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BEFORE THE ARIZONA CORPORATIO

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AZ CORP COMMISSION
DOCKET CONTROL

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 SURREBUTTAL TESTIMONY

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

RESPECTFULLY SUBMITTED this 10th day of November 2010.

ROSHKA DEWULF & PATTEN, PLC

Arizona Corporation Commission

DOCKETED

NOV 10 2010

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filed this 10th day of November 2010 with:

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4 Phoenix, Arizona 85007

5 Copy of the foregoing hand-delivered/mailed
this 10th day of November 2010 to:

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GARY PIERCE

Commissioner

PAUL NEWMAN

Commissioner

SANDRA D. KENNEDY

Commissioner

BOB STUMP

Commissioner

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CENTURYTEL SOLUTIONS, LLC FOR)		
APPROVAL OF THE PROPOSED MERGER OF)		
THEIR PARENT CORPORATIONS QWEST)		
COMMUNICATIONS INTERNATIONAL INC.)		
AND CENTURYTEL, INC.)		

SURREBUTTAL TESTIMONY

OF

RICHARD E. THAYER

ON BEHALF OF

LEVEL 3 COMMUNICATIONS, LLC

NOVEMBER 10, 2010

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1 concerns of the Utility Division and interveners. Qwest witness Robert Brigham leads the
2 charge when he attacks the testimony of Dr. Ankum and Mr. Gates as “highly
3 speculative” and criticizes the competitive industry for not providing any “evidence
4 suggesting that the claims are likely to become a reality in Arizona.”² This approach puts
5 the Commission, the public and the competitive industry in the untenable position of
6 having to know how the Combined Entity will act *before* the Combined Entity will
7 answer any questions. That’s a disingenuous path to travel for the Joint Petitioners.

8 **Q. WHY IS THAT DISINGENUOUS?**

9 A. It is disingenuous for the Joint Petitioners to demand that the Commission, and
10 competitors predict the future when the Combined Entity won’t tell anyone how it
11 intends to function. “Trust us” is not an answer that meets the public interest test that the
12 Joint Petitioners must clear to close this transaction. The burden is on the Joint Petitioners
13 to show that this transaction is in the public interest and as the Utility Division testifies,
14 that test has not been met and cannot be met without conditions.

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

19 A. The issues raised by the Competitive Industry, and especially Level 3, are not just
20 commercial issues because they go to the ability of companies to compete against the
21 Combined Entity. In fact, many of the issues revolve around the legal obligations of both

for Approval of Indirect Transfer of Control of Qwest Operating Companies to
CenturyLink, Docket No.T-01051B-10-0194 et al. [hereafter “Fimbres Direct”].

² Rebuttal Testimony of Robert Brigham on Behalf of Qwest Corporation, October 27, 2010, at
page 4. In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of
Qwest Operating Companies to CenturyLink, Docket No.T-01051B-10-0194 et al.
[“Brigham Rebuttal”]

1 Qwest and CenturyLink. It seems that the Joint Petitioners prefer a “divide and conquer”
2 approach. They would prefer to push those issues, which relate to the Combined Entity’s
3 legal obligations, into commercial negotiations or individual complaint cases if the
4 Combined Entity does not get its way. This lack of transparency should raise red flags for
5 everyone involved in this proceeding.

6 **III. THE COMMISSION SHOULD CONDITION APPROVAL OF THE MERGER BY**
7 **PROHIBITING THE COMBINED ENTITY FROM LEVERAGING BILLING**
8 **DISPUTES TO SLOW OR REFUSE TO PROVIDE SERVICES.**
9

10 **Q. CAN YOU PLEASE BRIEFLY SUMMARIZE LEVEL 3’S CONCERN WITH**
11 **RESPECT TO THE COMBINED ENTITY LEVERAGING BILLING DISPUTES?**
12

13 A. Yes. In my testimony, Level 3 raises a concern that post-closing, the Combined Entity
14 will leverage billing disputes with one affiliate to slow roll or refuse to provision services
15 post-closing. Let me provide an example. Assume that Level 3 and Qwest have a billing
16 dispute for \$100 for transport charges in Arizona. We’ll also assume that Level 3 has no
17 outstanding billing disputes with CenturyLink. After the closing, Level 3 submits an
18 order for a transport to meet a customer critical deadline in a CenturyLink territory in any
19 state. Level 3 is concerned that CenturyLink will rely upon the open billing dispute with
20 Qwest to refuse delivering the transport.

