Robert C. Brown
Qwest Services Corporation
1801 California, 10th Floor
Denver, CO 80202
(303) 383-6642
(303) 296-3132 (fax)
robert.brown@qwest.com

Ted D. Smith (3017)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
tsmith@stoel.com

Attorneys for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN RE:	:	Docket No. 05-2266-01
	:	
PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ENFORCEMENT OF THE INTERCONNECTION AGREEMENT BETWEEN QWEST AND LEVEL 3	:	**QWEST CORPORATION'S STATEMENT OF POSITION IN OPPOSITION TO LEVEL 3's PETITION AND IN SUPPORT OF QWEST'S COUNTERCLAIM**

Qwest Corporation ("Qwest") hereby submits its Position Statement in Opposition to the Petition of Level 3 Communications, LLC ("Level 3") and in support of Qwest's Counterclaim.

I. INTRODUCTION

The fundamental issue presented in Level 3's Petition and in Qwest's Counterclaim is straightforward. Indeed, it is an issue that, in the Commission's Report and Order in the most recent arbitration proceeding (Docket No. 02-2266-02) between Qwest and Level 3 ("*Report and Order*"), the Commission decided in Qwest's favor.[1] The issue is whether Level 3 must compensate Qwest for the direct trunk transport facilities and related entrance facilities ("DTT facilities") it ordered from Qwest pursuant to the parties' Interconnection Agreement ("ICA") in effect between September 7, 2000 and February 2004 (the "Old ICA"). Based on the *Report and Order*, the 1996 Federal Act (the "Act"), FCC orders, and relevant judicial decisions, the answer is clear: Level is liable to Qwest for those services under the Old ICA and the Commission should enter an order determining that Level 3 is financially responsible for them. The Commission therefore should deny Level 3's claim and grant Qwest's counterclaim.

II. FACTUAL BACKGROUND

This matter arises out of Level 3's order of DTT facilities from Qwest pursuant to the terms and conditions found in the parties' Old ICA dated September 7, 2000, and its various amendments (the "Old ICA").[2] Level 3 ordered the DTT facilities for the

[1] 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) ("*Report and Order*").

[2] The Old ICA was signed by the parties on September 7, 2000 and was approved by the Commission on January 10, 2001. The Old ICA was amended by the parties several times. Those amendments included an Internet Service Provider ("ISP") amendment approved January 8, 2003, which was intended to deal with reciprocal compensation for ISP traffic after the FCC order on that issue, and 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.

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 Internet Service Providers ("ISPs").[3]

To provide its service to its ISP customers, Level 3 established a single Point of Interconnection ("POI")[4] with Qwest in Salt Lake City that gave it the ability to serve the entire State of Utah from a single POI.[5] 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.[6] 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 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 to 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

[3] *Report and Order,* at 1. Please note that page references to the *Report and Order* are to the page numbers on the version of the order attached to Level 3's Petition.

[4] 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.

[5] *Report and Order,* at 1.

[6] *Id.*

traffic to its ISP customers, which then provided the end user with access to the Internet. Thus, for example, a Qwest 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' Old ICA and its amendments. Under the Old 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.[7] If one-

[7] The applicable sections of the Old ICA state (a copy of this portion of the Old ICA is attached hereto as Exhibit 1):

> 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 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.
>
> 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.

way trunks were 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 Old ICA, the cost of those facilities was to be adjusted by reducing the rate paid to the provider of those facilities to reflect the providers relative use of those facilities.[8] Paragraph 5.1.2.4 states:

> 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 paragraph 1.3.1 of the SPOP Amendment to the Old ICA (attached hereto as Exhibit 2), 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).[9] Level 3

> 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.

[8] *Id.* ¶¶ 5.1.2.1 and 5.1.2.4

[9] Paragraph 1.3.1 of the SPOP Amendment to the Old 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

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 parties' Old 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 Old 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[10] calls, and (3) paragraph 5.1.2.4 of Attachment 1 to the Old ICA did not specifically exclude Internet bound traffic from the compensation formula for shared two-way direct trunk groups.

At this same time, the Parties were engaged in negotiations for a new ICA to govern their relationship in Utah (the "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 relative use formula which the parties agreed to apply to the cost for DTT facilities

---

> 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.

[10] As used in this Position Statement, the terms "Internet bound," "ISP-bound," and "Internet traffic" are synonymous.

