT facilities. Rather, it relied on an economic rationale, which was based on facts that were already well-known, as one of the bases for its decision to require a transition away from reciprocal compensation for Internet-bound traffic. The Commission cited this rationale as support for its interpretation of section 5.1.2.4. There was no change in law involved and there is no reason to assume Qwest would have been able to invoke the change of law provisions in the ICA as a basis for an amendment to the ICA.

E. THE ORDER WAS AN ADJUDICATION AFFECTING TWO PARTIES, NOT A RULEMAKING.

Finally, Level 3 argues that the Order is in error because it amounts to a rulemaking that discriminates against Level 3 without compliance with the requirements of rulemaking. This argument is new, and Level 3 fails to articulate why it could not

have been raised at the hearing.[24] Moreover, the argument is manifestly incorrect and provides no justification for reconsideration of the Order.

Level 3 acknowledges that rulemaking is only required when an agency action applies to a class of persons.[25] The Order does not apply to a class of persons—it simply resolves a contract dispute between Qwest and Level 3. Nonetheless, Level 3 argues that the Order 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."[26] This argument might equally be made with respect to almost any Commission adjudication of a dispute between two parties. Certainly, the fact that a decision may have some precedential effect on similar proceedings in the future does not turn an adjudication into a rulemaking. A rulemaking must, from the outset and by intent, be intended to apply to a class of persons, not just the parties to an adjudication.

Williams,[27] cited by Level 3, illustrates the difference between a rulemaking proceeding and an adjudication. In *Williams*, a one-way paging company sought an opinion from the Commission on whether it was required to obtain a certificate of public convenience and necessity to operate its business in Utah. Without providing notice to any of the one-way paging carriers who had previously obtained certificates from the Commission, the Commission issued an informal opinion that one-way paging carriers

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[24] *See, e.g., Taylor v. Public Service Comm'n*, No. 20030694-CA, 2005 WL 615164, *1 (Ut. Ct. App. Mar. 17, 2005) (upholding the Commission's refusal to grant rehearing where "[appellant] provided no explanation as to why the 'new' evidence or similar evidence was not available at the May 29, 2003 hearing, or why he could not have introduced this material during the May hearing."); *Garner v. Thomas*, 78 P.2d 529, 530 (Utah 1938) ("As a general rule courts will not grant rehearings to consider questions which could have been urged in the first hearing but were not.") (Wolfe, J., Concurring).

[25] Utah Code Ann. § 63-46a-3(2)(c).

[26] Motion at 10.

[27] *Williams v. Public Service Comm'n*, 720 P.2d 773 (Utah 1986).

were not required to obtain a certificate. The Utah Supreme Court held that such a decision, affecting a class of companies, who had no notice that the issue was even pending, let alone an opportunity to address the issue, was in the nature of rulemaking, not an adjudication. The court also noted that the decision was a change in long-standing policy under which the Commission had issued certificates to one-way paging companies for many years. Here Level 3 filed the Petition to commence a formal adjudicative proceeding and participated throughout the proceeding. The Order did not effect any change in a long-standing policy. In fact, as far as Qwest is aware, it was the first time the Commission had considered and decided the issue. Most importantly, the Order has no application to anyone other than Qwest and Level 3.

Level 3 also argues that rulemaking is required because the Order "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*."[28] Like most of Level 3's other arguments, this argument assumes that when the Commission approved the ICA, it approved it based on Level 3's interpretation of section 5.1.2.4. In fact, Level 3 argues that it "relied on the Commission's ruling."[29] As has already been discussed above, there is no basis for Level 3's biased world view. If anything, it is more appropriate to assume that the Commission approved the ICA based on Qwest's interpretation of the ICA given that the Commission has now concluded that Level 3's interpretation would render the ICA unlawful. Furthermore, the argument that the Order is a written interpretation of a federal mandate is incorrect. The *ISP Remand Order* did not provide any federal mandate with respect to calculation of

[28] Motion at 10.

[29] *Id.*

RUF in determining allocation of costs of DTT facilities. The Commission simply cited the sound rationale of the *ISP Remand Order* in support of its conclusion that it "cannot conclude that [requiring Qwest to bear all of the costs of DTT facilities] would equate to just and reasonable compensation for Qwest."[30]

This Order is not remotely close to rulemaking, and the Commission should ignore Level 3's argument.

IV. CONCLUSION

Level 3's Motion is based on an unfounded assumption that its interpretation of the ICA is the only possible interpretation and that, therefore, the Commission's Order is in error. The undisputed facts in this matter belie Level 3's assumption. In addition, as correctly concluded by the Commission, Level 3's interpretation of the ICA would render it unlawful under section 251(d)(1). The Order already rejected this argument, and Level 3 offers no good reason to reconsider that rejection. Level 3's argument that the Order is improper rulemaking is manifestly incorrect. The Order is correct, and the Motion should be denied.

[30] Order at 10.

RESPECTFULLY SUBMITTED: November 18, 2004.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **OPPOSITION OF QWEST TO MOTION FOR RECONSIDERATION** was served upon the following, on November 18, 2005.

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