21 **Q. IN HIS REBUTTAL TESTIMONY, MR. HUNSUCKER CALLS THIS**
22 **“SPECULATIVE BEHAVIOR” AND CRITICIZES YOU FOR RAISING**
23 **“WHAT” MIGHT HAPPEN.³ HOW DOES LEVEL 3 RESPOND?**
24

25 A. Hunsucker’s response continues the theme: unless you know the future, you will have to
26 trust the Combined Entity. It is an “Ask but We Won’t Answer” defense. That argument

³ Rebuttal Testimony of Michael Hunsucker On Behalf of Qwest Corporation, October 27, 2010, page 73, lines 8 to 18. In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink, Docket No. T-01051B-10-0194 et al. [“Hunsucker Rebuttal”]

1 is especially absurd with this issue. First, the ability to leverage billing disputes between
2 the two companies cannot occur until *after* this transaction closes. So contrary to Mr.
3 Hunsucker's protestations, the Commission and competitive industry have to question
4 how the Combined Entity will act.

5 The second reason to address this issue now is because Level 3 has experienced this exact
6 type of conduct from other companies post merger. The problems arise normally through
7 internal process changes or new contract interpretations. These changes come without
8 warning and are first encountered when a service order is held or rejected. Such conduct
9 escapes Commission review, causes delay and harms competition. The lengths that
10 ILECs will go to reinterpret contract clauses bears proof that the contract provisions do
11 not provide the security that would prevent CenturyLink or Qwest from defying the "ICA
12 terms that legally dictate the operating relationship" between the companies.⁴

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

21 **Q. ARE THERE OTHER ISSUES IN THIS PROCEEDING THAT RELATE TO**
22 **LEVERAGING DISPUTES BETWEEN AFFILIATES?**
23

⁴ Id. at lines 16-18.

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

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

11
12 A. Yes, and the response of Qwest witness Karen Stewart proves Level 3's point. Stewart
13 admits that Qwest is "in the process of negotiating agreements that will provide more
14 explicit guidelines" in those instances where express terms are not identified.⁵ Qwest
15 goes on to say that resolution of the issue is between the companies. Nothing can be
16 farther from the truth because it shifts the power to reach fair and equitable terms and
17 conditions to the Combined Entity. Qwest and CenturyLink should offer the same basic
18 terms and conditions to all carriers. By forcing each carrier into "one-off" negotiations,
19 the Combined Entity can use its dominant position to force vastly different terms on
20 different companies. Such treatment is not in the public interest because it will cause
21 varying degrees of harm across the industry.

⁵ Rebuttal Testimony of Karen A. Stewart on Behalf of Qwest Corporation, October 27, 2010, at pages 42-43. In the Matter of the Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink, Docket No. T-01051B-10-0194 et al. ["Stewart Rebuttal"]

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

3
4 A. Yes. By imposing such requirements on the Combined Entity, the Commission will
5 ensure that competition is not harmed through dilatory or unilaterally arbitrary conduct.
6 Any delay in the provision of services harms competition and is unacceptable. The
7 Commission can avoid these harms by adopting these simple, targeted, common sense
8 conditions. If the Combined Entity has no intentions of engaging in such conduct, then
9 such conditions would be something they can support. If the Combined Entity does not
10 want to declare its intentions, the Commission must act to preserve the public interest in
11 competition on a post-closing basis.

12 **Q. WHAT IS THE RECOMMENDATION OF LEVEL 3?**

13 A. In order to preserve competition and ensure that the public interest is met, Level 3 urges
14 the Commission to condition its approval by prohibiting the combined entity from using a
15 billing dispute that arises between a telecommunications carrier and either Qwest or
16 CenturyLink to delay or refuse to provision services by the other affiliate or as a result of
17 an unrelated matter.

