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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

KRISTIN K. MAYES - CHAIRMAN
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE JOINT NOTICE AND)	DOCKET NOS. T-01051B-10-0194
APPLICATION OF QWEST CORPORATION,)	T-02811B-10-0194
QWEST COMMUNICATIONS COMPANY, LLC,)	T-04190A-10-0194
QWEST LD CORP., EMBARQ)	T-20443A-10-0194
COMMUNICATIONS, INC. D/B/A CENTURY)	T-03555A-10-0194
LINK COMMUNICATIONS, EMBARQ)	T-03902A-10-0194
PAYPHONE SERVICES, INC. D/B/A)	
CENTURYLINK, AND CENTURYTEL)	
SOLUTIONS, LLC FOR APPROVAL OF THE)	
PROPOSED MERGER OF THEIR PARENT)	
CORPORATIONS QWEST COMMUNICATIONS)	
INTERNATIONAL INC. AND CENTURYTEL,)	
INC.)	

NOTICE OF FILING DIRECT TESTIMONY

Level 3 Communications, Inc. hereby gives notice that it is filing the attached Direct Testimony of Richard E. Thayer.

RESPECTFULLY SUBMITTED this 27th day of September 2010.

ROSKA DEWULF & PATTEN, PLC

Arizona Corporation Commission

DOCKETED

SEP 27 2010

DOCKETED BY	
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By

Michael W. Patten
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Attorneys for Level 3 Communications

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Original and 13 copies of the foregoing
filed this 27th day of September 2010 with:

2 Docket Control
3 Arizona Corporation Commission
1200 West Washington Street
4 Phoenix, Arizona 85007

5 Copy of the foregoing hand-delivered/mailed
this 27th day of September 2010 to:

6 Belinda Martin, Esq.
7 Administrative Law Judge
8 Hearing Division
9 Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Joan S. Burke
Law Office of Joan S. Burke
1650 North First Avenue
Phoenix, Arizona 85003

10 Maureen A. Scott, Esq.
11 Legal Division
12 Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Nicholas J. Enoch, Esq
Jarrett J. Haskovec, Esq
Lubin & Enoch, PC
349 North Fourth Avenue
Phoenix, Arizona 85003

13 Steve Olea, Director
14 Utilities Division
15 Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Scott J. Rubin, Esq
333 Oak Lane
Bloomsburg, Pennsylvania 17815

16 Norman Curtright
17 Qwest Corporation
20 East Thomas Road, 16th Floor
Phoenix, Arizona 85012

Gregory L. Rogers
Level 3 Communications, LLC
1025 Eldorado Blvd.
Broomfield, CO 80021

18 Jeffrey W. Crockett
19 Bradley Carroll
20 Snell & Wilmer
One Arizona Center
400 E. Van Buren
Phoenix, Arizona 85004

Rogelio Peña
Peña & Associates, LLC
4845 Pearl East Circle, Suite 101
Boulder, CO 80301

22 Kevin K. Zarling, Esq.
23 Senior Counsel
CenturyLink
400 West 15th Street, Suite 315
24 Austin, Texas 78701

William A. Haas
Vice President of Public Policy & Regulatory
PAETEC Holding Corp.
One Martha's Way,
Hiawatha, Iowa 52233

25 Daniel Pozefsky
26 Residential Utility Consumer Office
1100 West Washington, Ste 220
Phoenix, Arizona 85007

Karen L. Clauson
Vice President, Law & Policy
Integra Telecom
6160 Golden Hills Drive
Golden Valley, Minnesota 55416-1020

Gregory Merz
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

ROSHKA DEWULF & PATTEN, PLC

ONE ARIZONA CENTER

400 EAST VAN BUREN STREET - SUITE 800

PHOENIX, ARIZONA 85004

TELEPHONE NO 602-256-6100

FACSIMILE 602-256-6800

1 Stephen S. Melnikoff, Esq
Regulatory Law Office
2 U. S. Army Litigation Center
901 North Stuart Street, Suite 700
3 Arlington, Virginia 22203

4 Harry Gildea
Snavey King Majoros O'Connor & Bedell,
5 Inc.
1111 14th Street, N.W., Suite 300
6 Washington, , D.C. 20005

7 Michel Singer Nelson
360networks (USA), Inc.
8 370 Interlocken Blvd, Suite 600
Broomfield, Colorado 80021
9

10 Penny Stanley
360networks (USA), Inc.
370 Interlocken Blvd, Suite 600
11 Broomfield, Colorado 80021

12 Thomas Campbell
Michael Hallam
13 Lewis & Roca
40 North Central Avenue
14 Phoenix, Arizona 85004

15 Deborah Kuhn
Assistant General Counsel
16 Verizon
205 North Michigan Avenue, 7th Floor
17 Chicago, Illinois 60601

18 Lyndall Nipps
Vice President, Regulatory
19 tw telecom
9665 Granite Ridge Drive, Suite 500
20 San Diego, California 92123

21 Rex Knowles
Executive Director
22 XO Communications Services, Inc.
7050 Union Park Avenue, Ste 400
23 Midvale, Utah 84047

24 James C. Falvey
Senior Regulatory Counsel
25 Pac-West Telecomm, Inc.
420 Chinquapin Round Red, Ste 2-1
26 Annapolis, Maryland 21401
27

John Ilgen
Westel, Inc.
Vice President of Sales & Marketing
9606 N. Mopac Expressway, Suite 700
Austin, Texas 78759

By 

BEFORE THE ARIZONA CORPORATION COMMISSION

KRISTIN K. MAYES

Chair

GARY PIERCE

Commissioner

PAUL NEWMAN

Commissioner

SANDRA D. KENNEDY

Commissioner

BOB STUMP

Commissioner

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SERVICES, INC. D/B/A CENTURYLINK, AND)		
CENTURYTEL SOLUTIONS, LLC FOR)		
APPROVAL OF THE PROPOSED MERGER OF)		
THEIR PARENT CORPORATIONS QWEST)		
COMMUNICATIONS INTERNATIONAL INC.)		
AND CENTURYTEL, INC.)		

