December 5, 2005

BY HAND DELIVERY

Ms. Julie Orchard
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

Re: Docket No. 05-2266-01 – Reply Brief of Level 3

Dear Ms. Orchard:

Enclosed please find the following: an original and 5 copies of the *Reply Brief of Level 3* and a CD with electronic versions of the filing. We have also e-mailed copies of everything to lmathie@utah.gov.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Parsons Behle & Latimer

Vicki M. Baldwin

VMB/jld
Enclosures

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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3	**REPLY BRIEF OF LEVEL 3** Docket No. 05-2266-01

Pursuant to the Order of the Public Service Commission ("Commission") issued November 23, 2005, granting Level 3 Communications, LLC ("Level 3") permission to reply to the Opposition Brief filed by Qwest Corporation ("Qwest"), Level 3 through its counsel, hereby does reply and states as follows:

ARGUMENT

I. THE OLD AGREEMENT MUST BE INTERPRETED IN ACCORDANCE WITH THE WELL-ESTABLISHED PRINCIPLES OF CONTRACT INTERPRETATION.

A. Qwest's Argument that the Old Agreement Is Ambiguous Must Fail.

In its Opposition, Qwest argues that the language in Section 5.1.2.4 of the Old Agreement is ambiguous because Qwest now claims it has always interpreted the provision differently than Level 3. *Qwest Opposition* at 10. Simply because Qwest claims to have interpreted the contractual language differently than Level 3, does not make clear language ambiguous. Pursuant to the rules of statutory construction, Qwest's argument must fail.

Section 5.1.2.4 of the Old Agreement provides:

> 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 § 5.1.2.4 (emphasis added).

This is the only relevant language in the entire contract to consider. Qwest has pointed to no other language that would somehow create an ambiguity to this definition of "relative use." Principles of contract interpretation require the Commission to "give effect to the meaning intended by 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)). The Commission may rely on extrinsic evidence as to the parties' intent only if it first determines that the provision is ambiguous. *Id.* (citing *Nielsen v. Gold's Gym*, 78 P.3d 600 (Utah 2003)). Otherwise, if a provision of the agreement is unambiguous, the Commission "'must 'determine the parties' intentions from the plain meaning of the contractual language as a matter of law.'" *Id.* (quoting *Fairbourn Commercial, Inc. v. American Hous. Partners, Inc.*, 94 P.3d 292 (Utah 2004)). Therefore, the Commission must first make a preliminary determination of whether an ambiguity exists, and to do this, it may consider relevant extrinsic evidence of the facts that were known to the parties at the time they entered the contract. *Id.*

Neither the language of the "relative use" provision, nor the rest of the entire contract, for that matter, suggests any exclusion of ISP-bound traffic, or any different treatment of any sort for traffic originated by Qwest and terminated by Level 3 to its ISP customers. While claiming that the originating minutes of use to be used in the RUF calculation did not include Internet-bound traffic, Qwest has not identified any words in Section 5.1.2.4 or the rest of the contract that would give credence to its "interpretation." *Opposition Brief* at 10. If the Commission is not willing to simply give effect to the plain meaning of the contractual language, it must be understood that a "'contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does. To demonstrate ambiguity, the contrary positions of the parties must each be tenable.'" *Id.* (quoting *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768 (Utah Ct. App. 2004) (internal quotations omitted)). While a legal authority interpreting contractual language must not give one party a benefit for which they did not bargain and reduce to contractual language, a decision maker may determine whether a party's position is tenable by considering relevant extrinsic evidence of the facts that were known to the parties at the time they entered the contract if necessary. *Id.* In this case, Qwest's interpretation is not supported by the language of Section 5.1.2.4 or the facts known to the parties at the time of contracting.

Level 3 has always been a CLEC interconnected to Qwest to exchange local traffic pursuant to legally required and lawfully approved local ICAs throughout Qwest's region. Qwest admits that it knew that Level 3's traffic was to be locally dialed ISP-bound traffic originated by Qwest customers and terminated to Level 3's customers. *Qwest Opposition* at 4. There is absolutely no evidence in the record that the parties could have interpreted Section 5.1.2.4 to have the meaning now claimed by Qwest when the contract was executed.