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

22
23 **Q. CAN YOU PLEASE SUMMARIZE LEVEL 3's CONCERN WITH RESPECT TO**
24 **THE COMBINED ENTITY ESTABLISHING A RURAL CLEC?**

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

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

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

10 A. No. Rather than respond to Level 3's concerns directly, Mr. Hunsucker references a
11 string of cases involving Qwest and various rural LECs now pending in various states,
12 but nowhere does he address or admit that CenturyLink is a largely rural LEC, enjoys
13 significantly higher terminating access charges, and may therefore have incentive to
14 arbitrage rate differentials that exist between rural and incumbent LEC rates.⁶ As with
15 leveraging billing disputes across the Combined Entity, this issue is one where the harm
16 can be prevented ahead of time, but is certain to occur and harm competitors if the
17 Commission waits until after the fact to redress it.⁷ Due to the potential harm that would

⁶ See Hunsucker Rebuttal Testimony at page 48, lines 10-19, and footnote 33, which cites several Qwest cases, but makes no mention of CenturyLink.

⁷ 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

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

3 **Q. CENTURYLINK DOES NOT CURRENTLY PROVIDE SERVICE IN ARIZONA.**
4 **IS THAT ALONE ENOUGH TO PREVENT CENTURYLINK FROM**
5 **LEVERAGING ARBITRAGE OPPORTUNITIES?**

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

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

17 A. As discussed in Level 3's initial testimony, this transaction is one of first impression
18 where a largely rural, independent local exchange carrier is purchasing a Regional Bell
19 Operating Company. It will create unique policy issues that have not arisen in traditional

volumes, but the LEC then experiences a relatively 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).

1 RBOC or CLEC combinations. One of the reasons why CenturyLink is purchasing Qwest
2 is to maximize its ability to generate revenues from its assets. That incentive is
3 heightened when regulatory rules create an opportunity, limitations and mandates as to
4 the terms and conditions of agreements instead of traditional market forces or contract
5 negotiations. It would be a normal outgrowth for the Combined Entity to evaluate
6 whether it can maximize its revenue by pursuing a particular regulatory path. Level 3
7 does not believe that it is “speculative” for CenturyLink to undertake such an evaluation
8 because it is in the best interests of the Combined Entity to do that. The broader policy
9 issue arises when that regulatory opportunity is used in manner that goes beyond the
10 rationale for creating that policy. That’s when regulatory arbitrage occurs.

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

14 A. When the Federal Communications Commission exempted rural CLECs from its order
15 capping CLEC access rates, it wanted to preserve nascent competition in the more rural
16 territories of the RBOC.⁸ The FCC determined that in less densely populated RBOC
17 territories, it was unlikely that a competitive local exchange carrier would expand into
18 those markets.⁹ The idea behind the exemption was to provide an incentive for rural
19 CLECs to provide competitive services in adjoining territories.

⁸ See 47 C.F.R. § 61.26(f).

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).

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

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

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

18 A. In my initial testimony, Level 3 raised this issue in the context of understanding the
19 financial projections of the Combined Entity. The Commission needs to evaluate whether
20 the Combined Entity is including any revenue projections from this arbitrage opportunity.
21 The fact that CenturyLink did not respond to the question speaks volumes of its long-
22 term plans. Under such circumstances, the Commission should assume that the Combined
23 Entity will pursue this course for growing its revenue stream.

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

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

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

13 **Q. DID CENTURYLINK RESPOND TO THE 8YY TRANSPORT ISSUES**
14 **RAISED IN YOUR INITIAL TESTIMONY?**
15

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

24 **Q. MR. HUNSUCKER ASSERTS THAT YOU ARE WRONG AND THAT EMBARQ**
25 **DOES NOT CHARGE FOR ALL OF THE TRANSPORT. DO YOU AGREE?**
26

1 A. No, I do not. When Mr. Hunsucker says on page 72 of his testimony that the charges are
2 “limited”, Level 3 does not understand whether only some elements are charged or
3 whether CenturyLink is limiting the mileage of the transport charge. The latter is what
4 Level 3 believes should be the appropriate resolution but as our bills indicate, that is not
5 the case.