DIRECT TESTIMONY

OF

RICHARD E. THAYER

ON BEHALF OF

LEVEL 3 COMMUNICATIONS, LLC

September 27, 2010

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 **A.** My name is Richard E. Thayer. I am employed by Level 3 Communications, LLC
3 ("Level 3"). My business address is 1025 Eldorado Boulevard, Broomfield, CO
4 80021.

5

6 **Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES AT LEVEL 3.**

7 **A.** I am Senior Corporate Counsel at Level 3. In that role I am primarily responsible
8 for negotiating and finalizing interconnection agreements between Level 3 and
9 other carriers in the U.S. Additionally, I am responsible for dispute resolution
10 between Level 3 and other carriers when the subject matter of those disputes lies
11 within the areas of interconnection agreements or the regulations regarding the
12 exchange of traffic.

13

14 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND.**

15 **A.** From 1989 until 2002, I worked as an attorney for AT&T. My responsibilities
16 included acting as: managing counsel for an AT&T subsidiary company,
17 American Transtech; General Attorney responsible for all commercial affairs for
18 AT&T in the Pacific Northwest (including interconnection agreements); and Vice
19 President responsible for AT&T's wireless regulatory activities in the Pacific
20 Northwest and AT&T Broadband, formerly TCI. I joined Level 3 in 2003 in my
21 present position. A more comprehensive CV describing my qualifications is
22 attached hereto as Exhibit A.

23

24 **Q. PLEASE PROVIDE LEVEL 3's POSITION ON THE PROPOSED MERGER OF**
25 **QWEST WITH CENTURYLINK.**

1 **A.** Level 3 believes that with the adoption of targeted, common sense conditions,
2 the Commission can approve the proposed transaction between “Qwest,” “Qwest
3 Operating Companies,” “CenturyLink,” and the “CenturyLink Operating
4 Companies,” as those terms are defined in the joint applicants’ application for
5 approval.¹ For ease of reference, when speaking about the transaction, I will refer
6 to it as the “Proposed Transaction,” to the involved companies as the
7 “Applicants,” and to the post transaction company as the “Combined Entity.”
8

9 **Q. WHY DOES THIS TRANSACTION RAISE CONCERNS FOR LEVEL 3?**

10 **A.** This merger is one of first impression because the entire operation of a Regional
11 Bell Operating Company (“RBOC”) will be taken over by an Independent
12 Incumbent Local Exchange Carrier (“ILEC”) that serves predominately rural
13 territories. If the Proposed Transaction is completed, the resulting entity will
14 combine businesses and management that have been forced to open their
15 markets to local competition with those that, for the most part, have not. For the
16 Combined Entity’s management, primarily from CenturyLink, its introduction to
17 the ways of competition may run counter to past obligations or experiences of
18 managing a rural ILEC. To ensure that the Combined Entity understands and
19 meets its obligations, the Commission will need to adopt common sense
20 conditions before it approves the transaction. Level 3 also believes that the
21 Commission must be vigilant to ensure that the Combined Entity does not meet
22 the same fate as Hawaii Telephone or Fairpoint.
23

24 **Q. WHAT CONDITIONS DOES LEVEL 3 BELIEVE ARE NECESSARY BEFORE**
25 **THE COMMISSION CAN APPROVE THE PROPOSED TRANSACTION?**

¹ *Application For Approval of Merger Between CenturyTel, Inc. and Qwest Communications International, Inc.* Docket UM 1484 (May 24, 2010) (“Application”).

- 1 **A.** Level 3 believes the Commission should:
- 2 1. Promote stable and predictable interconnection rights by:
- 3 a. Extending the term of existing interconnection agreements as set
- 4 forth in the Joint CLEC testimony;
- 5 b. Requiring the Combined Entity to allow the portability from one
- 6 state to another of the existing interconnection agreements between the
- 7 Applicants and that CLEC; and
- 8 c. Requiring Qwest to extend its existing Statements of Generally
- 9 Available Terms ("SGAT") for a period of five years.
- 10 2. Provide explicit guidance that, in light of the decision by the United States
- 11 Court of Appeals for the District of Columbia upholding the order of the Federal
- 12 Communications Commission ("FCC") in the Core Communications Mandamus
- 13 case,² all ISP-bound traffic is now subject to the rate set by the FCC, including
- 14 what has been labeled in the past as "virtual NXX" traffic. Specifically, the
- 15 Commission should impose the following conditions:
- 16 a. The Combined Entity shall compensate terminating carriers at the
- 17 appropriate rate for ISP-bound traffic and that ISP-bound traffic shall
- 18 include traffic provisioned using virtual NXX codes; and
- 19 b. The Combined Entity shall treat all locally-dialed ISP-bound traffic
- 20 including virtual NXX traffic, as telecommunications traffic in the
- 21 calculation of relative use factors for purposes of 51 C.F.R. § 703(b).
- 22 3. Take steps to prevent the Combined Entity from arbitraging the Rural
- 23 CLEC exemption to circumvent the CLEC access rate cap;

² *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) ("*D.C. Circuit Decision*").