(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 was excluded from relative use calculation ("RUF"), Level 3 would be required to pay 100 percent of the costs for these facilities; if, on the other hand traffic bound for ISPs was to be included in the RUF calculation, Qwest would be financially responsible for the entire cost of the facilities. 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.

After an evidentiary hearing and briefing, the Commission issued the *Report and Order* on February 20, 2004, wherein the Commission determined that ISP-bound traffic should be excluded from the RUF in the agreement and that Level 3 was therefore responsible for the entire cost of these 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 *Report and 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 period that preceded the *Report and Order*. This period of

[11] *Report and Order*, at 3-4.

time runs from July 2002 to February 2004, and the amount in dispute for that time is $563,616.99.

Level 3's basis for refusing to pay these charges is apparently based on following conclusions: (1) the *Report and Order* is prospective only in its application; (2) the DTT facilities were on Qwest's side of the POI and therefore Qwest is financially responsible for them; (3) Qwest's end-user customer's originated all of the Internet bound calls; and (4) paragraph 5.1.2.4 of Attachment 1 to the Old ICA did not specifically exclude Internet bound traffic from the RUF for shared two-way direct trunk groups. None of these reasons bears scrutiny and all should therefore be rejected.

III. ARGUMENT

For the following reasons, Level 3 is obligated under the Old ICA for the DTT facilities:

1. In the *Report and Order*, the Commission ruled that requiring Qwest to pay the costs of delivering ISP-bound traffic to Level 3 violates section 252(d)(1). Therefore, in light of the reasoning of the *Report and Order*, if the Commission were to construe section 5.1.2.4 of the Old ICA to prevent Qwest from recovering for the DTT facilities, that ruling would violate section 252(d)(1) of the Act, which requires that incumbent local exchange carriers ("ILECs") like Qwest receive "just and reasonable" compensation for providing interconnection to CLECs. Both the Restatement of Contracts and Corbin articulate the basic principle that a contract should be interpreted to give it a lawful meaning as opposed to an interpretation that would leave all or part of the contract unlawful. Given the Commission's ruling that requiring Qwest to bear financial responsibility for the DTT facilities used to deliver ISP-bound traffic would be a violation of section 252(d)(1) of the Act, Qwest's interpretation of section 5.1.2.4 of the

Old ICA, which would render it lawful and consistent with the Act, should be adopted. Adopting Level 3's interpretation of section 5.1.2.4 would render that section in violation of section 252(d)(1) and thus conflict with this well-established rule of contract construction. Level 3's interpretation of the Old ICA would also violate a rule of construction favoring equitable as opposed to harsh and inequitable results.

2. In its arguments in the prior arbitration, Level 3 relied on FCC rules 51.703(b)[12] and 51.709(b)[13] for the proposition that Qwest must bear the financial responsibility for the DTT facilities used to transport ISP-bound traffic to the POI with Level 3. In the *Report and Order*, the Commission rejected that argument and expressly relied on a decision of a federal district court in Colorado. An even more recent decision by the same court has reaffirmed the principle of the earlier decision.

3. Requiring Level 3 to bear financial responsibility for DTT facilities used to deliver one-way traffic is consistent with the FCC's *ISP Remand Order*. Allowing ISP-bound traffic to be included in relative use would violate the same policy considerations that led the FCC to mandate, in the *ISP Remand Order*, the phase-out of the payment of reciprocal compensation for local Internet traffic. The FCC ruled that reciprocal compensation for ISP-bound traffic (1) leads to improper subsidies and uneconomic pricing signals; (2) gives CLECs a distorted incentive to specialize in serving only ISPs to the exclusion of residential and other customers; and (3) improperly

[12] 47 C.F.R. § 51.703(b).

[13] *Id.* § 51.709(b).

ignores the ability of CLECs to collect costs from their ISP customers.[14] Allowing Level 3 to obtain the DTT facilities for free in this docket will have these same effects.

4. To the extent Level 3 argues that the retroactive application issue addressed in the *Report and Order* purports to preclude Qwest from recovering under the Old ICA, its argument is in error and should be rejected.

For these reasons and those set forth more fully below, the Commission should reject Level 3's Petition and rule that Level 3 is obligated to pay Qwest the $563,616.99 billed for these DTT facilities from July 2002 to February 2004.

A. The Commission Ruled in the *Report and Order* That Requiring Qwest to Bear the Cost of DTT Facilities For Level 3's Traffic to ISPs Would Violate Section 252(d)(1) of the Act. Section 5.1.2.4 of the Old ICA Must Be Construed in Light of That Ruling.