Even if one were to assume for the sake of argument that, at the time it entered into the Old Agreement, Qwest interpreted Section 5.1.2.4 to have a different meaning than is plainly stated, that would still not necessarily make the provision ambiguous and allow Qwest to get a better deal than it bargained for. Even if Qwest attributes a different subjective meaning to the contract term, the term is not ambiguous unless its interpretation is tenable. *Uintah Basin Med.*, 110 P.3d at 172; *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 774 (Utah Ct. App. 2004). When viewed in the context of the time the Old Agreement was made, Qwest's claimed interpretation of the provision is not tenable.

Qwest claims that its obligation to pay reciprocal compensation is limited to "local" traffic (i.e., where the customer initiating the Internet call and the ISP server receiving the call are physically located in the same local calling area), and that it "has never regarded Internet-bound traffic as local traffic." *Qwest Opposision* at 10. For that reason, Qwest claims it has "never believed that Internet-bound traffic would be included in the RUF calculation." *Id.* Qwest's assertion is not tenable because it conflicts with the state of the law as it existed at the time the ICA was signed. Further, the relative use provision simply states that "originating minutes of use" and nothing more dictates financial responsibilities for the facilities in question.[1] Qwest's argument is an attempt to revise history based on events that occurred after the Old Agreement was executed and to unilaterally reinterpret the plain language of the contract under which the parties operate.

In 1996, the FCC issued an order declaring that Section 251(b)(5) applied only to local telecommunications traffic. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996); *see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3693 (¶ 7) (1999) (*"ISP Declaratory Ruling"*). The FCC applied that rule to ISP-bound traffic in its *ISP Declaratory Ruling*, which relied on the traditional "end-to-end" jurisdictional analysis to conclude that ISP-bound traffic is not "local" because "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *ISP Declaratory Ruling* at ¶ 1; *see also Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. Mar. 24, 2000). However, the D.C. Circuit reversed and remanded that decision saying that the FCC had failed to "provide an explanation why this [end-to-end jurisdictional analysis] is

[1] The ICA was signed on September 7, 2000, and submitted to the Commission, which approved it on January 10, 2001. (Docket No. 00-049-88).

relevant to discerning whether a call to an ISP … should … fit within the local call model … or the long-distance model." *Bell Atlantic*, 206 F.3d at 5. While Qwest continues to try to argue that ISP-bound traffic is not "local" and therefore it must somehow prevail in this dispute, the *Bell Atlantic* decision long ago established that such a distinction is improper. Thus, at the time Qwest and Level 3 entered into the ICA in September, 2000, the FCC had been reversed by the D.C. Circuit Court of Appeals for concluding that Internet-bound traffic is not local. In light of that ruling, Qwest's claim that it "has never regarded Internet-bound traffic as local traffic" is patently unreasonable. Moreover, its interpretation of Section 5.1.2.4, which was purportedly based on its belief that such traffic would not be included in the RUF, is untenable in light of the law existing at the time.

Even if it could be deemed "tenable" to view the law at the time as unsettled on the issue of whether Internet-bound traffic was "local" and whether it should be considered in the RUF calculation, (though there is no evidence in the record in this docket to confirm any facts or assumptions in that respect), then it would have been unreasonable for Qwest to fail to explicitly address the question in the language of Section 5.1.2.4. Qwest does not dispute that it knew from the outset that Level 3 would serve ISPs. *Qwest Opposition* at 4, 10-11. Consquently,it is somewhat disingenuous for Qwest now to claim that it never intended Internet-bound traffic to be included in the RUF calculation when it did not insist on explicit language to make its intention clear in the first place. Further and perhaps more importantly, it must be noted that although there has been litigation over how CLECs should be compensated for terminating ISP-bound traffic for the originating carrier, there has never been a change in the "Calling Party Pays" policy established by the Act itself. Therefore, the language the parties agreed to and the Commission approved that dictated that Qwest would be responsible for the cost of the DTT facilities used to carry its traffic was perfectly in line with 252(d)(1) and the rest of the Act, which established the "Calling Party Pays" structure upon which Section 5.1.2.4 is based.

Qwest's claim of ambiguity is simply not tenable. The Commission, therefore, must look to the plain meaning of the contractual language as a matter of law. The plain language of the Old Agreement states that the rate paid by Level 3 for DTT facilities must be reduced to reflect Qwest's use of that facility. It does not allow Qwest to unilaterally exclude Internet-bound traffic originated by Qwest from the calculation. Because the Commission's Order did not follow these principles of contract interpretation, the Commission must reconsider its decision.

B. <u>Qwest's Argument that the Commission May Imply a Term to the Old Agreement Is in Error.</u>

Qwest asserts in its Opposition that "[w]hen 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." *Qwest Opposition* at 10. This is a plain misstatement of the law applicable to the current dispute. While it is true that in some instances a reviewing tribunal may imply an essential term in a contract when that term was omitted by the parties, that principle of contract interpretation is inapplicable here. Following Qwest's position will lead the Commission into reversible error.

Except in specific, rare circumstances, a reviewing court or commission cannot imply a requirement in a contract that explicitly or implicitly affects the parties' obligations or expectations. *U.P.C., Inc. v. R.O.A. Gen., Inc.*, 990 P.2d 945, 954 (Utah Ct. App. 1999) (refusing to imply a term absent from a contract). To do so would violate the well-settled principle that "a court may not make a better contract for the parties than they have made for themselves . . . [and] . . . may not enforce asserted rights not supported by the contract itself."[2] *Id.*; *see also Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, (Utah 2002) (refusing to imply an intent not present in the contract and noting "We will not make a better contract for the parties than they have made for themselves. . . . Nor will we avoid the contract's plain language to achieve an 'equitable' result"); *Hal Taylor Assocs. v. UnionAmerica, Inc.*, 657 P.2d 743, 749 (Utah 1982) ("It is a long-standing rule in Utah that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain . . . [and the] Court will not rewrite a contract to supply terms which the parties omitted."); *Dalton v. Jerico Const. Co.*, 642 P.2d 748, 750 (Utah 1982) (refusing to imply an intent not present in the terms of the contract and noting "it is not for a court to rewrite a contract improvidently entered into at arm's length or to change the bargain indirectly on the basis of supposed equitable principles").

In its Opposition Brief, Qwest relied on *Allstate Enterprises, Inc. v. Valley Bank & Trust Company*, 772 P.2d 466 (Utah Ct. App. 1989), for its assertion that the Commission can insert a term not present in the contract. In the *Qwest Opposition* at 10, Qwest's reliance is misplaced. *Allstate* dealt with the rare and specific situation in which an indemnity agreement was missing a term required by law. As explained in *Wagenseller v. Scottsdale Memorial Hospital*, (relied on by the *Allstate* court), an implied-in-law term arises from a duty which is imposed by law even though the contract itself may be silent on that duty, such as the covenant of good faith and fair dealing. 710 P.2d 1025, 1036 (Ariz. 1985). The *Allstate* court noted that it is generally held that either party to an indemnity agreement may revoke it at will but that such revocation must be with notice. *Allstate*, 772 P.2d at 469. Therefore, there is an implied duty at law to give notice before revoking an indemnity agreement, and this duty to give notice could be implied even in an indemnity agreement that did not provide a term for duration of the contract. *Id.*

The implied-in-law doctrine cannot be invoked in the instant case. Section 5.1.2.4 addresses the obligations and expectations of the parties with regard only to the cost of facilities. There is no implied law that says Qwest must include a provision in the ICA excepting ISP bound traffic from the RUF calculation. As Qwest failed to include such a term, the Commission

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[2] This is true even under Section 252(d)(1) of the Act. As acknowledged by Judge Goodwill in the hearing, Section 252(d)(1) of the Act only *entitles* Qwest to just and reasonable compensation it does not require it. Qwest is free to contract its own terms. *In re Matter of The Petition of Level 3 Commcs., LLC for Enforcement of the Interconnection Agreement between Qwest and Level 3*, Docket No. 05-2266-01, Tr. at 38 (July 26, 2005).

cannot impose one. To do so would result in the Commission making a better bargain for Qwest than it made for itself.

The law is well established in Utah that neither Qwest nor the Commission can simply rewrite a contract to supply terms which the parties omitted, not even on the basis of supposed equitable principles. The Commission's Order in this case effectively inserts terms that were not contained in the contract contrary to the law of contract interpretation. Therefore, the Commission should grant Level 3's request for reconsideration of the Commission's decision.

II. QWEST'S ALLEGATIONS OF NEW FACTS, WHICH ARE DISPUTED BY LEVEL 3, SHOULD BE STRICKEN.

Qwest asserts in its Opposition Brief the claim that Qwest has always interpreted Section 5.1.2.4 of the Old Agreement to exclude Internet-bound traffic from the calculation of the RUF and that Qwest has always billed Level 3 according to this interpretation. *Qwest Opposition* at 10. Level 3 disputes these claims. This argument by Qwest's counsel raises factual questions that were not addressed during the course of this proceeding. Consequently, there is no evidence on the record that supports Qwest's assertion that it "has always" interpreted Section 5.1.2.4 differently than Level 3 and "always" billed Level 3 according to this interpretation. These allegations of material facts were asserted by counsel for Qwest with no opportunity for cross-examination and cannot be a basis for the Commission's decision. R746-100-10.F.1 ("Testimony shall be under oath and subject to cross-examination."). Because this "testimony" of Qwest's counsel is not in the record, and has not been subjected to cross-examination and rebuttal, it should be stricken, along with all arguments based on it. Alternatively, the Commission should grant Level 3's request for rehearing and take additional evidence on the issue. Only if the Commission does so may it consider this new factual allegation and the arguments it supports.

III. THE CHANGE IN LAW PROVISION IS APPLICABLE IN THIS CASE.

A. Qwest's Argument Regarding Section 252(d)(1) Is an Oversimplification of the Law.

Qwest argues that the change of law provision in the Old Agreement does not apply because Section 252(d)(1) did not change. *Qwest Opposition* at 17. It asserts that there was not any "decision of a court interpreting section 251(d)(1),[3] [sic]" that would have caused Qwest to invoke the change of law provision in the Old Agreement. *Id*. Qwest's argument asks the Commission to take an overly simplistic view about both Section 252(d)(1), and what might trigger the change of law provision under the Old Agreement.

Obviously, the requirement in Section 252(d)(1) that rates for interconnection be "just

[3] Qwest has mistakenly referenced Section 251 of the Act.

and reasonable," has not changed since the Act was adopted. But, the determination of what is just and reasonable depends not only on the words of the statute, but on the practice of the industry, the right of the parties to negotiate their own agreements, and the state of other laws and regulations in existence at the time the determination is made. Both before and after the *ISP Remand Order* Internet-bound traffic has been exchanged between co-carriers as local traffic on local facilities pursuant to FCC rules and orders. Locally dialed ISP-bound traffic has also always been subject to reciprocal compensation requirements. The *ISP Remand Order* only changed the rates and structure that applied. Thus, before the *ISP Remand Order* when this ICA was executed, there was no question that the language in Section 5.1.2.4 requiring the carrier originating the traffic to bring it to the point of interconnection at its own cost was just and reasonable.

As regulators grappled with the nature of Internet-bound traffic, the nature of "just and reasonable" rates may have evolved, but the relevant question in the present case is what the law was at the time the parties' reached a meeting of the minds and reduced that understanding to writing. As discussed above, in interpreting the Old Agreement, the Commission must look at the law and circumstances as they existed at the time it was signed. The Commission cannot apply the finding it made in the arbitration docket, which was based on recent legal developments, to the Old Agreement, which was entered into in a different legal environment. The best window on the context at the time the Old Agreement was signed is the decision regulators made at that time. This Commission and every other state commission that considered it, determined the Old Agreement was just and reasonable.

B. <u>If Qwest Believed the RUF Did Not Include Internet-bound Traffic, It Was Incumbent on Qwest to Seek an Amendment to the Old Agreement Based on the Rationale of the *Isp Remand Order*.</u>

Qwest admits that it would have sought an amendment to Section 5.1.2.4 of the Old Agreement if it believed it was "necessary" and "worthwhile". *Qwest Opposition* at 16. Qwest claims it was not necessary because Qwest interpreted Section 5.1.2.4 to exclude Internet-bound traffic, allegedly based upon the rationale of the *ISP Remand Order*. *Id.* Yet, in the same paragraph, Qwest admits that Level 3 disputed these charges at the same time the *ISP Remand Order* amendment to the ICA was being negotiated. *Id.*

As Qwest admits, the *ISP Remand Order* only relates to reciprocal compensation. *Id.* Qwest knew at the time that the parties were amending the ICA to reflect the *ISP Remand Order*, that Level 3 disputed any charges for facilities used to carry Internet-bound traffic originated by Qwest end-users. *Id.* Indeed, Qwest's primary argument in the arbitration case for excluding ISP-bound traffic from the RUF depended upon the *ISP Remand Order*. If Qwest had truly had that interpretation of Section 5.1.2.4 of the Old Agreement at the time, as it now claims, it was incumbent on Qwest to exercise the change of law provision.

Qwest argues that "[t]here would have been little point" seeking an amendment to the contract because they had already started unilaterally billing Level 3 without regard to the contractual language of the ICA. This is precisely Level 3's point in this case. Because Qwest failed to avail themselves of the contractual provision that established the process for amending the Old Agreement for a change in the law, which Qwest admits it could have done, Qwest is

stuck with the plain language of the contract. Neither Qwest nor the Commission has authority or a basis to ignore the plain language of Section 5.1.2.4 and amend it now. Accordingly, the Commission should reconsider its decision.

IV. THE ARBITRATION ORDER REQUIRES THAT THE EXCLUSION OF INTERNET-BOUND TRAFFIC BE APPLIED PROSPECTIVELY ONLY.

Once again, Qwest's position rests on taking unambiguous language and interpreting it contrary to its plain meaning for Qwest's benefit. The Arbitration Order could not have been more clear that the new calculation of the RUF should be used prospectively only. And yet, Qwest tries to highlight the losing argument as if it is the controlling position. The Commission clearly ruled that Level 3 prevailed.

> 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*.

Arbitration Order at 4 (emphasis added). Qwest has done precisely what the Commission ordered it could not - it has taken the Commission's decision to adopt Qwest's new relative use language in the new ICA and imposed it on Level 3 under the Old Agreement that contains entirely different contractual obligations. Qwest's argument that the issue of retroactivity related solely to the application of the new language related to the RUF in the New Agreement makes no sense. The Commission should not ignore its clear prior ruling and encourage the very monopolistic practices that Level 3 argued would ensue if Qwest's position on retroactive application were adopted in the Arbitration.

The New Agreement gave rise to a new RUF, and the Commission determined that the new RUF should not be applied retroactively. If the RUF was always 100% Level 3's responsibility, as Qwest wants to claim now, there would have been no point in even arguing this issue during the Arbitration. The dispute about how a new RUF should be implemented only arose because it was *new*. The new argument that ISP-bound traffic should somehow be excluded when calculating the RUF was entirely different from the way the RUF had been agreed to in the Old Agreement. If it had been the same all along, there would be no reason for Qwest to argue for retroactive application at all. Thus, Qwest's argument makes no sense and should be disregarded. The Commission must give effect to the plain language of its Arbitration Order.

V. CONCLUSION

This situation is not unfair as Qwest would have the Commission believe. Qwest's customers pay Qwest for the ability to make local calls including connecting to their ISPs. Further, it is well established that between Qwest's stranglehold position over the PSTN and its

strong marketing efforts during the time of this dispute, it profited enormously from people ordering second lines to access ISPs. Ignoring plain contractual language to try to find an equitable result for Qwest is not only contrary to the law, it is entirely unnecessary. The law requires that the Commission interpret the Old Agreement as written. Therefore, based on the foregoing and Level 3's arguments in its Motion for Reconsideration and Rehearing, Level 3 requests that the Commission grant its Motion.

DATED this 5th day of December, 2005.

/s/ Vicki M. Baldwin
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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of December, 2005, I caused a true and correct copy of the foregoing **REPLY BRIEF OF LEVEL 3** to be sent in the following manner:

Via Hand Delivery

Ted D. Smith

Stoel Rives

201 South Main Street, Suite 1100

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Via Hand Delivery

Michael Ginsberg

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Instructions for filing with the Public Utilities Commission of Utah
For Nevada see instructions below

Documents being filed are hand delivered and addressed as follows:

Ms. Julie Orchard
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

Required for filing:

- A cover letter MUST be included with EACH copy submitted for filing. (Reference doc. no.734333 for cover letter format. The cover letter must be modified to reflect each particular filing).

- Original document and 5 additional copies (**exceptions**: rate case filings require original plus 15 and tariffs require the original plus 2). Copies are to be two-sided and three hole punched.

- The filing must also include a computer disk (or CD depending on size) with electronic versions of documents in the file formats in which they were created (e.g. Word, WordPerfect, Excel). Filing NOT considered complete if disk not included (label disk with docket no. and names of documents).

- YOU MUST ALSO SEND AN E-MAIL to lmathie@utah.gov with the same documents included on the disk, in the same formats that are on the computer disk. She will not accept PDF unless it is an exhibit. See next bullet.

- PDF documents are NOT (usually) accepted – see attached MEMO for exceptions and instructions).

- Mail and/or e-mail copies to everyone on the COS.

Please refer to attached MEMO from the Commission for further information.

NEVADA FILINGS

Cover letter (728942) and nine copies of the pleadings.