6 **Q. MR. HUNSUCKER BRUSHES ASIDE THE IMPORTANCE OF THIS ISSUE BY**
7 **SAYING THAT LEVEL 3 DID NOT RAISE IT WHEN CENTURYTEL**
8 **PURCHASED EMBARQ.¹⁰ WHAT IS LEVEL 3’S RESPONSE?**
9

10 A. CenturyLink’s response is just more of the same. Qwest and CenturyLink prefer to
11 demean the issues raised by competitors in this proceeding and cast aspersions on the
12 motives of any one who has a question. The reason why Level 3 did not raise the issue in
13 the CenturyLink-Embarq proceeding is simple. At the time of the transaction, Level 3 did
14 not have a full understanding of this problem. At that time, Level 3 believed it was
15 limited to one operating territory. We understand the problem now and have a concern
16 that it might be imported throughout the Qwest operating territory. That’s why we’ve
17 raised it now. But what is more troubling is CenturyLink’s reliance on the lack of
18 “rules”. If no rules exist, what prevents the Combined Entity from adopting that practice
19 across its operating territory? What prevents the Combined Entity from routing calls that
20 originate in Arizona out of state in order to leverage the transport costs or establishing an
21 outsourcing arrangement where Embarq does all database dips for the Combined Entity?
22 For Level 3, the real issue is whether the Combined Entity exports this practice of
23 inefficient network routing into Arizona or the rest of the its service territory.

¹⁰ Hunsucker Rebuttal at page 73.

1 Such changes can be implemented without Commission review, leaving the competitive
2 industry in a rearguard battle when it discovers the problem. Such actions will hurt the
3 competitive industry and represent another opportunity for the Combined Entity to
4 leverage its market dominance to impose new costs on carriers who will have to turn
5 around and pass those costs through to consumers. It is hard to see how increased
6 subsidization of the Combined Entity can benefit consumers and wholesale customers or
7 be in the public interest.

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

9 A. In my initial testimony, Level 3 proposed a targeted, common sense condition to alleviate
10 the incentives for the Combined Entity to use its market dominance to derive new
11 revenue from inefficient practices. Mr. Hunsucker's testimony reaffirms the need for this
12 condition. When a party with market dominance relies upon a lack of rules for its
13 practices, alarm bells should go off for everyone. Under these circumstances, Level 3
14 urges the Commission to adopt the following condition: "The Combined Entity agrees
15 that it will limit any tandem transport charges for 8YY traffic to charges based upon the
16 nearest tandem identified in the Local Exchange Routing Guide to the originating point
17 of the call."

18 **VI. THE COMMISSION SHOULD RESOLVE OUTSTANDING ISSUES WITH THE**
19 **TREATMENT OF ISP-BOUND TRAFFIC.**

20
21 **Q. WHY DOES THE ISSUE OF ISP-BOUND TRAFFIC BEAR ON THIS**
22 **PROCEEDING?**

23
24 A. At its most fundamental, the treatment of ISP-bound traffic goes to the public interest
25 because it involves how one class of consumers will obtain or maintain access to the
26 Internet. That issue is crucial because the both Qwest and CenturyLink have cited as a

1 benefit in their testimony here and before the FCC that these transactions will lead to
2 increased broadband deployment and the introduction of IPTV.¹¹ I don't see how you can
3 focus on broadband deployment without taking steps to ensure that consumers have low
4 cost access to the Internet in the interim.

5 **Q. DID THE UTILITY DIVISION PROVIDE TESTIMONY ON THIS ISSUE?**

6
7 A. Yes. Mr. Fimbres testifies that, "Staff has recommended several wholesale conditions
8 designed to end ongoing disputes between Qwest and CLECs. It is important to
9 eliminate time-consuming litigation where this can be done. This is particularly true
10 where CenturyLink or Embarq's position on the issue may be an acceptable resolution or
11 where resolution has been reached in other Qwest states but litigation continues in
12 Arizona."¹² Attachment 1 of Mr. Fimbres's testimony then recommends approval of the
13 following two conditions:

14 Condition 31. Merged Company shall offer an amendment to ICAs which provides for
15 compensation for all ISP-bound traffic (including VNXX traffic) at the rate of \$.0004 per
16 minute. This is consistent with a provision contained in Embarq's (a subsidiary of
17 CenturyLink) ICA with Level 3. The amendment shall only be available to carriers to the
18 extent they agree to resolve any pending disputes before the Commission based upon the
19 same terms and conditions.
20

21 Condition 47. The Merged Company shall evaluate existing litigation involving the
22 Commission and make a good faith effort to resolve the issues without further litigation.
23 Following are cases which have entailed significant Commission resources which the
24 Merged Company should include in its evaluation: ... (c) Pac-West/Level 3 VNXX

¹¹ 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. 10-11-, 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.