In its Petition, Level 3 states (1) that section 5.1.2.4 of the Old ICA contains no language excluding ISP-bound traffic from the application of the RUF[15] and (2) that the *Report and* Order was prospective in nature.[16] The first statement is true, but irrelevant. The second statement is true in the sense that the narrow issue being decided by the Commission related to the New ICA, which was approved on a prospective basis. However, the second statement is false in a broader sense that is relevant in this docket: that is, the Commission's analysis of the underlying legal principles in the *Report and Order* is equally applicable to the Old ICA and supports the conclusion that Level 3 is financially responsible under the Old ICA for the DTT facility charges. In other words, although Qwest agrees that the narrow issue addressed in the *Report and Order* applied to

[14] *ISP Remand Order* ¶¶ 66-70.

[15] Level 3 Petition ¶ 7.

[16] *Id.* ¶¶ 8, 10.

the New ICA and is prospective in that sense, the reasoning underlying the *Report and Order* applies with equal force under to the Old ICA as well.

1. The Underlying Legal Rationale of the *Report and Order* Applies with Equal Force to the Old ICA.

It is critical to the Commission's analysis of the issues in this docket to consider that the Commission's decision in the *Report and Order* was not simply based on a discretionary preference for one set of language over another set. Rather, the Commission's decision to require the New ICA to include language expressly stating that ISP bound traffic shall not be included in the RUF calculation was based on a conclusion that that result was compelled by the Act. The Commission stated:

> Section 251(d)(1) [252(d)(1)][17] of the Act requires that rates for interconnection facilities be 'just and reasonable' and based on the cost of providing the interconnection. An incumbent LEC is to recoup the interconnection costs from the competing carriers making the request. *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).
>
> Level 3's proposed language would result in Qwest bearing all of the costs of the interconnection facilities. *We agree with Qwest's assertion that such a result would violate the requirements under the Act; that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.*[18]

Thus, the Commission ruled as a matter of law that a contrary result (i.e., requiring Qwest to bear financial responsibility for those costs) would be a direct violation of the Act.

Section 203 of the Second Restatement of Contracts identifies basic principles of contract interpretation, including the principle that "an interpretation which gives a

---

[17] While the quoted language in the *Report and Order* referred to section 251(d)(1), it is an obvious typographical error and it is clear that the Commission was referring to section 252(d)(1), particularly since the language the Commission quotes is from section 252(d)(1).

[18] *Report and Order* at 3-4 (emphasis added).

reasonable, *lawful*, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, *unlawful*, or of no effect."[19] Likewise, Corbin states that "[c]ourts often state that when a contract term can be interpreted in at least two ways, and when one of these interpretations would result in a valid contract and the other would cause the agreement to be void or illegal, the former interpretation is preferred."[20]

The application of these principles to the Old ICA is simple. The Level 3 interpretation would require section 5.4.2.1 to be read in a manner that the Commission has ruled would place it in violation of section 252(d)(1), while Qwest's interpretation is not only consistent with the Commission's decision, it is also consistent with section 252(d)(1). Thus, applying the well-established rule of construction described above, the only reasonable result is that ISP-bound traffic must be excluded from the RUF calculation. Otherwise, the result would a provision that is unlawfully inconsistent with section 252(d)(1).

A second rule of construction articulated by the Utah Supreme Court leads to the same conclusion: "Where courts have to choose between conflicting interpretations in the agreements under review, an interpretation which will bring about an equitable result will be preferred over a harsh or inequitable one."[21] A simple review of some key facts make it clear that the most equitable result in this docket would be to make Level 3 responsible for this traffic. It would certainly be inequitable under the facts to impose these costs on Qwest. The reasons for those conclusions are compelling.

---

[19] Restatement (Second) of Contracts § 203(a) (1981) (emphasis added).

[20] 5 *Corbin on Contracts* § 24.22 (Margaret N. Kniffin ed. 1998).

[21] *First Security Bank v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983).

Under more normal circumstances, where Qwest is truly exchanging traffic with a CLEC (unlike Level 3) that actually provides local exchange service to customers in the same LCA, a call from a Qwest customer to a CLEC customer should be classified as Qwest traffic and Qwest should be financially responsible for the traffic under the RUF. Likewise, under those same circumstances, when a CLEC customer calls an ILEC customer in the same LCA, the traffic is appropriately assigned to the CLEC.