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

4 5. Prohibit the Combined Entity from using billing disputes with one entity to
5 threaten disconnection of services or refuse to provision new orders across the
6 Combined Entity;

7 6. Prohibit the Combined Entity from continuing or expanding improper 8YY
8 homing switched access arbitrage practices. All telecommunications carrier
9 entities of the Combined Entity will assess tandem transport switched access
10 charges based on call routing to the nearest tandem according to the currently
11 published LERG, even when such a tandem is a non-Embarq tandem;

12 7. Require Qwest to cease its practice of denying dispute claims purely on
13 the basis that they are older than 90 days from the date originally billed; and

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

17
18 **Q. ARE THESE THE ONLY CONDITIONS THAT LEVEL 3 BELIEVES THE**
19 **COMMISSION SHOULD CONSIDER?**

20 **A.** No. Level 3 supports the conditions proposed by the Joint CLECs, and is one of
21 the sponsors of the testimony offered by Messrs. Gates and Ankum in support of
22 those conditions. My testimony is intended as a complement to testimony
23 offered by the Joint CLECs, but with a particular focus on problems Level 3 has
24 experienced first hand or is particularly concerned could result from this
25 transaction if left unaddressed.

26

1 **Q. PLEASE EXPLAIN LEVEL 3's POSITION ON INTERCONNECTION**
2 **AGREEMENTS.**

3 Interconnection agreements are the lifeblood of a competitive
4 telecommunications infrastructure. Without them, a carrier cannot exchange
5 traffic or provide services within a specific area. Because of their importance,
6 companies invest substantial time and effort in those agreements before they
7 invest funds in their networks. It is crucial that the Commission ensure that the
8 interconnection process continues as smoothly as possible while the Combined
9 Entity goes about integrating its systems and streamlining its operations. It can
10 do so by adopting three common sense conditions related to interconnection.

11 They are:

12 1. The Combined Entity shall allow competitive providers to extend existing
13 interconnection agreements as described in the testimony of Mr. Gates and as
14 stated in the Joint CLEC combined Conditions List.

15 2. The Combined Entity shall allow competitive providers to import any
16 interconnection agreement between the CLEC and the Applicants, including all of
17 their ILEC affiliates, into the operating territory of another affiliate. For example,
18 Level 3 should be able to import the Embarq-Level 3 interconnection agreement
19 into the Qwest region.

20 3. Qwest shall agree to keep its existing SGAT available, without changes,
21 for five years.

22

23 **Q. WHY SHOULD THE COMMISSION REQUIRE AN EXTENSION OF THE**
24 **INTERCONNECTION AGREEMENTS?**

25 **A.** To ensure that the Combined Entity can focus on integrating its operations and
26 meeting its wholesale commitments, the Commission should require the

1 Combined Entity to allow competitive providers to elect to extend the existing
2 interconnection agreement between the parties for a period of three years from
3 the closing date of the transaction. This requirement must expressly include all
4 agreements in "evergreen" status.

5 The competitive industry is concerned that the Combined Entity will
6 decide to terminate those agreements and force carriers into renegotiations that
7 will eventually result in the CLECs filing for arbitration. The CLECs and the
8 Combined Entity have limited resources to devote to any project. Level 3 would
9 prefer that the parties devote those resources, personnel and financial, toward
10 ensuring the wholesale commitments are met.

11

12 **Q. WOULD A CONDITION EXTENDING THE INTERCONNECTION**
13 **AGREEMENTS BE UNIQUE TO THIS TRANSACTION?**

14 **A.** No, it would not. Similar conditions have been adopted in orders approving the
15 mergers of AT&T and Bell South; SBC and Ameritech; Fairpoint and its purchase
16 of the Verizon territories in New Hampshire, Vermont and Maine; and the Frontier
17 acquisition of certain Verizon territories.

18

19 **Q. PLEASE DISCUSS LEVEL 3's PROPOSAL TO REQUIRE PORTABILITY OF**
20 **INTERCONNECTION AGREEMENTS.**

21 **A.** Level 3 believes that the Commission should require the Combined Entity to
22 allow a competitive carrier to import into Arizona any interconnection agreement
23 that it maintains in another state. So, for example, Level 3 would have the option
24 of extending an interconnection agreement it already has in Arizona or it could
25 notify the Combined Entity that it wants to use the Nevada interconnection
26 agreement between Level 3 and Embarq in Arizona. Only mandatory state-

1 specific pricing changes would be required and those changes should be
2 automatic. The Combined Entity should not be allowed to delay implementation
3 of an imported agreement by claiming that negotiations are required to make the
4 agreement state specific.

5

6 **Q. WOULD A PORTABILITY REQUIREMENT FOR INTERCONNECTION**
7 **AGREEMENTS BE UNIQUE TO THIS TRANSACTION?**

8 **A.** No, it would not. A similar condition was imposed by the FCC in the
9 *AT&T/BellSouth Order*. In doing so, the FCC found that such conditions "should
10 reduce any incremental effect on the pending merger on the incentive to
11 discriminate."³

12

13 **Q. PLEASE EXPLAIN LEVEL 3's CONCERNS REGARDING THE QWEST SGAT.**

14 **A.** Since the Combined Entity will be focused on integrating its operations and
15 meeting its wholesale commitments, it is important that competitors limit friction
16 caused by expiring interconnection agreements. That's why Level 3 believes it is
17 important to extend the existing agreements and allow for the importation of other
18 interconnection agreements the Combined Entity maintains. There is a third step,
19 however, that Level 3 believes the Commission should take to allow competitors
20 flexibility, and that is, requiring Qwest to agree to keep its SGAT available for five
21 years. By doing so, the Commission will ensure that competitive providers have
22 sufficient options to establish interconnection arrangements with the Combined
23 Entity. Everyone will then be focused on integration, implementation and
24 exchanging traffic instead of arbitrating new interconnection agreements. Five
25 years is the appropriate time period for offering the SGAT because it provides a

³ *Memorandum Opinion and Order*, In the Matter of AT&T Inc. and BellSouth Corporation
Application for Transfer of Control, WC Docket No. 06-74, released March 26, 2007.

1 consistent approach to interconnection for competitors to rely upon. When it
2 comes to interconnection, the public interest requires certainty so that
3 appropriate investments can be made in the respective networks. With the
4 adoption of this simple, common sense solution, Level 3 believes the
5 Commission can promote a competitive playing field in the marketplace.

6
7 **Q. IF THE COMMISSION PROVIDES AN OPTION TO EXTEND THE**
8 **INTERCONNECTION AGREEMENTS OR TO IMPORT AN AGREEMENT**
9 **FROM ANOTHER STATE, DOES THAT RESOLVE ANY DISPUTES OR**
10 **ISSUES SURROUNDING THE COMBINED ENTITY'S WHOLESALE**
11 **OBLIGATIONS?**

12 **A.** While those two steps would go a long way in ensuring that the parties focus on
13 operating their businesses and providing services to end-users, the Commission
14 must resolve the outstanding issues with respect to contract interpretation. It
15 won't do much good to extend an agreement when the parties have serious
16 policy disagreements over the interpretation for implementation of the
17 agreements. It's in everyone's best interests to resolve interconnection issues.

18
19 **Q. WHAT ISSUES SHOULD THE COMMISSION RESOLVE?**

20 **A.** One important issue the Commission should resolve involves intercarrier
21 compensation for ISP-bound traffic. Any condition regarding agreements will be
22 hollow unless this question is explicitly addressed. Without clear guidance,
23 regulatory and judicial litigation involving the interpretation of interconnection
24 agreements will drag on and agreements ported into a state will spur new
25 conflicts.

1 The most litigated issue that Level 3 has experienced in the Qwest
2 service territory for the past 10 years has been the treatment of locally dialed
3 ISP-bound traffic. Qwest has taken every opportunity to oppose its obligation to
4 pay terminating compensation for that traffic, arguing that the ISP must be
5 physically located in the same local calling area as the Qwest end user making
6 the call. The dockets of the state commissions as well as state and federal courts
7 are full of proceedings interpreting and reinterpreting the *ISP Remand Order*.
8 With each conflicting interpretation, the unsuccessful party pushes the matter
9 further up the appellate ladder.

10
11 **Q. WHY SHOULD THE COMMISSION RESOLVE THE TREATMENT OF ISP-**
12 **BOUND TRAFFIC HERE?**

13 **A.** Resolution of the applicable interconnection obligation concerning ISP-bound
14 traffic is necessary to ensure that the Combined Entity does not force its
15 competitors to litigate issues that have been finally resolved by the United States
16 Court of Appeals for the District of Columbia Circuit in its review of the *Core ISP*
17 *Order*.⁴ As incumbents, CenturyLink, Qwest and Embarq have every incentive to
18 dispute the application of the intercarrier compensation regime for ISP-bound
19 traffic by pressing invalidated arguments to avoid paying their competitors for
20 traffic that their end users originate. In the context of this merger, however, the
21 question isn't just whether the Combined Entity will thwart competition, but it also
22 goes to the basic economic assumptions the Applicants have made when

⁴*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-bound traffic*, CC Docket Nos. 96-98, 99-68, 01-92, et al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) ("Core ISP Order"); *D.C. Circuit Decision*.

1 examining this transaction and whether the Applicants will force competitors to
2 subsidize the operations of the Combined Entity.

3

4 **Q. PLEASE EXPLAIN WHAT YOU MEAN BY THE BASIC ECONOMIC**
5 **ASSUMPTIONS MADE BY THE APPLICANTS.**

6 **A.** In preparing for this transaction, CenturyLink has made some basic assumptions
7 about the expenses that Qwest incurs, such as reciprocal compensation, and the
8 revenue it receives, such as inter- and intrastate access charges. In the case of
9 ISP-bound traffic, Qwest and CenturyLink have taken the position that unless the
10 ISP's modem is in the same local calling area as their customer, then the call is a
11 toll call and access charges apply. While the *Core ISP Order* and the D.C. Circuit
12 Court's affirmation reject this interpretation, Level 3 expects Qwest to continue to
13 argue—wherever and whenever it can—that "VNXX" traffic is not covered by the
14 FCC's established regime for ISP-bound traffic. One question for the
15 Commission is whether the Combined Entity is assuming it will receive access
16 charges for ISP-bound traffic, thus inflating its revenue, or whether it will pay the
17 reciprocal compensation rate, thus reducing some revenue. The second question
18 is how either outcome impacts the ability of the Combined Entity to meet its
19 commitments based on its financial projections.