¹² Fimbres Direct at page 18, lines 7-14.

1 Remand Proceeding ACC (Docket Nos. T-01051B-05-0495, T-03693A-0495, T-01051B-
2 05-0415, T-036564A-05-0415).

3
4 **Q. HOW DO YOU RESPOND TO MR. FIMBRES' TESTIMONY AND THE**
5 **PROPOSED CONDITIONS CONTAINED IN ATTACHMENT 1?**

6
7 A. Level 3 agrees with the purpose of Mr. Fimbres' testimony – the settlement of the so-
8 called ISP-bound VNXX dispute. However, the rate proposed by Mr. Fimbres fails to
9 take into account the rate that Level 3 is entitled to under the law or the fact that in a
10 declining market for dial-up traffic the rate proposed by Mr. Fimbres could make the
11 continuation of the provisions of dial-up ISP services in Arizona financially infeasible.
12 As I testified in my Direct Testimony, this is the most litigated issue Level 3 has
13 experienced in the Qwest service territory for the past 10 years. The Commission should
14 take advantage of the unique opportunity presented by the merger application and put an
15 end to endless litigation.

16 **Q. IS RESOLUTION OF THIS ISSUE IN THE PUBLIC INTEREST?**

17 A. Yes. First, the treatment of ISP-bound traffic and the classification of how that traffic is
18 treated for assessing relative use charges go to the heart of the finances of the Combined
19 Entity entity. That is especially true when regulators consider how the Combined Entity
20 will pay for or meet its broadband commitments. It is important for regulators to
21 understand the economic assumptions the Combined Entity has made with respect to it
22 intercarrier compensation obligations. Does the Combined Entity treat ISP-bound traffic
23 as income from access charges or a network expense for terminating compensation? In
24 addition, is the Combined Entity counting on revenue collected for relative use charges
25 that related to ISP-bound traffic. These are important questions that the Commission
26 needs to consider as it evaluates whether this transaction meets the public interest. If the

1 Combined Entity is relying upon traffic classifications or other assumptions to fund its
2 broadband or IPTV efforts, then the Commission must consider the ability of the
3 Combined Entity to rely upon those revenue sources.

4 The economics of the dial-up Internet access business have changed since the FCC took
5 its initial steps to rein in what it saw as problems in the market for dialup ISP services.¹³

6 After its initial determination, the FCC found that the arbitrage opportunities were
7 eliminated when it lifted the minute and new market caps.¹⁴ As more Americans
8 transition to broadband services, the ISP dial -up market continues to shrink but remains
9 an important means of accessing the Internet for those areas with no or low broadband
10 penetration, for those who cannot afford broadband services and those who do not wish
11 to adopt broadband. In today's marketplace, the reality is that the costs imposed by Qwest
12 for relative use charges, and its constant fight against its obligation to pay reciprocal
13 compensation rates for ISP-bound traffic, have made it largely uneconomical for carriers
14 to provide wholesale dialup services. By bringing the regulatory regime into line with the
15 state of the law, the Commission will ensure that those who prefer or cannot obtain dialup
16 services have competitive choices. It is what the public interest requires.

17 Since the Joint Petitioners are asserting their ability to encourage economically efficient
18 deployment of infrastructure for high-speed telecommunications services and greater
19 capacity for voice, video and data transmission, the Commission and the industry must

¹³ *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).

¹⁴ *Core Communications Inc. v. Federal Communications Commission, et al*; 592 F.3d 139, decided Jan. 12, 2010. ("Core Mandamus Order")

1 examine the ability of the Combined Entity to do so. Understanding how the Combined
2 Entity plans to pay for its commitments to deliver this infrastructure, and how the
3 Combined Entity plans to treat and classify ISP-bound traffic, is a crucial part of that
4 analysis and part of the public interest test.

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

7
8 A. No they did not. Their witnesses did not address what financial assumptions they were
9 making with respect to ISP-bound traffic and Relative Use Charges. Instead, it appears
10 that Qwest witness Karen Stewart was designated to take the lead on the response, but
11 she did so on legal grounds.

12 **Q. DOES LEVEL 3 AGREE WITH THE ANALYSIS THAT MS. STEWART**
13 **PROVIDES IN HER REBUTTAL TESTIMONY?¹⁵**

14 A No, Level 3 does not. We'll provide more legal guidance in our briefs and other post-
15 hearing submissions. However, I would say that Stewart's reliance on the "ISP Order" is
16 incorrect. That order has been superseded by the action taken by the FCC in the ISP
17 Remand Order and the subsequent action by the D.C. Circuit Court of Appeals in the
18 Core Mandamus Order. Those decisions have replaced the underlying legal rationale of
19 the original ISP Order with a coherent legal structure that leaves no room for the type of
20 creative regulatory lawyering that Qwest has pursued for the past five years. Under those
21 decisions, ISP-bound traffic is classified as telecommunications traffic subject to the
22 reciprocal compensation requirements of Section 251(b)(5) of the Telecommunications
23 Act. However because of the interstate nature of that traffic, the FCC determined that it
24 could set the rate for that traffic under its authority over interstate traffic in Section 201 of

¹⁵ Stewart Rebuttal at p. 40.

1 the Communications Act. Since locally dialed ISP-bound traffic falls under Section
2 251(b)(5), the rules Part 51 rule apply and they prohibit one carrier from assessing
3 charges on traffic that originates on the network of another carrier. That alone prohibits
4 the Combined Entity from excluding ISP-bound traffic when assessing relative use
5 charges against an interconnecting carrier.

6 **VII. THE COMMISSION SHOULD REQUIRE THE COMBINED ENTITY TO**
7 **MAINTAIN THE QWEST STATEMENT OF GENERALLY AVAILABLE**
8 **TERMS (SGATS) FOR UP TO FIVE YEARS.**

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

12 A. Level 3 will respond to the legal analysis of Ms. Stewart in its post-hearing briefs.

13 However, from a policy perspective Level 3 disagrees with much of her testimony.

14 **Q. PLEASE EXPLAIN.**

15 A. As a threshold matter, Level 3 does not believe that Qwest can withdraw its SGAT
16 without the approval of the Commission. Despite Qwest's view that it is not required to
17 maintain the SGAT, a number of state commissions have had to weigh in on Qwest's
18 attempts to withdraw it.¹⁶ Qwest cites Idaho as one state where they have been allowed to
19 withdraw the SGAT but even that discussion shows that an order was required from that
20 state regulatory authority. Based on my research, I do not believe that this Commission
21 has allowed Qwest to withdraw its SGAT or to just ignore its implementation.

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

23 A. Qwest should be required to maintain the SGAT because it would be in public interest.

24 Having an available set of terms and conditions can allow a carrier the ability to avoid the

¹⁶ Stewart Rebuttal at pages 34 to 37.

1 extended costs and transactional delays involved in negotiating an interconnection
2 agreement. This is especially true when there are no available interconnection agreements
3 to adopt. As I mentioned in my original testimony, Level 3's agreement with Qwest has
4 been in evergreen status for a number of years. That makes it unavailable to other
5 carriers. The SGAT provides a quick roadmap for new entrants to bring their competitive
6 services to the marketplace. As I discussed earlier, preserving a competitive market for
7 telecommunications is one of the factors state law requires the Commission to consider as
8 it evaluates this proposed transaction.

