July 15, 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 – Position Statement of Level 3 Communications, LLC

Dear Ms. Orchard:

Enclosed please find the following: an original and 5 copies of the *Position Statement of Level 3 Communications, LLC* and a disk with an electronic version of the filing. We have also e-mailed a copy of the filing to lmathie@utah.gov.

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

Sincerely,

Parsons Behle & Latimer

Vicki M. Baldwin

VMB/gm
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	**POSITION STATEMENT OF LEVEL 3 COMMUNICATIONS, LLC** Docket No. 05-2266-01

Level 3 Communications, LLC ("Level 3") through its undersigned counsel and pursuant to the scheduling order issued in this Docket on June 30, 2005, submits this Position Statement to identify the issues and summarize the position of Level 3 in this matter.

This matter arises out of a letter that Qwest Corporation ("Qwest") sent to Level 3, demanding payment for direct trunking facilities charges, for which Qwest billed Level 3 from July, 2002 through February, 2004 ("Dispute Period"). Level 3 disputes that such charges are now or were ever authorized under the controlling interconnection agreement between Level 3 and Qwest. Accordingly, Level 3 has no obligation to pay them.

STATEMENT OF FACTS

~~1.~~On or about September 7, 2000, Level 3 and Qwest entered into an interconnection agreement ("Old Agreement") pursuant to the Telecommunications Act of 1996 ("Act") and Utah Code Annotated § 54-8b-2.2, which was approved by the Commission on January 10, 2001. (A copy of the Commission's Order Approving the Old Agreement is attached as Exhibit A).

~~2.~~The Old Agreement expired on June 26, 2001.

~~3.~~Before the Old Agreement expired, Level 3 and Qwest began negotiations for a new interconnection agreement ("New Agreement"). The parties were unable to reach agreement on all issues of the New Agreement before the Old Agreement expired, and needed to arbitrate outstanding issues before the Commission.

~~4.~~The agreed upon Term of the Old Agreement was described as follows:

> This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 *and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties*. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. *This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective*.

Part A, Section 20.1 (emphasis added). Thus, the terms of the Old Agreement were to apply until the New Agreement was approved by the Commission. See Utah Code Ann. § 54-7-10 (providing that orders of the Commission take effect and become operative on the date issued and continue in force until changed or abrogated by the Commission).

~~5.~~In negotiating the New Agreement, the parties were able to agree to all but one general issue. In order to resolve that single issue in the New Agreement, on August 6, 2002, Level 3 filed its

Petition for Arbitration. The issue to be arbitrated was whether or not ISP-bound traffic should count as Qwest originating minutes of use for the calculation of "relative use" of direct-trunked transport and entrance facilities on Qwest's side of the point of interconnection ("POI"). Docket No. 02-2266-02. The arbitration dealt with new language that was proposed by Qwest to exclude ISP-bound traffic from relative use calculations. Qwest's proposed language excluding ISP-bound traffic from its originating minutes of use for the New Agreement did not exist in the Old Agreement.

~~6.~~On December 10, 2002, a hearing was held and testimony was received in the Arbitration proceeding in connection with the New Agreement. The Commission issued its Report and Order in Docket 02-2266-02 ("Order") on February 20, 2004. (A copy of the Order is attached as Exhibit B.)

~~7.~~The Order resolved the disputed matters that were litigated before the Commission in the New Agreement between Qwest and Level 3. It adopted Qwest's proposed language excluding ISP-bound traffic from the originating minutes of use in the calculation of the relative use of direct-trunked facilities and entrance facilities. However, it prohibited Qwest from attempting to retroactively apply a new relative use factor that excluded ISP-bound traffic minutes and held that any new relative use factor would apply prospectively only. Order, Docket No. 02-0266-02, Feb. 20, 2004.

~~8.~~Level 3 is in full compliance with the Commission's Order in that regard and is current on its accounts with Qwest under the New Agreement.