20

21 **Q. IS THE ONLY QUESTION SURROUNDING ISP-BOUND TRAFFIC THE**
22 **TERMINATION RATE FOR THE TRAFFIC?**

23 **A.** No. The classification of ISP-bound traffic impacts more than compensation. It
24 goes to whether the Combined Entity can shift the cost of interconnection for
25 facilities on its side of the network to its competitors.

26

1 **Q. PLEASE EXPLAIN.**

2 **A.** In the past, Qwest has used the now discredited legal theory that ISP-bound
3 traffic falls under Section 251(g) to argue that such traffic cannot be counted as
4 local traffic when calculating the relative use factor ("RUF") charges that apply to
5 local interconnection facilities. RUF charges apportion the cost of an
6 interconnection facility based on the flow of the traffic. So, if all the traffic on a
7 facility was local and Qwest delivered 80 percent, Qwest credits the terminating
8 carrier for that percentage of the usage. However, Qwest has argued that ISP-
9 bound traffic must be excluded from the calculation of RUF charges because
10 Qwest claims it does not fall within the scope of Section 251(b)(5). That
11 argument was cut out from under Qwest and CenturyLink by the *D.C. Circuit*
12 *Decision*. It's unfortunate, but the acceptance of Qwest's flawed position by a
13 number of states has resulted in millions of dollars in subsidies by competitive
14 carriers for the network operations of Qwest.

15

16 **Q. CAN YOU PLEASE BRIEFLY SUMMARIZE THE LEGAL TREATMENT OF**
17 **ISP-BOUND TRAFFIC?**

18 **A.** Yes, based on the *D.C. Circuit Decision* upholding the FCC's *Core ISP*
19 *Order*, all ISP-bound traffic falls under the scope of Section 251(b)(5). The Court
20 also upheld the FCC's ability to set the rate for ISP-bound traffic under its Section
21 201 authority because ISP-bound traffic is interstate in nature. Since the traffic
22 falls under 251(b)(5), it is subject to the Part 51 Rules. The application of those
23 rules to ISP-bound traffic is not new, because even when the FCC tried to
24 regulate ISP-bound traffic under 251(g), it was *explicit* that the finding did not
25 "alter carriers' other obligations under our Part 51 rules, 47 C.F.R...."⁵ Under

⁵ *ISP Remand* at Footnote 149

1 those rules: "A LEC may not assess charges on any other telecommunications
2 carrier for telecommunications traffic that originates on the LEC network."⁶ Now
3 that the FCC's legal basis for treating such traffic as covered by Section
4 251(b)(5) in the Core ISP Order has been affirmed by the D.C. Circuit Court, the
5 application of the Part 51 rules to ISP-bound traffic is settled and the Combined
6 Entity may not assess RUF charges on ISP-bound traffic.

7 Despite the clarity of the *D.C. Circuit Decision* and the *Core ISP Order*,
8 Level 3 expects the Combined Entity to continue to argue the opposite. Such a
9 refusal in the face of this clear ruling will result in unnecessarily adding more
10 complaints to the Commission's docket. It is in everyone's best interests to avoid
11 any additional litigation on these issues.

12
13 **Q. HAS CENTURYLINK AGREED TO PAY RECIPROCAL COMPENSATION ON**
14 **ALL ISP-BOUND TRAFFIC?**

15 **A.** Yes. Embarq, which is now a subsidiary of CenturyLink, pays \$.0004 per
16 minute of use for ISP-bound traffic exchanged with Level 3.⁷ In that agreement,
17 ISP-bound traffic "includes ... traffic provisioned using virtual NXXs."⁸

18
19 **Q. PLEASE SUMMARIZE LEVEL 3's POSITION ON RECIPROCAL**
20 **COMPENSATION FOR ISP-BOUND TRAFFIC AND RUF CHARGES IN THIS**
21 **PROCEEDING.**

22 **A.** The Commission needs to resolve the treatment of ISP-bound traffic for two
23 reasons. The first is so that it can better understand the basic economic
24 assumptions made by Qwest and CenturyLink that underlie this transaction. If the

⁶ As part of the *ISP Remand Order*, the Commission deleted the word "local" from its original rule.

⁷ It's worth noting that the rate is lower than the \$.0007 set by the *ISP Remand Order*.

⁸ See Section 55.1, Part F, Master Interconnection, Collocation & Resale Agreement for the State of Nevada, August, 2005

1 business model for the Combined Entity is based in part on continuing to try to
2 charge access fees on ISP-bound traffic and shifting network expenses to
3 competitive providers, the Commission needs to understand this because the law
4 no longer supports that assumption. Then, the Commission needs to determine
5 whether a transaction based on such an illegal assumption is in the public
6 interest.

7 The second reason is to bring the Combined Entity in line with the law
8 and to make sure that companies can focus on building their networks and
9 dealing with integration issues rather than fighting old battles that have been
10 settled by federal law.

11

12 **Q. ARE THERE OTHER POLICY ISSUES THE COMMISSION SHOULD**
13 **CONSIDER IN RESOLVING INTERCARRIER COMPENSATION FOR ISP-**
14 **BOUND TRAFFIC?**

15 **A.** Yes. While the country, and especially regulators, are focused on ensuring
16 ubiquitous deployment of broadband facilities, the simple truth is that for the
17 foreseeable future, dial-up internet access will remain a primary vehicle for
18 internet access for many residents in Arizona and across the country. Whether it
19 is because of price or lack of access to a broadband provider, dial-up access will
20 remain a necessity for many Americans for years to come. The Commission
21 must consider the future of dial-up services as part of any state plans to roll out
22 broadband access. Any money spent by either the Combined Entity or the
23 competitive industry fighting over the compensation regime for dial-up services is
24 money that could have been spent on broadband deployment.

25 When the FCC adopted the *ISP Remand Order* in 2001, it did so with the
26 goal of stopping what it saw as an arbitrage opportunity. The FCC did that by

1 reducing the compensation rate, capping the amount of compensable traffic and
2 excluding new markets from any compensation regime. However, a few years
3 later, the FCC found that the arbitrage threat was gone and lifted the cap on
4 compensable traffic and the new market exclusion. In supporting its decision, the
5 FCC cited the decrease in dial-up traffic and the increasing migration of
6 Americans to broadband internet access services.

7 One of the "compelling" events that Qwest and CenturyLink have touted
8 to shareholders is that the Combined Entity will be a stronger company with an
9 "extensive 173,000 mile fiber network" and the "enhanced ability to competitively
10 rollout strategic products such as IPTV and other high-bandwidth services"⁹ that
11 will be able to continue its broadband deployment. Meeting the Company's
12 economic assumptions will be crucial to that expanded deployment of broadband
13 services. And while that transition occurs, it is important to ensure that all end
14 users can access the internet, not just those who purchase broadband services
15 from the Combined Entity. Resolving these settled issues of compensation for
16 ISP-bound traffic and the treatment for RUF charges will ensure that companies
17 devote their resources to broadband deployment while at the same time ensuring
18 that a competitive market exists for dial-up services for those consumers who
19 choose not to or are not afforded the opportunity to purchase broadband access.

20

21 **Q. DOES LEVEL 3 HAVE ANY SPECIFIC RECOMMENDATIONS FOR THE**
22 **COMMISSION?**

23 **A.** Yes, Level 3 recommends that any order granting approval for the transaction
24 include the following language:

⁹ See:
<http://www.centurylinkqwestmerger.com/downloads/presentations/Investor%20Presentation-4-22-10.pdf>, Slide 8

1 1. The Combined Entity shall compensate terminating carriers at the
2 appropriate rate for all locally dialed ISP-bound traffic, and all locally dialed ISP-
3 bound traffic shall include traffic provisioned using "virtual NXX codes."

4 2. The Combined Entity shall treat all locally dialed ISP-bound traffic,
5 including any "virtual NXX traffic," as telecommunications traffic in the calculation
6 of relative use facilities for the purposes of 51 C.F.R. § 703(b).

7 By adopting these conditions, the Commission will provide the explicit
8 guidance that the industry, regulators and courts have sought since the release
9 of the *ISP Remand Order*. With that issue resolved, the industry can turn its
10 attention to deploying capital in a manner that will grow networks and help
11 expand broadband networks across the country instead of funding litigation. It's
12 time that the telecommunications industry stop paying by the hour to determine
13 what it can charge by the minute.

14

15 **Q. PLEASE EXPLAIN WHY LEVEL 3 WANTS ALL CONTRACTS FOR**
16 **TELECOMMUNICATIONS SERVICES OR NETWORK INTERCONNECTION**
17 **BETWEEN QWEST AND CENTURYLINK MADE AVAILABLE TO THE**
18 **PUBLIC.**

19 **A.** A major theme for all parties filing testimony in this proceeding is the concern that
20 the Combined Entity will be able to use its unique corporate structure and
21 regulatory status to establish preferential deals between the carriers for
22 interconnection, access to each other's poles, ducts and conduits, the exchange
23 of traffic, special access or other switched access services. Under these
24 circumstances, the Combined Entity could also impose additional costs on its
25 competitors. Level 3 believes that by making all agreements between the carriers
26 public and available for public inspection, the public interest will be furthered.

1

2 **Q. WILL MAKING THE DEALS PUBLICLY AVAILABLE RESOLVE LEVEL 3's**
3 **CONCERN?**

4 **A.** No, not by itself. In addition to making the contracts available, the Combined
5 Entity should allow any party to avail itself of any specific term or rate without
6 regard for any volume or term commitment. As discussed, the Combined Entity
7 will be in a unique position to identify opportunities where it can leverage the
8 network of its affiliates to its advantage and perhaps to the disadvantage of its
9 competitors. Volume and term commitments in this context are inappropriate
10 since the CenturyLink territories are generally free from landline competition. In
11 the past, Qwest and CenturyLink have dealt with each other in arms-length
12 transactions. This merger changes that negotiating dynamic. The Commission
13 can ensure that competition is not harmed, and the public interest met, by
14 ensuring that transactions between the Applicants are open for public review and
15 that the appropriate rates can be selected by other carriers.

16

17 **Q. PLEASE DESCRIBE LEVEL 3's CONCERNS REGARDING HOW THE**
18 **COMBINED ENTITY WILL TREAT 8YY TRAFFIC.**

19 **A.** This issue involves problems that Level 3 has experienced with the routing of
20 wireless originated 8YY traffic primarily but is something that could happen with
21 any kind of 8YY traffic. As is relevant to this proceeding, Embarq is the ILEC
22 entity that is engaged in an access charge arbitrage scheme Level 3 seeks to
23 address.

24

25 An example of the scheme is described in the following scenario: a
26 wireless 8YY call is originated in Boise and the call is routed to Embarq, who is
providing transport services to the wireless carrier. In this call flow, Level 3 is the

1 IXC providing the 8YY service. When the call hits the Embarq network, Embarq
2 must route the call to Level 3. However, instead of handing the traffic off at the
3 Qwest tandem in Boise or through some other interconnection point in Idaho,
4 Embarq backhauls the traffic to its switch in or near Spokane and then sends it
5 back to the Qwest tandem in Boise. What is troublesome about this scenario is
6 that Embarq then bills Level 3 for all the transport from the point of picking up the
7 call in Boise to Spokane and back to Boise. Level 3 has been disputing these
8 transport charges and believes that Embarq should be limiting its tandem
9 transport charges to the amount of transport that represents the distance
10 between the Level 3 POI and the nearest tandem. Level 3's recommendation in
11 this example also reflects the industry practice.

12
13 **Q. WHY IS THIS ISSUE IMPORTANT IN THIS PROCEEDING?**

14 **A.** This issue is important for a number of reasons. First, it represents the type of
15 inefficient network routing that the Combined Entity is engaging in and could
16 continue to engage in for the purposes of increasing the costs it imposes on
17 competitors. With Embarq, CenturyLink and Qwest all operating as incumbents in
18 the Western U.S., the Combined Entity will have an incentive to home traffic
19 across its affiliates to maximize transport costs. That would not be in the public
20 interest.

21 Second, because routing can be altered relatively easily, the Combined
22 Entity can implement this type of routing changes with no or little notice to the
23 industry. Then like traffic pumping, the impacted carrier will not know about the
24 excessive charges until it is too late. At that point, carriers will open disputes and
25 some party will seek self-help, with the resulting disputes landing in either courts
26 or before the Commission.

1 The third and final reason for why it is an important issue is that the
2 Commission needs to understand if the Combined Entity has included in its
3 financial projections revenues from excessive transport charges for 8YY traffic.
4 The Commission will need to have a complete understanding of those
5 assumptions before it can determine if this transaction is in the public interest.

6

7 **Q. WHAT IS LEVEL 3'S RECOMMENDATION ON THIS ISSUE?**

8 **A.** With a few common sense conditions, the Commission can resolve this issue
9 and allow the transaction to move ahead. To do that, Level 3 proposes the
10 following language: "The Combined Entity agrees that it will limit any tandem
11 transport charges for 8YY traffic to charges based upon the nearest tandem
12 identified in the LERG to the originating point of each call." This simple
13 requirement will eliminate any incentive for the Combined Entity to re-home 8YY
14 traffic through inefficient routes and creates the incentive for bringing traffic to the
15 nearest, most efficient tandem.

16

17 **Q. PLEASE EXPLAIN LEVEL 3's CONCERNS REGARDING EXISTING BILLING**
18 **DISPUTES BEING LEVERAGED AGAINST A COMPETITOR.**

19 **A.** This issue focuses on the ability of the Combined Entity to leverage existing
20 billing disputes with one ILEC affiliate to slow or refuse to provision new services
21 by another ILEC affiliate. For example, assume that Level 3's billing dispute with
22 Embarq for improper homing of 8YY traffic continues after the transaction closes.
23 The concern is that one of the other entities, CenturyLink or Qwest, would refuse
24 to provision or process a request for interconnection or some other service order
25 based on the outstanding dispute with Embarq. Level 3 does not believe that the
26 transaction should allow the Combined Entity to refuse to provision services

1 because of billing disputes that existed prior to the transaction or for unique
2 billing disputes that arise afterwards. Absent the proper conditions, the Combined
3 Entity will be able to impair competition by throwing up new roadblocks to the
4 provision of services. But for the completion of the transaction, the existing
5 disputes would not allow Qwest from provisioning services by citing a billing
6 dispute between Level 3 and Embarq. This transaction should not create that
7 incentive.

8
9 **Q. WHAT IS LEVEL 3's RECOMMENDATION ON THIS ISSUE?**

10 **A.** Level 3 believes that with a simple, common sense condition, the Commission
11 can resolve this issue and allow the transaction to proceed. Level 3 proposes the
12 following language be added to any order:

13 "The Combined Entity shall not refuse to provision services, process
14 orders or threaten disconnection across the entire footprint of the
15 Combined Entity based on a billing or other commercial dispute between
16 any telecommunications provider and any one affiliate of the Combined
17 Entity."

18 This condition will keep the playing field level between the Combined Entity and
19 its competitors. Because a dispute between Level 3 and Embarq could not be
20 legally used to threaten disconnection in the Qwest territory today, this condition
21 preserves the status quo and eliminates any incentive for the Combined Entity to
22 use its size to force parties into unreasonable settlements.

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24
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26

1 **Q. DOES LEVEL 3 HAVE A POSITION ON THE ISSUES REGARDING**
2 **OPERATIONAL SUPPORT SYSTEMS (“OSS”) RAISED BY THE JOINT**
3 **CLECS?**

4 **A.** Yes. Like many parties, Level 3 is concerned about the ability of the Combined
5 Entity to meet its obligations regarding OSS. Level 3’s experiences in Maine,
6 Vermont and New Hampshire following the Verizon and Fairpoint transaction are
7 a clarion’s call for vigilant oversight when a relatively untested independent ILEC
8 takes over the significantly greater operations of a RBOC. The ink has not dried
9 on the recent transfer of the West Virginia operation of Verizon to Frontier
10 Communications and a complaint has been filed alleging Frontier has not met its
11 OSS commitments.¹⁰

12 Level 3 does not rely heavily upon unbundled network elements to
13 provide services like other competitive providers, however, Level 3’s experience
14 for provision of wholesale services from Qwest and CenturyLink is anecdotally
15 similar to the competitive comments. Ensuring an even playing field in the
16 wholesale market is a crucial litmus test for whether the transaction is in the
17 public interest. Level 3 agrees that conditions are required to ensure wholesale
18 transactions are completed in a timely, fair and efficient manner.

19
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¹⁰ *Commission Order*, Petition to Reopen by FiberNet LLC, Case No. 09-871-T-PC, Frontier Communications Corporation (full cite omitted), Public Service Commission of West Virginia, August 16, 2010. The Commission denied FiberNet’s petition to reopen because most of the issues happened after the sale from Verizon to Frontier. The Commission also noted that the issues raised could be best handled in a complaint proceeding; the Commission ruled that the issues would be transferred to a complaint proceeding and also determined that the parties would be given time to mediate the disputes. If mediation does not resolve the issues, the parties are to notify the Commission and the matter will be handled in the complaint case. *Commission Order*, pp. 2-3; see also *FiberNet, LLC v. Frontier West Virginia, Inc.*, Case No. 10-1289-T-C.

1 **Q. WHY ARE QWEST'S CARRIER BILLING PRACTICES IMPORTANT FOR THE**
2 **COMMISSION TO UNDERSTAND AND CHANGE AS A CONDITION OF**
3 **APPROVAL?**

4 **A.** At a high level, Qwest's existing carrier billing practices must be modified as a
5 condition of approval for two reasons. First, any improper or inappropriate billing
6 practice can have a significant detrimental effect on competitors. Any delays in
7 payment or underpayment to a competitor harms its financial situation and can
8 even jeopardize a carrier's survival. Second, if CenturyLink is basing any of its
9 financial projections on a continuation of some of the aggressive billing practices
10 of Qwest, it is important for the Commission to understand this and assess the
11 degree to which such practices not only threaten the competitive industry and
12 other carriers such as rural carriers, but also the degree to which such practices
13 reflect some underlying financial weakness that could jeopardize CenturyLink's
14 commitments to the Commission and its customers.

15
16 **Q. CAN YOU CITE TO ANY EXAMPLES OF BILLING PRACTICES THAT**
17 **WARRANT THE COMMISSION MAKING A CHANGE AS A CONDITION OF**
18 **APPROVAL?**

19 **A.** Yes. A little over a year ago, Qwest informed Level 3 that it would no longer
20 accept any billing disputes that were lodged with Qwest 90 days after the date of
21 the invoice. When challenged on the lawfulness of establishing this apparent
22 arbitrary barrier to lodging good faith billing disputes and asked to point to any
23 legal authority that allows Qwest to implement this practice, Qwest failed to
24 provide any satisfactory legal explanation.

25
26

1 **Q. WHY IS THIS IMPORTANT?**

2 **A.** The arbitrary cut-off date imposed by Qwest curtails a CLEC's ability to lodge
3 and collect on a legitimate billing dispute and rewards Qwest by allowing it to
4 keep monies it is otherwise not entitled to. Given the complexity of intercarrier
5 billing, it is not uncommon for billing errors to be discovered months—or even
6 years—after the bills have been received. Qwest's practice in this regard is an
7 assertion of its far greater financial and regulatory litigation resources to the
8 effect that carriers are faced with the choice of either expending scarce
9 resources to litigate with Qwest or just accept its unlawful practice. Qwest should
10 not be allowed to arbitrarily "deem" a 90-day cut-off period to be in effect to the
11 harm of CLECs that rely upon them as an RBOC. A continuation of this practice
12 by the Combined Entity is improper and should not be countenanced by approval
13 of the transaction without this practice being ceased.

14

15 **Q. IS THERE ANOTHER BILLING PRACTICE THAT YOU CAN CITE TO THAT**
16 **THE COMMISSION SHOULD INVESTIGATE?**

17 **A.** Yes. Level 3 is aware of another example in which Qwest has refused to follow
18 the terms of its own tariffs and has billed Level 3 for charges that are not included
19 within the applicable intrastate tariff. In this case, in the absence of a specific
20 provision in Qwest's intrastate tariff addressing expanded interconnection, Qwest
21 nonetheless billed, and continues to bill, Level 3 a rate that is contained in its
22 interstate tariff (rather than its intrastate tariff), which does have the specific
23 provision in question. In this context, it is critical that the Commission affirm the
24 Combined Entity's obligation to strictly abide by the terms of its tariffs, amending
25 them as necessary to allow for the requisite Commission scrutiny and industry
26 input before Qwest bills and attempts to collect intercarrier charges.

1

2 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

3 **A.** In my testimony, Level 3 has highlighted a number of areas where conduct by the
4 Combined Entity could threaten to impair competition in general and especially in
5 the Qwest operating territory. That conduct ranges from forcing competitors to
6 subsidize the network operations of the Combined Entity through RUF or
7 excessive tandem transport charges for 8YY traffic to threatening nationwide
8 disconnection over unrelated billing disputes. It is imperative the Commission
9 understand and address these concerns now to ensure that the public interest is
10 met by this transaction. Level 3 has proposed simple, common sense solutions to
11 the issues it has raised. Level 3 urges the Commission to protect competition and
12 adopt these conditions.

13

14 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

15 **A.** Yes it does. Thank you.