9 Utility Division witness Fimbres recognizes the importance of the SGAT, testifying that
10 the parties in the 271 proceeding spent considerable time and effort working on the terms
11 and conditions of the SGAT.¹⁷ Mr. Fimbres also testifies that the SGAT was developed
12 in a *collaborative process* in which the CLECs participated.¹⁸ Unlike the SGAT, the
13 Qwest "template"¹⁹ reflects Qwest's positions on issues and CLECs were not invited in to
14 comment on included language. Mr. Fimbres also testifies that the Commission's 271
15 order remains in effect.²⁰

16 VIII. SUMMARY OF TESTIMONY AND RECOMMENDATIONS

17 **Q. CAN YOU PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.**

18 A. Yes. Level 3 agrees with the staff of the Utilities Division of the Arizona Corporation
19 Commission in that the Joint Petitioners have failed to provide adequate information for

¹⁷ Fimbres Direct at page 13, lines 9-14.

¹⁸ Id.

¹⁹ Stewart Rebuttal at page 36, lines 7-9.

²⁰ Fimbres Direct at page 12, line 3.

1 the Commission and the telecommunications industry as a whole to evaluate whether this
2 transaction complies with the public interest. Absent a thorough review of the finances of
3 the Companies and the assumptions underlying their projections, the Commission cannot
4 confidently make a credible determination as to the ability of the Combined Entity to
5 meet its post closing obligations. Those projections are crucial because they go to the
6 ability of the Combined Entity to meet all of its obligations. As a competitor of Qwest
7 and CenturyLink, in the absence of any ability to understand the financial arrangements
8 that will govern the RBOC's relationship with the CLECs, Level 3's main concern is that
9 the Combined Entity be able to meet its contractual obligations to provide
10 interconnection services or , to provide operational support systems. Yet, when asked to
11 answer the most basic questions regarding those assumptions, Qwest and CenturyLink
12 obfuscate, avoid and ignore. That type of conduct raises red flags.

13 Compounding the problem is the long-term negative impacts on competition that will
14 follow if the Combined Entity stumbles. As much as they would prefer to brush aside the
15 problems of Hawaiian Telephone and Fairpoint Communications, the Combined Entity
16 has a duty to ensure that it meets its obligations. It's hard to understand why Qwest and
17 CenturyLink believe that they can dismiss industry questions and concerns as
18 "speculation" while at the same time offering nothing more than "speculation" about the
19 conduct of the Combined Entity.

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

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

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

12 **Q. CAN YOU PLEASE SUMMARIZE LEVEL 3's RECOMMENDATION TO THE**
13 **COMMISSION.**

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

- 17 1. Extending the time period of existing interconnection agreements;
- 18 2. Requiring the Combined Entity to allow the portability from one state to
19 another any existing interconnection agreement between the Combined
20 Entity and that CLEC;
- 21 3. Requiring Qwest to extend its existing Statements of Generally Agreeable
22 Terms and Conditions ("SGATs") for a period of five years;
- 23 4. Requiring the Combined Entity to compensate terminating carriers at the
24 appropriate rate for ISP-bound traffic and that ISP-bound traffic shall
25 include traffic provisioned using virtual NXX codes;

- 1 5. Ensuring that the Combined Entity treats all locally dialed ISP-bound
2 traffic including virtual NXX traffic as local traffic in the calculation of
3 relative use factors pursuant to 47 C.F.R §703(b);
- 4 6. Requiring the Combined Entity to allow carriers to use new or expanded
5 interconnection routes established by affiliates of the Combined Entity
6 that are in adjoining service territories;
- 7 7. Requiring all contracts between the affiliates of the Combined Entity for
8 telecommunications services and network interconnection to be made
9 publicly available;
- 10 8. Prohibiting the Combined Entity from using billing disputes with one
11 entity from threatening disconnection, disconnecting or refusing to
12 provision new orders across the Combined Entity;
- 13 9. Prohibiting the Combined Entities from continuing or expanding the
14 improper homing of 8YY switched access charge and transport practices;
- 15 10. Requiring Qwest to cease its unlawful and arbitrary practice of denying
16 dispute claims solely on the basis that they are more than 90 days beyond
17 the date originally billed; and
- 18 11. Requiring Qwest to cease its practice of using its interstate tariffs as a
19 claimed basis for establishing billing analogs for intrastate charges that are
20 not in its intrastate tariffs.

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

22 A. Yes it does.