~~9.~~The only mention of "relative use" in the Old Agreement was in Section 5.1.2.4 of Attachment 1. The Old Agreement stated:

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

Old Agreement, Section 5.1.2.4 (emphasis added). There is no language in any other part of the agreement that would allow Qwest to ignore the plain language of Section 5.1.2.4 and pretend that its customers had not originated all of the traffic on these facilities. The relative use treatment in the Old Agreement thus was consistent with what Level 3 advocated be adopted in the New Agreement – that is, that the relative use of direct-trunked facilities are to reflect all of the originating minutes of use on the trunks without exception.

~~10.~~Because Qwest end-users originated all the traffic that was exchanged on the facilities in question and because there was no exclusion of ISP-bound minutes, the Old Agreement did not provide any basis for Qwest to charge Level 3 for direct-trunked facilities deployed by the parties. This of course is consistent with long standing FCC rules and orders that establish that the originating carrier is responsible for the costs of the carriage of traffic originated by their end-users.[1] Likewise, none of the amendments that were made to the Old Agreement during its

[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶¶ 1042, 1062 (1996) ("*Local Competition Order*") (subsequent history omitted).; *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) ("*Texas 271*"); *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al*., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM")*; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for*

term, including the Single Point of Presence ("SPOP") Amendment[2] or the amendment implementing the FCC's *ISP Remand Order*,[3] changed the manner in which relative use would be determined.

~~11.~~Despite the fact that the Old Agreement did not provide a basis for Qwest charging for direct trunking facilities, Qwest illegally billed Level 3 for these trunks under the Old Agreement. Level 3 consistently contested those charges.

~~12.~~In October, 2002, Qwest and Level 3 reached a global settlement of a number of past billing issues across Qwest's territory for all amounts in dispute between the parties through June 30, 2002, including billing disputes under the Old Agreement related to direct trunking that carried Qwest's originating traffic to the Level 3 point of interconnection in Utah.

~~13.~~During the Dispute Period, roughly the same period during which the parties were arbitrating the question of whether the New Agreement would introduce Qwest's new language that would exclude ISP-bound traffic from the calculation of originating minutes, Qwest continued to bill Level 3 for interconnection trunks in Utah, accruing approximately $563,616.99 during that nineteen-month period.

~~14.~~Level 3 does not owe the amount that Qwest billed for direct trunk transport. On July 15, 2004, Qwest sent Level 3 a letter demanding payment. Although the parties held discussions in an effort to resolve the matter at that time, neither the letter nor the discussions changed the fact that the Old Agreement contains absolutely no basis for excluding ISP-bound traffic from Qwest

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Expedited Arbitration, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 52 (Wireline Comp. Bureau, rel. July 17, 2002) ("*Federal Arbitration Order*").

[2] Attached as *Exhibit C.*

[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, (2001) ("*ISP Remand Order*"), *remanded WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *Internet Service Provider Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Level 3 Communications, LLC, for the State of Utah*, filed November 14, 2002.

originating minutes exchanged by the parties during the Dispute Period. No resolution was reached and Qwest continued to illegally bill Level 3.

~~15.~~On June 13, 2005, Qwest sent Level 3 another demand letter, this time threatening to suspend Level 3's orders and to discontinue service. (a copy is attached as Exhibit D). On July 23, 2005, Level 3 filed its Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3, and a Motion for Expedited Relief. In response, Qwest agreed that it would not suspend orders or discontinue service to Level 3 during the pendency of this proceeding, as long as the parties could proceed under an expedited schedule. The Commission issued its Scheduling Order on June 30, 2005, expediting the hearing and decision in this case.

THERE IS NO BASIS FOR THE CHARGES UNDER THE OLD AGREEMENT.

~~16.~~Qwest's most recent demand letter reflects an attempt to collect from Level 3 for direct-trunked facilities that carried ISP-bound traffic from Qwest to Level 3 during the Dispute Period when the Old Agreement was in effect, before the Commission's Order was issued, and therefore before the New Agreement that introduced new language excluding ISP-bound traffic from the relative use determination.

