Level 3 Communications, LLC
Docket No. 10-049-16
Witness: Richard E. Thayer

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF UTAH

LEVEL 3 COMMUNICATIONS, LLC

Surrebuttal Testimony of Richard E. Thayer

October 14, 2010

I. INTRODUCTION OF WITNESS

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Richard E. Thayer. I work for Level 3 Communications, LLC ("Level 3"). My business address is 1025 Eldorado Boulevard, Broomfield, Colorado, 80021.

Q. WHAT IS YOUR POSITION AT LEVEL 3?

A. I am Senior Corporate Counsel. I have been with Level 3 for eight years.

Q. ARE YOU THE SAME RICHARD E. THAYER WHO FILED DIRECT TESTIMONY IN THIS DOCKET ON AUGUST 19, 2010?

A. Yes.

II. SUMMARY OF SURREBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. In this round, I respond to specific issues raised in rebuttal testimony regarding the pending indirect transfer of control of Qwest Communications International ("Qwest") to CenturyLink ("CenturyLink") (collectively, "Joint Applicants"). As I did in initial testimony, I will refer to the post-closing company at the "Combined Entity".

Q. PLEASE DESCRIBE THE RESPONSE OF LEVEL 3 TO THE REBUTTAL TESTIMONY OF QWEST AND CENTURYLINK.

A. Qwest and CenturyLink have been evasive and disappointing in both rounds of testimony. Given the scope of this transaction and the role both companies play in the state's telecommunications marketplace, Level 3 believes that Qwest and CenturyLink have not offered specific information to demonstrate that the proposed transaction is in the public interest. It is clear that the basic theme of the Joint Petitioners is to brush aside the concerns of the Commission and any interveners. This approach puts the Commission, the public, and the competitive industry in the untenable position of having

to know how the Combined Entity will act ***before*** the Combined Entity will answer any questions.

Q. WHY IS THAT DISINGENUOUS?

A. It is disingenuous for the Joint Petitioners to demand that the Commission, the public, and competitors predict the future when the Combined Entity won't tell anyone how it intends to function. "Trust us" is not an answer that meets the public interest test, which the Joint Petitioners must pass to close this transaction. The burden is on the Joint Petitioners to show that this transaction is in the public interest.

Q. THE JOINT PETITIONERS ARGUE THAT MANY OF THE ISSUES RAISED ARE COMMERCIAL IN NATURE AND THAT THIS PROCESS SHOULD NOT BE USED TO RENEGOTIATE CONTRACTS. HOW DOES LEVEL 3 RESPOND?

A. The issues raised by the CLECs, and especially Level 3, go to the ability of companies to compete against the Combined Entity. In fact, many of the issues revolve around the legal obligations of both Qwest and CenturyLink. It seems that the Joint Petitioners prefer a "divide and conquer" approach. They take this approach by leveraging their market power to push those issues that relate to the Combined Entity's legal obligations into commercial negotiations or individual complaint cases if the Combined Entity does not get its way.

This allows the Combined Entity to leverage the legal and financial power it maintains from its market dominance to force delay while the legal process plays out. In addition to delay, decisions in the complaint process are not self-enforcing across the industry. Qwest's practice has been to require a third-party seeking to implement a decision to invoke negotiations, which inevitably leads to the complaint process. The result is that complaint decisions are not applied uniformly across the industry, which gives

competitive providers disparate rights. By addressing these open questions in the context of this proceeding, the Commission ensures (1) that wholesale customers are treated in a non-discriminatory manner, (2) that competitors and the Combined Entity understand their legal rights and obligations, and (3) that competition is not harmed or delayed.

III. THE COMMISSION SHOULD CONDITION APPROVAL OF THE MERGER BY PROHIBITING THE COMBINED ENTITY FROM LEVERAGING BILLING DISPUTES TO DELAY OR REFUSE TO PROVIDE SERVICES.

Q. CAN YOU PLEASE BRIEFLY SUMMARIZE LEVEL 3's CONCERN WITH RESPECT TO THE COMBINED ENTITY LEVERAGING BILLING DISPUTES?

A. Yes. In my previous testimony, Level 3 raised a concern that post-closing, the Combined Entity will leverage billing disputes with one affiliate to slow-roll or refuse to provision services post-closing. Again, as already noted by Mr. Coleman in his testimony, the Combined Entity will possess significant market power over Competitive Local Exchange Carriers (CLECs) due to its control over the vast majority of network infrastructure in the state of Utah. There can be no question of the Combined Entity's ability to (or incentive) to create and leverage billing disputes to its advantage.[1] Let me provide an example. Assume that Level 3 and Qwest have a billing dispute for $100 for transport charges in Utah. We'll also assume that Level 3 has no outstanding billing disputes with CenturyLink. After the closing, Level 3 submits an order for a transport to meet a customer critical deadline in a CenturyLink state outside of the legacy Qwest

[1] Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company, LLC, and Qwest LD Corporation, Docket No. 10-049-16, DPU Exhibit 1.0, Direct Testimony of Casey J. Coleman, p. 5-6 (August 30, 2010) ("Coleman Direct") (Noting that "competition is not as robust in the wholesale market" and that there may be a "locale of effective competition", particularly viewed in light of changing market conditions and the fact that "the success of the wholesale market depends almost entirely on Qwest providing a network that is open and available for all parties to use […] such that "terms and conditions for using the network" [are] "just and reasonable for both Qwest and for the CLEC[.]").

footprint. Level 3 is concerned that CenturyLink will rely upon the open billing dispute with Qwest to refuse delivering the transport even though the transport request involves another state, not to mention another CenturyLink affiliate.[2]

Q. IN HIS REBUTTAL TESTIMONY, MR. HUNSUCKER CALLS THIS "SPECULATIVE BEHAVIOR" AND CRITICIZES YOU FOR RAISING "WHAT MIGHT HAPPEN".[3] HOW DOES LEVEL 3 RESPOND?

A. Mr. Hunsucker's response continues the theme that unless you can know the future, you will have to trust the Combined Entity. It is an "Ask but We Won't Answer" defense. That argument is especially absurd with this issue. First, the ability to leverage billing disputes between the two companies cannot occur until ***after*** this transaction closes. So contrary to Mr. Hunsucker's protestations, the Commission and competitive industry have to question how the Combined Entity will act.

The second reason to address this issue now is because Level 3 has experienced this exact type of conduct from other companies post-merger. The problems arise normally through internal process changes or new contract interpretations. These changes come without warning and are first encountered when a service order service is held or rejected. Because such conduct "escapes Commission review," it causes delay and harms competition. The lengths that ILECs will go through to reinterpret contract clauses bears proof that the contract provisions do not provide the security that would prevent

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[2] Given, as Mr. Coleman notes, "the almost monopolistic nature of the incumbent's infrastructure" Level 3's concerns that the Combined Entity would have incentive to leverage access to such infrastructure based upon faulty, inaccurate or deliberately manufactured billing disputes are well-founded. *See* Coleman Direct, p. 21 (noting also that there are a "variety of areas where competition could be harmed by CenturyLink integrating the Qwest's assets.").

[3] Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company, LLC, and Qwest LD Corporation, Docket No. 10-049-16, DPU Exhibit 1.0, Rebuttal Testimony of Michael Hunsucker On Behalf of Qwest Corporation, p. 45, l. 7-14 (September 30, 2010) ("Hunsucker Rebuttal").

CenturyLink or Qwest from defying the "ICA terms that legally dictate the operating relationship" between the companies.

Mr. Hunsucker's response is further weakened by the fact that he does not try to prove his point with any contract language. The simple truth is that the interconnection agreements with Qwest and CenturyLink do not expressly prohibit an affiliate or other entity from leveraging billing disputes across the corporate family because they were not written with an understanding that Qwest and CenturyLink would seek a merger. Without such express language, the Combined Entity can take the unilateral position that it does not have to provide services in the event of a billing dispute between a wholesale customer and any other affiliate of the Combined Entity.

Q. ARE THERE OTHER ISSUES IN THIS PROCEEDING THAT RELATE TO LEVERAGING DISPUTES BETWEEN AFFILIATES?

A. Yes, in initial testimony, Level 3 raised the issue of Qwest unilaterally imposing a 90-day time frame in which a carrier had to identify and raise a billing dispute or it was deemed waived. Since the ability to identify and raise billing disputes is a crucial tool for each carrier, neither Qwest nor CenturyLink should be allowed to arbitrarily short-circuit a customer's ability to raise disputes. In addition to being denied the ability to pursue a legitimate claim, if the Combined Entity is allowed to leverage billing disputes across entities it will gain extra leverage over entities that try to raise disputes outside of the arbitrary windows that the Combined Entity establishes.

Q. DID QWEST OR CENTURYLINK ADDRESS THE 90-DAY DEADLINE IN THEIR TESTIMONY?

A. Yes, and the response of Qwest witness Karen Stewart proves Level 3's point. Stewart admits that Qwest is "in the process of negotiating agreements that will provide more

explicit guidelines" in those instances where express terms are not identified.[4] Qwest goes on to say that resolution of the issue is between the companies. Nothing can be farther from the truth because it shifts the power to reach fair and equitable terms and conditions to the Combined Entity. Qwest and CenturyLink should offer the same basic terms and conditions to all carriers. By forcing each carrier into "one-off" negotiations, the Combined Entity can use its dominant position to force vastly different terms on otherwise relatively similar companies – in this case, the same CLEC, say Level 3, could be subject to vastly disparate treatment by Qwest on one hand and CenturyLink on the other. Such treatment is not in the public interest because it can only result in unreasonable discrimination harmful to legitimate competition.

Q. CAN THESE MARKET PROBLEMS BE SOLVED THROUGH CONDITIONS ON THIS TRANSACTION?

A. Yes. By imposing such requirements on the Combined Entity, the Commission will ensure that competition is not harmed through dilatory or unilaterally arbitrary conduct. Any delay in the provision of services harms competition and is unacceptable. The Commission can avoid the types of competitive harm that concerned Mr. Coleman if it adopts these simple, targeted, and common-sense conditions. Moreover, if the Combined Entity has no intention of engaging in such conduct, then there would be no reason to object to these conditions. The Combined Entity's interests are served when it can demonstrate that the merger is in the public interest. Certainly if the Combined Entity can agree to conditions offered by CLECs (rather than rejecting all of them as illegal or

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[4] Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company, LLC, and Qwest LD Corporation, Docket No. 10-049-16, DPU Exhibit 1.0, Rebuttal Testimony of Karen A. Stewart On Behalf of Qwest Corporation, p. 36, l. 6-16 (September 30, 2010) ("Stewart Direct").

somehow gaining an unfair advantage over a company that is poised to become one of the largest telecommunications carriers in the nation), arguably at least that portion of the public interest which depends upon the health of a competitive market would be served. If, however, the Combined Entity refuses to declare its intentions, the Commission cannot preserve the public interest in competition on a post-closing basis unless the Commission regulates on a proactive and prospective basis. If the Commission takes the Combined Entity at its word, the Combined Entity's entire case is summed up in the words "wait and see," as contrasted with the Commission's regulatory authority to anticipate and prevent unnecessary harm.

Q. WHAT IS THE RECOMMENDATION OF LEVEL 3?

A. In order to preserve competition and ensure that the public interest is met, Level 3 urges the Commission to condition its approval of the merger by prohibiting the Combined Entity from using a billing dispute that arises between a telecommunications carrier and either Qwest or CenturyLink to delay or refuse to provision services by the Combined Entity, the other affiliate, or as a result of an unrelated matter. "Unrelated matter," by definition, therefore, means any disputes that arise in different states or between different corporate entities.

IV. THE COMMISSION SHOULD CONDITION APPROVAL WITH A COMMON-SENSE CONDITION THAT PROHIBITS CENTURYLINK FROM ESTABLISHING A RURAL CLEC IN QWEST OPERATING TERRITORIES IN ORDER TO ARBITRAGE ACCESS RATES.

Q. CAN YOU PLEASE SUMMARIZE LEVEL 3's CONCERN WITH RESPECT TO THE COMBINED ENTITY ESTABLISHING A RURAL CLEC?

A. Yes. As I discussed in my initial testimony, Level 3 is focused on one particular form of arbitrage. It involves a rural local exchange company establishing a competitive local exchange carrier to provide services in the less populated areas of an adjoining territory

of a Regional Bell Operating Company. In that case, the rural competitive local exchange carrier is allowed to charge the same access rates as its rural parent instead of being capped at the rate established for the RBOC. Level 3 is concerned that on a post-closing basis, CenturyLink will establish rural competitive local exchange carriers in qualifying Qwest territories. The Combined Entity could then develop a business plan that attracts to the rural CLEC high-volume users of access minutes, and charge the higher CenturyLink rate instead of the lower Qwest rate.

Q. DID QWEST AND/OR CENTURYLINK RESPOND TO LEVEL 3'S CONCERNS?

A. No. Rather than respond to Level 3's concerns directly, Mr. Hunsucker references a string of cases involving Qwest and various rural LECs now pending in various states, but nowhere does he address or admit that CenturyLink is a largely rural LEC, enjoys significantly higher terminating access charges, and may therefore have incentive to arbitrage rate differentials that exist between rural and incumbent LEC rates.[5] As with leveraging billing disputes across the Combined Entity, this issue is one where the harm can be prevented ahead of time, but is certain to occur and harm competitors if the Commission waits until after the fact to redress it.[6] Due to the potential harm that would

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[5] *See* Hunsucker Rebuttal Testimony at p. 27, lines 4-9, and footnote 23, which cites several Qwest cases, but makes no mention of CenturyLink.

[6] *See, e.g. Qwest Communications Corporation v. Superior Telephone Cooperative, et al*., IUB Docket No. FCU-07-2, 2009 Iowa PUC Lexis 428, Final Order (Iowa Util. Bd. Sept. 21, 2009)(Both Qwest and the Iowa Utilities Board note violations of the filed rate doctrine as applied to intrastate tariffs, discriminatory treatment of LEC customers, and necessity to collect refunds for charges imposed.) It may also be worth noting that the protracted litigation that started at the state level continues to this day despite FCC orders limiting these practices. Without effective state guidance on this issue, high access charge entities will continue to have strong financial incentives to exploit this system. As a result, the Iowa Utilities Board, for example, enacted rules limiting practices where a "LEC's rates for intrastate access services are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively

be caused by such an arbitrage opportunity -- by imposing inappropriate access charges on traditional Qwest traffic -- the Commission must resolve this issue now.[7]

Q. QWEST AND CENTURYLINK INDICATE THERE ARE NO RURAL CENTURYLINK EXCHANGES IN UTAH. IS THAT ALONE ENOUGH TO PREVENT CENTURYLINK FROM LEVERAGING ARBITRAGE OPPORTUNITIES?

A. No. CenturyLink has been very successful at acquiring and consolidating rural, and now, RBOC carriers. If the Commission does not establish conditions as Level 3 has suggested, then CenturyLink could engage in this practice any time it chooses to, leaving the competitive industry to expensive, time consuming, and, ultimately harmful post-hoc proceedings to address what is already a known industry problem. In addition, as I explain more thoroughly below, CenturyLink tends to view the lack of rules as justification for routing and call classification practices as applied to high volume wireless traffic that, if they are not clearly unjustified rate arbitrage, they certainly merit further examination.

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large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost of providing access service." *In re High Volume Access Services*, RMU-2009-0009, Order Adopting Rules (Iowa Util. Bd. June 7, 2010). The RLEC's CLEC customers, however, appealed this case to federal court. Much of this, however, could have been prevented on a forward-looking basis, particularly where, as here, both the FCC and many states have enacted rules that could be readily applied to prevent future harm. Notably, challenges to Iowa Utilities Board regulations limiting traffic pumping schemes have failed. (See, *Aventure Comm'n Tech., L.L.C., vs. Iowa Util. Bd*., No. C 10-4074-MWB, 2010 U.S. Dist. LEXIS 87250 (USDC ND IA Aug. 17, 2010).

[7] The Commission recently addressed an unfortunate traffic pumping situation in which a CLEC sought to operate in rural territory. With the increased traffic coming through on the free conference calling lines, however, the traffic would have resulted in a "higher per minute cost to Qwest and other IXC's to terminate traffic. Because the CLEC seeking such rural operations, however, mirrored the access rates of the rural ILEC, it can bill those higher access rates, while providing Utahans no benefit of increased services or completion in the state. *See In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Docket No. 08-2469-01, 2010 Utah PUC LEXIS 101, (Utah Pub. Serv. Comm'n, April 26, 2010).

Q. IS THERE AN INCENTIVE FOR THE COMBINED ENTITY TO ENGAGE IN SUCH A PRACTICE?

A. As discussed in Level 3's initial testimony, this transaction is one of first impression where a largely rural, independent local exchange carrier is purchasing a Regional Bell Operating Company. It will create unique policy issues that have not arisen in traditional RBOC or CLEC combinations. This is a prime example because every profit-seeking entity should seek to maximize its ability to generate revenue from its assets. Presumably that is one of the reasons why CenturyLink is purchasing Qwest. That incentive is heightened when regulatory rules create an opportunity and mandate the terms and conditions instead of traditional market forces or contract negotiations. It would be a normal outgrowth for the Combined Entity to evaluate whether it can maximize its revenue by pursuing a particular regulatory path. Level 3 does not believe that it is "speculative" for CenturyLink to undertake such an evaluation because it is in the best interests of the Combined Entity to do that. The broader policy issue arises when that regulatory opportunity is used in manner that goes beyond the rationale for creating that policy. That's when regulatory arbitrage occurs.

Q. WHAT WAS THE INTENT OF THE ORIGINAL POLICY ALLOWING RURAL CLECS TO CHARGE THE HIGHER ACCESS RATES OF ITS RURAL PARENT?

A. When the Federal Communications Commission exempted rural CLECs from its order capping CLEC access rates, it wanted to preserve nascent competition in the more rural territories of the RBOC.[8] The FCC determined that in less densely populated RBOC territories, it was unlikely that a competitive local exchange carrier would expand into

[8] *See* 47 C.F.R. § 61.26(f).

those markets.[9] The idea behind the exemption was to provide an incentive for rural CLECs to provide competitive services in adjoining territories.

Q. HOW DOES THIS TRANSACTION IMPACT THE RATIONALE FOR THE FCC'S RURAL CLEC EXEMPTION?

A. Once the entities are combined, CenturyLink no longer has the incentive to enter an adjoining Qwest market to compete for new customers if it will be competing against an affiliate. Instead, its incentive to enter a market will be driven more by a regulatory opportunity such as extracting rates that it normally would not be able to charge. In this scenario, the Combined Entity has the incentive to reassign customers if it can increase access revenue that would normally be generated for calls terminated to a CenturyLink rural CLEC instead of Qwest. The rationale for encouraging competition has been replaced with an arrangement that maximizes a regulatory rate and hurts competition by forcing competitive, terminating carriers to pay more for services because of a loophole in the rules. Where the incentives to arbitrage are this strong, and the patterns of market behavior are well known to state regulators nationally and to the FCC, the Commission's refusal to take action ahead of time and instead waiting until disputes and market harm occurs, cannot be, and is not, in the public interest.

Q. ARE THERE OTHER REASONS WHY THE COMMISSION SHOULD CONSIDER REGARDING THIS ISSUE?

A. In my initial testimony, Level 3 raised this issue in the context of understanding the financial projections of the Combined Entity. The Commission needs to evaluate whether the Combined Entity is including any revenue projections from this arbitrage opportunity.

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[9] The FCC has defined a Rural CLEC as a CLEC that does not service, by originating or terminating traffic within any incorporated place of more than 50,000 inhabitants based on most recently available Census Bureau statistics or an urbanized area as defined by the Census Bureau. *See* 47 C.F.R. § 61.26(a)(6).

The fact that CenturyLink did not respond to the question speaks volumes of its long-term plans. Under such circumstances, the Commission should assume that the Combined Entity will pursue this course for growing its revenue stream.

Q. WHAT IS LEVEL 3's RECOMMENDATION TO THE COMMISSION?

A. Since CenturyLink and Qwest have refused to provide any response to how the Combined Entity will act if this transaction closes, the Commission should assume that they will engage in the conduct discussed here. In that case, the Commission should condition its approval so that the Combined Entity cannot grow its revenues at the expense of competition by using a regulatory loophole. The Commission can achieve that with a targeted, common-sense condition that requires any rural CLEC established by CenturyLink that operates in an adjoining Qwest territory to mirror the access charges of its Qwest affiliate. Such a condition would level the playing field and allow competitors in the Qwest territories to be treated in a nondiscriminatory manner.

V. THE COMMISSION SHOULD REQUIRE THE COMBINED ENTITY TO LIMIT TRANSPORT CHARGES RELATED TO 8YY CALLS AND DATABASE DIPS.

Q. DID CENTURYLINK RESPOND TO THE 8YY TRANSPORT ISSUES RAISED IN YOUR INITIAL TESTIMONY?

A. It does not appear to me that CenturyLink addressed the issue Level 3 raised with respect to the transport incurred for certain wireless calls directed to Level 3's 8YY customers. My initial testimony involves a call on today's networks; thus my testimony is not speculative. In that instance, a call originates on a wireless network. Instead of that call being exchanged and the database dip being performed at the closest tandem, Embarq has been transporting the call to a distant tandem. The call is then routed back to the more logical tandem that should have handled the call in the first instance and handed off to

Level 3. The problem is that CenturyLink charges the full transport to the distance tandem and back.

Q. MR. HUNSUCKER ASSERTS THAT YOU ARE WRONG AND THAT EMBARQ DOES NOT CHARGE FOR ALL OF THE TRANPORT. DO YOU AGREE?

A. No, I do not. When Mr. Hunsucker says on page 44 of his testimony that the charges are "limited," Level 3 does not understand whether only some elements are charged or whether CenturyLink is limiting the mileage of the transport charge. The latter is what Level 3 believes should be the appropriate resolution but as our bills indicate, that is not the case.

Q. MR. HUNSUCKER BRUSHES ASIDE THE IMPORTANCE OF THIS ISSUE BY SAYING THAT LEVEL 3 DID NOT RAISE IT WHEN CENTURYTEL PURCHASED EMBARQ. WHAT IS LEVEL 3'S RESPONSE?

A. CenturyLink's response is just more of the same. Qwest and CenturyLink prefer to demean the issues raised in this proceeding and cast aspersions on the motives of anyone who has a question. The reason why Level 3 did not raise the issue in the CenturyLink-Embarq proceeding is simple. At the time of the transaction, Level 3 did not have a full understanding of this problem. At that time, Level 3 believed it was limited to one operating territory. We understand the problem now and have a concern that it might spread from CenturyLink territory throughout the Qwest operating territory. That's why we've raised it now.

Q. MR. HUNSUCKER ALSO SAYS THAT CENTURYLINK SHOULD BE ALLOWED TO RE-ROUTE AND DOUBLE-TANDEM CMRS-ORIGINATED BECAUSE THERE ARE NO RULES AGAINST THIS SPECIFIC PRACTICE. WHAT IS YOUR RESONSE?

A. Perhaps the single most aspect of Mr. Hunsucker's statements is the fact of CenturyLink's bald reliance on the lack of "rules" as justification for their actions. If no rules exist, what prevents the Combined Entity from routing traffic anywhere to any

tandem they like and charging access rates simply because they believe there are no rules prohibiting it? What is to stop them from adopting practices they apparently consider perfectly legal across their current operating territory in Qwest territory post-merger? What prevents the Combined Entity from routing calls that originate in Utah to another state in order to leverage the transport costs, or from establishing an outsourcing arrangement whereby Embarq does all database dips for the Combined Entity? For Level 3, the real issue is whether the Combined Entity is likely to export this practice of inefficient network routing into Utah or the rest of the its service territory.

Q. WHAT IS LEVEL 3'S RECOMMENDATION TO THE COMMISSION?

A. In my initial testimony, Level 3 proposed a targeted, common-sense condition to alleviate the incentives for the Combined Entity to use its market dominance to derive new revenue from inefficient practices. Mr. Hunsucker's testimony reaffirms the need for this condition. When a former RLEC that is obtaining major national market dominance relies upon a lack of rules to justify practices it would most certainly oppose were it subjected to them, alarm bells should go off for everyone. Under these circumstances, Level 3 urges the Commission to adopt the following condition: "The Combined Entity agrees that it will limit any tandem transport charges for 8YY traffic to charges based upon the nearest tandem identified in the Local Exchange Routing Guide to the originating point of the call." This simple change is rational, consistent with industry practices of routing traffic to the nearest tandem, and it prevents the Combined Entity from leveraging its market dominance to impose new and unjustified costs upon carriers who will have no choice but to turn around and pass those costs through to consumers while they pay their erstwhile incumbent "competitor" above-market and above-cost rates for services that are

not required. It is hard to see how rewarding the Combined Entity for inefficient and expensive network practices can benefit wholesale competition or Utah consumers.

VII. THE COMMISSION SHOULD RESOLVE OUTSTANDING ISSUES WITH THE TREATMENT OF ISP-BOUND TRAFFIC

Q. WHY DOES THE ISSUE OF ISP-BOUND TRAFFIC BEAR ON THIS PROCEEDING?

A. At its most fundamental, the treatment of ISP-bound traffic goes to the public interest because it involves how one class of consumers will obtain or maintain access to the Internet. That issue is crucial because the Combined Entities have cited as a benefit in their testimony here and before the Federal Communications Commission that this transaction will lead to increased broadband deployment and the introduction of IPTV.[10]

Q. DIVISION WITNESS COLEMAN SUGGESTS THAT THERE SHOULD BE CLEAR GUIDELINES AROUND THE COMPENSATION FOR ISP-BOUND TRAFFIC IN ORDER TO MINIMIZE REGULATORY AND JUDICIAL REGULATION. HOW DO YOU RESPOND?

A. Level 3 agrees with Mr. Coleman on a number of fronts. First, the treatment of ISP-bound traffic and the classification of how that traffic is treated for assessing Relative Use Charges go to the heart of the finances of the Combined Entity. That is especially true when regulators consider how the Combined Entity will pay for or meet its broadband commitments. It is important for regulators to understand the economic assumptions the Combined Entity has made with respect to it intercarrier compensation

[10] Ex Parte filing, In Re: Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent of Transfer of Control, Federal Communications Commission, WC Docket No. 10-110, filed Sept. 16, 2010. "During the meeting, CenturyLink and Qwest discussed the extensive public interest benefits of the transaction for consumers, including expanding IPTV opportunities, creating a stronger service provider to the enterprise market, improving the financial strength of the combined company, and expanding broadband services available to consumers consistent with the Commission's goals in the National Broadband Plan.

obligations. Does the Combined Entity treat ISP-bound traffic as income from access charges or a network expense for terminating compensation? This is an important question that the Commission needs to consider as it evaluates whether this transaction meets the public interest. If the Combined Entity is relying upon traffic classifications or other assumptions to fund its broadband or IPTV efforts, then the Commission must consider the ability of the Combined Entity to rely upon those revenue sources.

The economics of the dial-up Internet access business have changed since the FCC took its initial steps to reign in what it saw as problems in the market for dial-up ISP services.[11] The FCC later found that the arbitrage opportunities were eliminated when it lifted the minute and new market caps.[12] As more Americans transition to broadband services, the ISP bound market continues to shrink but dial-up service remains an important means of accessing the Internet for those areas with no or low broadband penetration, for those who cannot afford broadband services, and those who do not wish to adopt broadband. In today's marketplace, the reality is that the costs imposed by Qwest for Relative Use Charges and its constant fight against its obligation to pay reciprocal compensation rates for ISP bound traffic have made it largely uneconomical for carriers to provide wholesale dial-up services. By bringing the regulatory regime into line with the current status of the law, the Commission will ensure that those who prefer dial-up or cannot obtain broadband services have competitive choices. It is what the public interest requires.

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[11] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic , FCC 08-262, 24 FCC Rcd 6475 (2008) (the "ISP Order").

[12] *Core Communications Inc. v. Federal Communications Commission*, et al; 592 F.3d 139, decided Jan. 12. 2010. ("Core Mandamus Order")

In its decision approving the merger of US WEST and Qwest Communications, the Commission cited under state law its duty to ensure that "the applicants show that the transaction provides a net positive benefit to the public." In other words, the Commission can only find the merger to be in the public interest only where there is a "definable net benefit" to the public.[13] Since the Joint Petitioners are asserting their ability to deploy high speed Internet access throughout the state, the Commission and the industry must examine the ability of the Combined Entity to do so. Understanding how the Combined Entity plans to pay for its commitments to deliver this infrastructure is required in order to determine net public benefit. How the Combined Entity plans to treat and classify ISP bound traffic, is a crucial part of that analysis.

Q. DID QWEST OR CENTURYLINK RESPOND TO THE FINANCIAL OR PUBLIC INTEREST ISSUES RAISED IN YOUR TESTIMONY?

A. No they did not. Their witnesses did not address what financial assumptions they were making with respect to ISP bound traffic and Relative Use Charges. Instead, it appears that Qwest witness Karen Stewart was designated to take the lead on the response, but she did so on legal grounds.

Q. DOES LEVEL 3 AGREE WITH THE ANALYSIS THAT MS. STEWART PROVIDES IN HER REBUTTAL TESTIMONY?

A No, Level 3 does not. We'll provide more guidance in our briefs and other post-hearing submissions. However, I would say that Ms. Stewart's reliance on the "ISP Order" is incorrect. That Order has been superseded by the FCC's action taken in the ISP Remand

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[13] In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp. and US West Communications, Inc., Docket No. 99-049-41, 2000 Utah PUC LEXIS 228, (Utah PSC, June 9, 2000) citing Utah Code Ann. §§ 54-4-28, 54-4-29 and 54-4-30 and rejecting Qwest's arguments that the public interest standard did not apply in telecommunications. Notably the Commission's merger conditions required that Qwest convert all of its Utah central offices to DSL.

Order and the subsequent action by the D.C. Circuit Court of Appeals in the Core Mandamus Order. Those decisions have replaced the previous underlying legal rationale of the original ISP Order with a coherent legal structure that leaves little room for the type of creative regulatory lawyering that Qwest has pursued for the past five years. Under those decisions, ISP-bound traffic is classified as telecommunications traffic subject to the reciprocal compensation requirements of Section 251(b)(5) of the Telecommunications Act. However, because of the interstate nature of that traffic, the FCC determined that it could set the rate for that traffic under its authority over interstate traffic in Section 201 of the Communications Act. Since locally-dialed ISP-bound traffic falls under Section 251(b)(5), the Part 51 rules apply and they prohibit one carrier from assessing charges on traffic that originates on the network of another carrier. That alone prohibits the Combined Entity from excluding ISP-bound traffic when assessing Relative Use Charges against an interconnecting carrier.

VIII. THE COMMISSION SHOULD REQUIRE THE COMBINED ENTITY TO MAINTAIN THE QWEST STATEMENT OF GENERALLY AVAILABLE TERMS FOR (SGATS) FOR UP TO FIVE YEARS.

Q. IN THE STEWART REBUTTAL, QWEST ARGUES THAT THE LAW DOES NOT REQUIRE IT TO MAINTAIN ITS SGAT. HOW DOES LEVEL 3 RESPOND?

A. Level 3 will respond to the legal analysis of Ms. Stewart in its reply briefs. However, from a policy perspective Level 3 disagrees with much of her testimony.

Q. PLEASE EXPLAIN.

A. As a threshold matter, Level 3 does not believe that Qwest can withdraw its SGAT without the approval of the Commission. Despite Qwest's view that it is not required to maintain the SGAT, a number of state commission have had to weigh in on Qwest's

attempts to withdraw it.[14] Qwest cites Idaho as one state where they have been allowed to withdraw the SGAT but even that discussion shows that an order was required from that state regulatory authority. Based on my research, I do not believe that this Commission has allowed Qwest to withdraw its SGAT or to just ignore its implementation.

Q. WHY SHOULD QWEST BE REQUIRED TO MAINTAIN THE SGAT?

A. Qwest should be required to maintain the SGAT because it would be in public interest. Having an available set of terms and conditions can allow a carrier the ability to avoid the extended costs and transactional delays involved in negotiating an interconnection agreement. This is especially true when there are no available interconnection agreements to adopt. As I mentioned in my original testimony, Level 3's agreement with Qwest has been in evergreen status since June 2006. That status makes it unavailable to other carriers. The SGAT provides a quick roadmap for new entrants to bring their competitive services to the marketplace. As I discussed earlier, preserving a competitive market for telecommunications is one of the factors state law requires the Commission to consider as it evaluates this proposed transaction.

IX. SUMMARY OF TESTIMONY AND RECOMMENDATIONS

Q. CAN YOU PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY?

A. Yes. Level 3 believes that the Joint Petitioners have failed to provide adequate information for the Commission and the telecommunications industry as a whole to evaluate whether this transaction complies with the public interest. Absent a thorough review of the finances of the Companies and the assumptions underlying their projections, the Commission cannot make a determination as to the ability of the

[14] Stewart Rebuttal at pp. 30 to 32.

Combined Entity to meet its post-closing obligations. Those projections are crucial because they go to the ability of the Combined Entity to meet all of its obligations. As a competitor of Qwest and CenturyLink, Level 3's main concern is that the Combined Entity be able to meet is contractual obligations to provide interconnection services, to provide operational support systems, and to understand the financial arrangements that will govern an RBOC's relationship with those entities. Yet, when asked to answer the most basic questions regarding those assumptions, Qwest and CenturyLink obfuscate, avoid, and ignore. That type of conduct raises red flags.

Compounding the problem is the long-term negative impacts on competition that will follow if the Combined Entity stumbles. While Mr. Hunsucker may be technically correct to brush aside CLEC concerns over OSS systems based upon the fact that FairPoint and Hawaii Telephone attempted to cut over to new OSS systems too rapidly following their respective mergers, his testimony fails to address the fact that substantial harm to the competitive industry occurred as a result. Following the FairPoint merger proceedings, for example, the respective FairPoint state commissions have been tied up in years of proceedings aimed at remedying the irreparable harms that occurred as a result of multiple failures of OSS systems. If anything, Mr. Hunsucker's attempt to avoid the issue of OSS cutover by focusing on companies who cutover their systems too quickly and too early underlines the importance of requiring the Combined Entities to provide something more substantive than "CenturyLink pledges to give its CLEC customers ample and adequate notice of any future changes in compliance with all rules and terms of the interconnection agreements and accepted business practices."[15] Just as such pleasant

[15] Hunsucker Rebuttal at p. 11.

sounding and apparently sincere statements were made by the acquiring entities in the Hawaii Telephone and FairPoint proceedings, so too, will the CLECs, Commission Staff and the Commission be left holding the bag, if, for whatever reasons that may come, inadequate thought was given to requiring substantive commitment to OSS cutover before, rather than after, the fact.[16] This is amplified by the fact that in the same section of testimony Mr. Hunsucker states that, "it is to benefit of all of the Joint Applicants' retail and wholesale customers for CenturyLink to conduct a thorough review of the legacy systems and to make decisions regarding the systems and practices to be used post-merger in a timely manner."[17] If, indeed, it would benefit retail and wholesale customers to conduct such a review, the public interest would be served if that review were conducted in the full light of proceedings taking place before the fact rather than in the absence of public involvement where the Combined Entity is the sole determinant of what may or may not benefit retail and wholesale customers after these proceedings have closed.

If the Combined Entity stumbles, the impact will be felt throughout the telecommunications industry and competition will suffer just as it has in Hawaii, Maine, New Hampshire and Vermont. If financial projections are not met, then regulators must

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[16] *Evaluating the Proposed Merger of CenturyLink and Qwest Communications*, National Regulatory Research Institute, Sherry Lichtenberg, Ph.D. (July 12, 2010). The NRRI evaluation states: "Failure to maintain the existing wholesale systems or seamlessly transition to new systems could drive even the largest competitors from the market. For example, the failure of the Hawaii and FairPoint operational support systems and the merged BellSouth/AT&T systems (albeit for a shorter time) resulted in thousands of orders that did not complete (including orders to transfer customers to cable companies), dissatisfied customers, and incorrect bills. Each of these problems significantly impacted the ability of competitors to retain and support their customers and resulted in financial loss." Pgs. 4-5. *See*: http://www.nrri.org/pubs/telecommunications/NRRI_merger_evaluation.pdf.

[17] Hunsucker Rebuttal at p. 11.

understand what will happen to the employees of the Combined Entity and which parts of the Combined Entity will be targeted for restructuring or reduction. Will the Combined Entity lay off employees in wholesale services in order to focus their efforts on broadband deployment, for example?

Level 3 expects the results of such behavior would be profound. Without vibrant competitive pressure, the Combined Entity will lack the market pressure to deploy broadband Internet access as soon as possible. Further, the Combined Entity will lack the incentive to provide innovative, price appealing services. And finally, the Combined Entity will have every incentive to reduce its workforce that it deems unnecessary in the face of diminished competition. The ripple effect on employment throughout the telecommunications industry will be devastating.

Such conduct is the classic example of stiff-arming your competition while you expand your revenue sources. That result cannot be tolerated. While Level 3 will address the standard of review in post hearing briefs, I would like to mention that the public interest is in part reflected in Utah's Legislative policy to "encourage the development of competition as a means of providing wider customer choice for public telecommunications services throughout the state." Utah Code. Ann. § 54-8b-1.1(3). The record presented by the Joint Petitioners does not meet that standard.

Q. CAN YOU PLEASE SUMMARIZE LEVEL 3's RECOMMENDATION TO THE COMMISSION?

A. In my initial testimony, Level 3 stated that this transaction could be approved if the Commission adopted targeted, common sense conditions. Nothing the Joint Petitioners has submitted so far has changed the Company's position. Those conditions include:

1. Extending the time period of existing interconnection agreements;

2. Requiring the Combined Entity to allow the portability from one state to another any existing interconnection agreement between the Combined Entity and that CLEC;

3. Require Qwest to extend its existing Statements of Generally Agreeable Terms and Conditions ("SGATs") for a period of five years;

4. Require the Combined Entity to compensate terminating carriers at the appropriate rate for ISP-bound traffic and that ISP bound traffic shall include traffic provisioned using virtual NXX codes;

5. The Combined Entity shall treat all locally dialed ISP-bound traffic including virtual NXX traffic as local traffic in the calculation of relative use factors pursuant to 47 C.F.R §703(b);

6. Require the Combined Entity to allow carriers to use new or expanded interconnection routes established by affiliates of the Combined Entity that are in adjoining service territories;

7. Require all contracts between the affiliates of the Combined Entity for telecommunications services and network interconnection to be made publicly available;

8. Prohibit the Combined Entity from using billing disputes with one entity from threatening disconnection, disconnecting or refusing to provision new orders across the Combined Entity;

9. Prohibit the Combined Entities from continuing or expanding the improper homing of 8YY switched access charge and transport practices;

10. Require Qwest to cease its unlawful and arbitrary practice of denying dispute claims solely on the basis that they are more than 90 days beyond the date originally billed; and

11. Require Qwest to cease its practice of using its interstate tariffs as a claimed basis for establishing billing analogs for intrastate charges that are not in its intrastate tariffs.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.