But the situation with Level 3 is fundamentally different. It is true that the traffic at issue is originated by customers of Qwest, but those customers are simultaneously and primarily the customers of their ISP when they log onto the Internet. Those ISPs, in turn, receive their local numbers from Level 3, which obtained those local numbers from NANPA by virtue of its status as a CLEC. Thus, when the end user customer dials the local access number to reach his or her ISP, that customer is doing so in its capacity as an ISP customer. The customer is only aware of the number to call for Internet access because the ISP (not Qwest) informed the customer of that number; the ISP has access to local phone numbers as the result of a contractual relationship with Level 3 (presumably, the ISP pays Level 3 significant compensation for the ability to use local access numbers). So it is a legitimate question to ask, in this context, exactly whose customers are generating the traffic.

To assist in answering that question, it is also relevant to analyze the underlying financial incentives. Qwest, of course, provides virtually all its local exchange service through flat rates and thus receives no incremental revenue from dial-up calls from its customers to ISPs that are accessed through local numbers. Indeed, given the long holding times associated with calls to the Internet, Qwest only incurs additional cost.

Level 3, on the other hand, has the incentive to sign up as many ISPs as possible as customers in order to generate revenues from serving the ISPs, but also, as identified by the FCC in the *ISP Remand Order*, to create as much traffic as possible in order to generate potential reciprocal compensation from Qwest. In other words, this traffic produces no revenue for Qwest, but does produce additional cost. It produces customers and therefore revenue for ISPs, whose customers are now able to access their ISP without incurring what would otherwise be long distance charges. And, of course, the traffic produces revenues to Level 3 from ISPs and potential reciprocal compensation revenues from Qwest. The conclusion is inescapable: it is the ISPs and Level 3 that generate the traffic and that benefit financially from it. They should likewise bear the costs that are associated with those benefits.

In the *Report and Order*, the Commission discussed these incentives. In this context, it is clear that it is these customers, acting as customers of the ISP (and indirectly the customers of Level 3), who are responsible for the use of the facilities under section 5.2.1.4 of the Old ICA. Thus, in light of applicable rules of contract construction, the only appropriate interpretation of section 5.2.1.4 is that it excludes ISP-bound traffic from the RUF calculation.

It is also critical, in light of the Commission's legal conclusions, to note that the DTT facilities provided by Qwest before the New ICA were the same type of facilities provided after the New ICA became effective, section 252(d)(1) existed during the Old ICA, and the application of the FCC decisions have not changed on these issues. Finally, none of the undisputed facts referenced by the Commission on page one of its *Report and Order* is any different for the period in dispute than existed when the Commission issued

its decision. Thus, the conclusion as to which party is responsible for paying for these interconnection facilities in this current dispute should be no different either.

2. The Commission's Interpretation of Section 252(d)(1) in the *Report and Order* is Correct.

The requirement that interconnecting carriers compensate ILECs for the costs they incur to provide interconnection is an integral component of the careful balance Congress struck in passing the 1996 Act. While Congress required ILECs to open their networks to competition, it also sought to ensure that the ILECs would be fully compensated for the costs they incur to comply with this mandate. Accordingly, section 252(d)(1) of the Act *requires* that rates for interconnection and network element charges be "just and reasonable" and based on "the cost . . . of providing the interconnection or network element." In *Iowa Utilities Board v. FCC*, the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests."[22] By refusing to pay for the cost of these DTT facilities in Utah that are in place solely for the benefit of Level 3 and its ISP customers, Level 3 has denied Qwest any recovery of its costs, in violation of this critical requirement of the Act and in violation of the principle underlying the *Report and Order*.

As noted in the prior section, Level 3 is not a typical CLEC that actually purports to provide local exchange service to customers. As Level 3 frankly acknowledges, it is in the primary business of serving ISPs. Level 3's refusal to pay for the cost of the DTT

[22] *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).

facilities is particularly troubling here given its method of operation, a problem that the Commission recognized in its *Report and Order*:

> Level 3's current business in Utah consists exclusively of servicing ISP's. Level 3 has a single Point of Interconnection ("POI") with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest's side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Sale Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP's facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.[23]

While Qwest has interconnection duties under the Act and under its Old ICA, those duties did not include the responsibility to transport this traffic destined for the Internet for free. Such a result is clearly prohibited under the Act's express requirement that Level 3, the interconnecting party, must pay Qwest a "just and reasonable" rate for interconnection facilities. This Commission already found as much in the context of the parties' dispute under the New ICA and it should now apply the same economic principles and reach the same conclusion about the parties operating relationship under the Old ICA as well.

B. The *Report and Order* as Well as Two Federal Court Decisions, One of Which was Relied Upon in the *Report and Order,* Ruled That Neither FCC Rule 51.703(b) Nor 51.709(b) Preclude the Assignment of Financial Responsibility to a CLEC for ISP-bound Traffic.

Level 3 argued in the arbitration proceeding that the Commission was precluded from imposing any costs on Qwest's side of the POI on Level 3 by the operation of FCC Rules 51.703(b) ("Rule 703(b)") and 51.709(b) ("Rule 709(b)"). Without going through the details of the argument, Level 3 argued that these rules, in conjunction with the

[23] *Report and Order*, at 1.

FCC's *TSR Wireless* decision,[24] compelled the Commission to require that Qwest be responsible for the cost of the DTT facilities, despite the fact that they were entirely for Level 3's benefit. The Commission rejected those arguments, instead relying the decision of a federal district court in Colorado, *Level 3 Communications v. Colorado Public Util. Comm'n* ("*Colorado Level 3 Decision*"),[25] a case that involved the identical issue and the identical parties. In the *Colorado Level 3 Decision,* the court upheld the Colorado commission's ruling that ISP-bound traffic should be excluded from the RUF, holding that neither of the FCC rules relied upon by Level 3 mandate a different result. Rule 709(b) states that a carrier like Qwest "shall recover only the costs of the proportion of that trunk capacity [dedicated to the transmission of traffic between two carriers' networks] use by an interconnection carrier [i.e., Level 3] that will terminate on the providing carriers's [i.e., Qwest's] network."[26] Level 3 took the position that this provision required Qwest to be responsible for all traffic originated on its network, including ISP-bound traffic. The Court ruled that the term "traffic" in Rule 709(b) refers to "telecommunications traffic," which, per the *ISP Remand Order,* does not include ISP-bound traffic.[27] In the *Report and Order,* the Commission stated that "[w]e agree with the reasoning of the U. S. District Court" in the *Colorado Level 3 Decision*.[28]

---

[24] *TSR Wireless v. U S West Communications,* 15 FCC Rcd 11166 (2000).

[25] 300 F. Supp. 2d 1069 (D. Colo. 2003).

[26] Last two bracketed inserts provided by Qwest.

[27] 300 F. Supp. 2d at 1077-79.

[28] *Report and Order,* at 4.

On June 10, 2005, the federal district court in Colorado revisited its earlier ruling and reaffirmed it in every respect in an appeal of the same issue by AT&T. The court quoted extensively from the earlier Level 3 decision, rejected new arguments advanced by AT&T, and affirmed the Colorado commission's decision on the RUF issue.[29] Thus, the principle these cases stand for is that the FCC rules do not preclude a state commission from holding a CLEC financially responsible for transporting traffic over Qwest's DTT facilities. Ruling that Level 3 is responsible for the DTT facility costs under the Old ICA is consistent with and supported by these decisions.

C. Level 3's Refusal to Pay the DTT Charges Is Inconsistent With the Compelling Policies Expressed by the FCC in the *ISP Remand Order* and Recognized by the Commission in the *Report and Order*.

The FCC's *ISP Remand Order*[30] dealt with the proper treatment of local ISP-bound traffic from for reciprocal compensation purposes. It did not deal directly with the issue of the application of a RUF to the assignment of financial responsibility for facilities on the ILEC's side of the POI. However, the underlying policies articulated by the FCC in the *ISP Remand Order*, which were explicitly recognized in the *Report and Order*, directly support the interpretation of the Old ICA that Qwest is advocating here. The same policies that led the FCC to make the decision to phase-out the payment of intercarrier compensation for Internet traffic[31] require the exclusion of Internet traffic

---

[29] *AT&T Communications of the Mountain States v. Qwest Corporation*, Civil No. 04-cv-00532-EWN-OES (D. Colo. June 10, 2005), at 21-26 (slip op.). A copy of the slip opinion of the AT&T decision is attached hereto as Exhibit 3.

[30] 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) ("*ISP Remand Order*").

[31] *ISP Remand Order* ¶¶ 77-82.

from the RUF calculation. In the *ISP Remand Order*, the FCC found that the payment of reciprocal compensation for Internet traffic causes uneconomic subsidies and improperly creates incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.[32] The FCC concluded that these uneconomic incentives arise from the fact that reciprocal compensation permits carriers, such as Level 3, to recover their costs "not only from their end-user customers, but also from *other carriers*."[33] The FCC explained:

> Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.[34]

The FCC further found that the market distortions caused by reciprocal compensation payments "are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act."[35] By targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap "a reciprocal compensation windfall."[36]

In this case, Level 3's refusal to pay for these DTT facilities, and its effort to compel Qwest to bear all the costs of the DTT facilities that benefit Level 3 and its ISP

---

[32] *Id.* ¶¶ 67-76.

[33] *Id.* ¶ 68 (emphasis in original) (footnote omitted).

[34] *Id.* (emphasis added).

[35] *Id.* ¶ 69.

[36] *Id.* ¶ 70.

customers ignores the fact that Level 3 could have recovered the costs of these facilities from its ISP customers. Given the fact that Qwest was billing Level 3 for the facilities, Level 3 was certainly on notice of Qwest's position that Level 3 was financially responsible for the facilities. 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 fail altogether to account for a carrier's opportunity to recover costs from its ISP customers."[37]

This concern expressed by the FCC applies with equal force to this case. In fact, the Commission relied on this same reasoning in the *Report and Order*:

> Many of the same policy considerations used in the reciprocal compensation are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.[38]

Nothing prevented Level 3 from recovering these costs from its ISP customers (indeed, since we know nothing of the charges Level 3 imposes on its ISP customers, there is

[37] *ISP Remand Order* ¶ 76.

[38] *Report and Order*, at 4 (footnotes omitted).

nothing to indicate that those charges have not already recovered from ISPs). Consistent with the FCC's reasoning in the *ISP Remand Order* and the Commission's own reasoning in the *Report and Order*, the Commission should not permit this cost shifting and forced subsidy, but instead should leave it to Level 3 to recover the cost of the interconnection trunks it leases from Qwest through the rates it charges its ISP customers. The Commission should find that Level 3 is obligated to pay for the cost of these DTT facilities during the dispute period.

D. To the Extent Level 3 Argues that the Retroactive Application Issue Addressed in the *Report and Order* Purports to Preclude Qwest from Recovering Under the Old ICA, Its Argument is in Error and Should Be Rejected.

Level has asserted that the *Report and Order* somehow precludes Qwest from recovering these charges retroactive to the New ICA. A rational analysis of the language of the *Report and Order* clearly refutes that position. The Commission was very 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 disputed 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 be made and new relative use factors will apply prospectively only.[39]

[39] *Report and Order*, at 4 (emphasis added).

This language is absolutely 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 agreement. Thus, the express language of the *Report and Order* is clear that the Commission was not purporting to issue an order that adjudicated claims under the Old ICA, nor could it legally do so since no such issues were before the Commission.

E. Qwest Only Became Aware Yesterday That Level 3 is Contesting the Amount Owed. Qwest Will Investigate and Respond to That Claim as Soon As Possible.

During the course of the dispute on the issues in this matter, Level 3 has disputed that it is liable for the DTT facilities' billings, but it has not contested that the amounts billed are the incorrect rates. Level 3's Petition in this matter challenged Qwest's claim of liability, but not the amount of the billing. It was only late yesterday, when Qwest received Level 3's reply to Qwest's counterclaim, that Qwest became aware that Level 3 was challenging whether the rate in the billings is the proper rate. See ¶ 3, Reply to Counterclaim. Given the short period of time since Qwest received Level 3's reply and given the lack of specificity in Level 3's reply, it is impossible at this time for Qwest to respond to Level 3 on this issue.

IV. CONCLUSION

On the basis of the arguments set forth herein and those which will be presented hereafter to the Commission, Qwest respectfully requests the Level 3's claim be denied and that the Commission grant Qwest's counterclaim.

RESPECTFULLY SUBMITTED: July 15, 2005.

_____

Ted D. Smith
Stoel Rives LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S STATEMENT OF POSITION IN OPPOSITION TO LEVEL 3's PETITION AND IN SUPPORT OF QWEST'S COUNTERCLAIM** was served upon the foregoing, on this 15th day of July, 2005.

By Hand Delivery and electronic service to:

William J. Evans
Vicki M. Baldwin
PARSONS, BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898

By U.S. Postal Service, postage prepaid to:

Gregory L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

By U.S. Postal Service, postage prepaid and electronic service to:

Michael Ginsberg
Assistant Attorney General
160 East 300 South, Suite 500
Heber M. Wells Building
Salt Lake City, UT 84111

_____