~~17.~~The Old Agreement, which was in effect during the Dispute Period, does not allow Qwest to bill Level 3 for relative use of direct-trunked facilities using a factor that excludes ISP-bound traffic carried from Qwest's customers to Level 3. The Old Interconnection Agreement provides in relevant part:

> 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, Section 5.1.2.4 (emphasis added). While the parties agreed to an *ISP Remand Order* Amendment to the Old Agreement, that amendment only established new terminating intercarrier compensation rates and was completely silent as to the exclusion of ISP-bound traffic from relative use calculations and in no way amended Section 5.1.2.4 of the Old Agreement. The same is true with respect to the SPOP Amendment that the parties executed. There is no language whatsoever in the SPOP Amendment that changes the "relative use" treatment that is set forth in Section 5.1.2.4 concerning the exchange of ISP-bound traffic or the fact that all such traffic was Qwest originated during the Dispute Period. While Qwest may argue that "the spirit" of these amendments somehow justifies their attempt to illegally bill Level 3, this Commission must only consider the "four corners" of the contract.

NEITHER THE COMMISSION'S ORDER NOR THE NEW RELATIVE USE LANGUAGE IN THE NEW AGREEMENT CAN BE USED TO OVERRIDE THE OLD AGREEMENT

~~18.~~The New Agreement does not provide a basis for the charges that Qwest billed to Level 3 during the Dispute Period. During the course of the Arbitration of the New Agreement, the issue arose as to whether, once a new relative use factor was determined pursuant to the new language of the New Agreement, should it be used on a prospective basis only or should there be a true-up that applied retroactively. Qwest proposed that the new relative use factor determined by studying the first quarter of traffic exchanged under the New Agreement should be used to retroactively adjust the initial billing quarter. Level 3 argued that any new relative use factor resulting from the new language of the New Agreement should be used prospectively only.

~~19.~~The Commission's Order approving the New Agreement adopted Qwest's newly proposed language that expressly excludes ISP-bound traffic from the calculation of a relative use factor. However, at the same time, the Commission adopted Level 3's position prohibiting the retroactive application of the new relative use factor. The relative use factor was to be

established by studying the traffic exchanged between the parties in the first three months of the term of the New Agreement but to be applied prospectively only. The Order explicitly states:

> 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.*

(Emphasis added). The Commission specifically rejected Qwest's proposal that the factor should be applied to true-up charges from the first quarter, and ruled that the new relative use factors determined according to Qwest's new language in the New Agreement should be applied prospectively only.

20. The attempt by Qwest to argue that the Commission's Order and the new language that excludes ISP-bound traffic from Qwest's originating minutes of use under the New Agreement "applies with equal force and effect to the provisions of the Old Agreement"[4] must be rejected according to the Commission's Order and according to basic contract law. Neither the Order nor the New Agreement can justify Qwest's attempt to collect charges for trunking from July 2002 through February 2004. This period was controlled by the terms of the Old Agreement, and the plain language of the Old Agreement prevents such an interpretation.

CONCLUSION

[4] See Qwest Response ¶ 10 p. 6 and Qwest Counterclaim ¶ 7 p. 9.

The Commission should issue an order declaring that Qwest cannot bill or collect from Level 3 direct-trunked transport charges based on a relative use calculation that excludes ISP-bound traffic from Qwest originating minutes of use during the Dispute Period.

DATED this _____day of July, 2005.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 2005, I caused a true and correct copy of the foregoing **POSITION STATEMENT OF LEVEL 3 COMMUNICATIONS, LLC** to be sent in the following manner:

Via Hand Delivery

Ted D. Smith

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Salt Lake City, Utah 84111

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POSITION STATEMENT OF LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT A

POSITION STATEMENT OT LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT B

POSITION STATEMENT OF LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT C

POSITION STATEMENT OF LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT D